Campbell v Gokel [2003] NTSC 81

PARTIES:	JOHN SAM CAMPBELL
	v
	NOEL JOHN GOKEL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 52/02 (20016083)
DELIVERED:	23 July 2003
HEARING DATES:	30 May 2003
JUDGMENT OF:	THOMAS J

CATCHWORDS:

CRIMINAL LAW – appeal from conviction– whether findings of guilt unsafe and unsatisfactory – whether reasonable hypothesis consistent with innocence – appeal dismissed

Criminal Code 1983 (NT) s 210, s 213, s 251

M v The Queen (1994) 181 CLR 487, applied
Jones v The Queen (1997) 191 CLR 439; *Liberato & Ors v The Queen (*1984-1985) 159 CLR 507, considered

REPRESENTATION:

Counsel:

Appellant:	I Rowbottom
Respondent:	M Johnston

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Withnall Maley & Co

Judgment category classification:	C
Judgment ID Number:	tho200325
Number of pages:	21

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

Campbell v Gokel [2003] NTSC 81
No. JA 52/02 (20016083)

BETWEEN:

JOHN SAM CAMPBELL
Appellant

AND:

NOEL JOHN GOKEL
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 23 July 2003)

[1] This is an appeal against conviction and sentence imposed in the Court of Summary Jurisdiction on 6 June 2002.

[2] The appellant had entered a plea of not guilty to the following three charges:

> "Between the 22nd day of March and the 23rd day of March 2000
> at HUMPTY DOO in the Northern Territory of Australia.
> 1. unlawfully damaged property, namely front glass door and padlocks, lights and a safe, the property of Humpty Doo Chem-Mart and the damage was approximately $1157.00.
> Contrary to Section 251 of the Criminal Code.
> AND FURTHER
> Between the 22nd day of March and the 23rd day of March 2000
> at HUMPTY DOO in the Northern Territory of Australia.

2. did, at night-time, unlawfully enter a building, namely, Humpty Doo Chem-Mart, with intent to commit therein a crime, namely stealing:

Contrary to Section 213 of the Criminal Code.

AND FURTHER

Between the 22nd day of March and the 23rd day of March 2000

at HUMPTY DOO in the Northern Territory of Australia.

3. did steal a quantity of Sudafed and various vaccines valued at $864.54, the property of Humpty Doo Chem-Mart:

Contrary to Section 210 of the Criminal Code."

[3] The charges proceeded to hearing. Evidence was presented to the Court.

[4] At the conclusion of the hearing the learned stipendiary magistrate found each of the offences proved. The appellant was convicted and sentenced to 18 months imprisonment on each charge concurrent. The sentence was suspended on 5 December 2002 on these terms.

- that the first six months of the unserved sentence is suspended upon the defendant entering into home detention for six months with certain conditions.

- the second six months of the unserved sentence is suspended under s 40 of the Sentencing Act.

- specify under s 40(6) of the Sentencing Act a period of two years from 6 June 2002 during which the defendant is not to commit any offence punishable by imprisonment if he is to avoid being dealt with under s 43 of the Sentencing Act.

[5] The Grounds of Appeal area set out in the Amended Notice of Appeal:

> "1. That the findings of guilt in respect to counts 1-3 are unsafe and unsatisfactory.
>
> 2. That the sentence imposed was manifestly excessive in all the circumstances of the offence and the offender.
>
> 3. The learned magistrate failed or apparently failed to regard a sentence of imprisonment as the sentence of last resort and failed to properly consider or at all, possible alternatives, including the possible alternative of a much shorter sentence.
>
> 4. That the learned magistrate erred in law by failing to give any or proper weight to the Appellant's prospects for rehabilitation."

[6] By agreement between the parties the only ground of appeal to be argued was Ground 1. The appellant reserved the right to argue the remaining grounds of appeal at a later time.

Ground 1: That the findings of guilt in respect to counts 1-3 are unsafe and unsatisfactory.

[7] The defendant has denied having any part in the commission of these offences.

[8] There are a number of agreed facts relevant to the appeal. It is agreed that the appellant was a customer of the Humpty Doo Chemmart. Mr Stephen Large, the proprietor of the Humpty Doo Chemmart, gave evidence he was away at the time of the burglary. He identified John Sam Campbell as a person who used to be a customer at the shop. In cross-examination Mr Large gave evidence he had personally seen Mr Campbell as a customer in the shop. Mr Large stated Mr Campbell had been a fairly regular customer

over a period of several years. Mr Large agreed Mr Campbell could have been a customer in the shop once or twice a week over this period.

[9] A taped record of interview between police officers and Mr Campbell was played in the Court of Summary Jurisdiction. The tape was tendered as an exhibit in the Court of Summary Jurisdiction.

[10] In this recorded interview on 3 October 2000, some six months after the date of the alleged offence, Mr Campbell stated he had been to the Humpty Doo Pharmacy on a number of times. He had been served at the counter. He stated he had never been into the office area of the Humpty Doo Pharmacy. He stated he did not get regular medication from the pharmacy. He estimated that the last time he had been at the Humpty Doo Pharmacy was two to three weeks ago. He stated he did not go there very regularly. In response to a question as to roughly how many times he had been there this year he replied "about five times".

[11] Neither the evidence of Mr Large or the record of interview with Mr Campbell indicate whether the appellant had attended the shop as a customer on 22 March 2000 or at any time close to that date.

[12] Constable Brown gave evidence he was patrolling the Humpty Doo area between 11.00 pm on 22 March and 7.00 am on 23 March 2000. As he and Sergeant Matchett approached the Humpty Doo shopping centre, he observed two persons coming out of the door at the northern end of the shopping centre. They were wearing what appeared to be balaclavas, heavy

clothing and carrying bolt cutters and a crow bar. These two persons on seeing the police went back into the shopping centre closing the door behind them.

[13] During a search of the appellant's premises at 42 Koro Road, Humpty Doo at 9.00 am on 24 March 2000, Detective Senior Constable Martin located a balaclava on the shelf of a cupboard at the top left hand side of the caravan.

[14] On 23 March 2000, Sergeant Humphrey attended the Humpty Doo Pharmacy. He located a 1.25 litre Crystal Spring Water bottle in the vicinity of a safe that was in the storeroom (tp 53.4).

[15] This water bottle was subsequently taken by police for analysis by Carmen Eckhoff, forensic biologist with the Northern Territory Police Fire and Emergency Services. The DNA profile obtained from the rim of the bottle was the same as the DNA profile obtained from John Sam Campbell. The appellant admits for the purpose of this appeal that it is his DNA that was found on the rim of the water bottle found in the storeroom of the chemist shop.

[16] I now turn to deal with the other evidence presented to the Court of Summary Jurisdiction.

[17] Moya Francis Aland gave evidence that she is a pharmacist and was manager of the Humpty Doo Chem Mart Pharmacy as at 22 - 23 March 2000. The pharmacy was closed and locked at approximately 8.00 pm on 22 March

2000. Ms Aland left the premises at about 8.10 pm. At about 2.30 am the following morning, Ms Aland received a telephone call in response to which she returned to the shop. Ms Aland entered the shop through the back door in the presence of police officers. Ms Aland gave detailed evidence as to the damage that had been done to the store. This included evidence to the effect that the door of the storeroom had been attacked with a sledge hammer (tp 22), the staff refrigerator was open and a lot things from under the sink were out on the floor. Ms Aland gave evidence that prior to leaving the night before there were a certain amount of vaccines in the fridge, a small amount of food and two bottles of water. When she saw the fridge door was open she noted one of the bottles of water was missing from the fridge and some of the vaccines had gone. She said the two bottles of water had been standing in the door of the fridge. Ms Aland gave evidence as to other tablets that were missing from the storeroom and the shop area.

[18] Ms Aland gave evidence (tp 26.4) that she saw the bottle of water that had been in the fridge the night before on the shelf above the safe. Her evidence was that the only person who had access to the water bottles were the staff. Ms Aland gave evidence she had never seen the appellant, John Samuel Campbell, in the shop. Ms Aland was shown the water bottle (tp 27) which was subsequently tendered as Exhibit 5. Ms Aland was asked to describe the water bottles and replied “Just a one litre round plastic bottle”. She was not able to state how long it had been there. She stated they would buy a

new one occasionally and would refill them till this got a bit "tacky looking" and would buy some more.

[19] The following questions were put and answers given during examination in chief (tp 28):

> "MS MCNAMEE: Are you able to say whether that was the bottle that was used or you're not able to say?---Well it looks like it, I couldn't say it's exactly the one, but it looks like it.
>
> Okay, and when I say used, what I mean is the one that was found on top of the safe?---Well that night the one that was found on top of the safe, I recognised as the one that had been in the fridge.
>
> Okay, but you're not able to say today whether that's the one, okay.
>
> HIS WORSHIP: So I take it from that, that your recollection is that it was an old Crystal Springs water bottle that was in the fridge?---Yeah - well I couldn't say it was Crystal Springs but it was the bottle that had been in the fridge.
>
> Oh, righto. Well maybe somebody else will prove it."

[20] It is Ms Aland's evidence that after she had a look at the bottle on the safe the police took it away for testing. Under cross examination Ms Aland agreed that Mr Campbell could have come into the shop at sometime before the date of the burglary and she would not have known because she could have been doing prescriptions and would not have seen him.

[21] Ms Aland was asked in cross examination details as to the size of the refrigerator and its contents as of 22 March 2000. It is Ms Aland's evidence that it was a small bar fridge, it contained a small amount of food. The vaccines that were taken were on the top shelf in the door of the fridge. The water bottles and milk were on the bottom shelf in the door of the fridge.

[22] Also under cross-examination, Ms Aland gave evidence there were three other employees working in the shop as at 22 March 2000. She was asked these questions with respect to the water bottle (tp 32):

> "All right, and you told us that there were 2 water bottles?---Yes.
> Do you remember on the other bottle that was in the fridge that you saw that night?---I can remember we often had a brand called Summit, but whether that was there I don't know."

[23] Ms Aland gave further evidence under cross-examination that members of staff would clean up the shop and a member of staff did the vacuuming. Rubbish left in the shop would be put in the bins at the back by a member of staff. At the end of the day all rubbish was taken out to the bins. Ms Aland gave further evidence (tp 35) that they usually had two litres of water in the fridge. Ms Aland was asked if it was possible that a member of staff picked up a bottle out of the shop during the day and put it in the storeroom. Ms Aland did not think that was a possibility, she stated if anything had been found in the shop it would have been put in the rubbish bin. It is her evidence that when she left the shop the night before the break-in, the two bottles of water in the fridge were half to three quarters full. She agreed she was probably guessing this because that is what they usually were.

[24] In re-examination Ms Aland gave the following evidence (tp 38):

> "Just to clarify - where was that bottle, before you left the shop?---The bottle, when we left the shop was in the refrigerator.
> Okay, and the bottle that you found on the safe, that was the same bottle that you'd seen in the fridge?---Yes."

Then in answer to questions by his Worship, the following evidence was given (tp 38):

> "HIS WORSHIP: I'm not saying there's a hierarchy in these things but there's usually somebody in a household or a shop who fills bottles of water?---Mm mm.
>
> Does that go on in your place?---Yeah, well I think as it was empty you did fill it up and put it back in the fridge.
>
> Unless someone came in - it would be usually somebody who was face with 2 empty bottles in the fridge, would say something?---Yeah, yeah."

[25] Sergeant Humphrey gave evidence (tp 52) that he is attached to the finger print bureau. He attended the Humpty Doo Pharmacy on 23 March 2000. He retrieved a 1.25 litre Crystal Spring water bottle and one Ronson blender box. He located the bottle in the storeroom area of the premises in the vicinity of the safe. A staff member told him the bottle had been removed from the kitchen fridge. Sgt Humphrey identified the Crystal Spring bottle that was tendered as the bottle he examined for fingerprints. He found no fingerprints on the bottle. The bottle was forwarded to the biology section for testing.

[26] This bottle was subsequently tested by Ms Eckhoff and subsequently identified the DNA of Mr Campbell on the rim of the bottle.

[27] Sergeant Stephen James Martin gave evidence he attended at 42 Koro Road, Humpty Doo at about 9.00 am on 24 March 2000. Sgt Martin described the premises. He stated he seized a number of items from these premises including a head lamp with a strap assembly from a cupboard at the top left

hand side of the caravan once through the entrance door and a balaclava on the shelf.

[28] Sgt Chapman also gave evidence he executed a search warrant at the premises 42 Koro Court, Humpty Doo at 9.00 am on 24 March 2000. Police re-attended the premises at a later date. The appellant was apprehended and a record of interview conducted at Palmerston Police Station. Following this the appellant was charged with the offence.

[29] Evidence was given for the defence by Ms Katrina Maree Sadowski who was at the relevant time the partner of John Campbell. They resided together at Lot 42 Koro Road, Humpty Doo. Ms Sadowski gave evidence that after five and a half years their relationship had broken up in June/July 2001.

[30] It is Ms Sadowski's evidence that on the day police came to search the place where she resided with Mr Campbell, both she and Mr Campbell were present. They had just returned from visiting friends earlier that morning. The police officer had asked her if she and Mr Campbell were there the night before and what they had done. Ms Sadowski gave evidence that they had watched television, had a pretty early night and did not go out anywhere until the next morning.

[31] Under cross examination Ms Sadowski agreed that police attended their residence on Friday 24 March 2000. Ms Sadowski then gave the following evidence in cross examination (tp 92):

"The night before and are your referring to the 23rd?---The night before, yes I guess so, that was the night before. I can't be exactly sure - it was a long time ago - on exactly what date it was, but I do know that he - they came out the next morning very early ---

Okay - - -?---And that he'd referred to the night before."

and (tp 93):

"Now you said that the police had asked you about where you were?---Mm mm.

Were they asking about where you were on that morning?---They asked me about the night before as well as that morning.

Okay. Do you recollect telling Mr Chapman or the Sergeant Chapman when he asked you, 'Can you tell me where you were on Thursday 23 March', and you saying 'No', do you remember that?---No.

Okay. Do you say that you didn't say that?---No I'm not saying that at all.

You just say that you can't remember?---No what - what I believe is that I probably was in - feeling in a smart-alec mood, like I didn't have to answer his questions, and said 'No' because I didn't want to say, not because I couldn't remember."

and (tp 94 - 95):

"And you have a recollection of telling the police that you were with John on the 23rd?---That's right.

Not talking about the 24th, the 23rd?---Well you've just told me that I did and I said 'No' so you'll have to go with that.

Well you said today that on the 23rd - it's your version - that you say you watched TV all night?---That's right.

On the Thursday?---Mm mm.

And you didn't go out until the next morning?---That's right."

and further (tp 95 - 96) Ms Sadowski was asked about the presence of a third person who had been staying with them:

"Okay, so was he there when you were watching telly that night on the 23rd?---No, no.

What time did you go to bed?---Probably about 12 o'clock.

And did you wake up at any point during the night?---No.

No, never woke up?---No.

Okay. So you - and it's a caravan obviously isn't it?---That's right, yes.

You - there's just how many beds in the caravan?---Well there's a double bed and then there's - at one end of the caravan there's two bunk-beds. But they didn't have mattresses and we had a lot of stuff stored in there, you couldn't really get into that part of the caravan, it was blocked off.

So when you went to bed at about 12 o'clock, what bed did you sleep in?---In the double bed.

And did John Campbell go to bed at the same time as you?---Yes he did.

Okay, now when you say 12 o'clock that's an approximate - that's a guess is it?---That's a guess, yeah, roughly."

[32] Her evidence is they went to bed and she woke at about 7.00 am the following morning. Mr Campbell was still with her. He did not go out anywhere until the following morning. Ms Sadowski gave evidence in cross-examination that she did not wake during the night. She had gone to bed together with Mr Campbell at about midnight. Her evidence is that she would have known if Mr Campbell got up between midnight and 7.00 am the next morning because the bed was against the wall and he would have had to climb over her as she slept on the outside. She gave evidence it was not possible for him to get out by getting off the end of the bed because the bed fitted the whole room and was blocked off at the end of the bed and the top. The only way out was from her side of the bed.

[33] Evidence was given by Ms Sadowski that Koro Road is five minutes away from the Humpty Doo shopping area. Ms Sadowski was asked on re-examination this question (tp 102):

> "MS LEE: On the morning of 24 March 2000 when the police were at your house, do you actually remember them asking you what you had been watching the night before?---No, not in particular, no.
>
> And on the evening of the 22nd - or between the evening of 22 and 23 March were you with John Campbell?---Yes."

[34] It is not in dispute that police attended the home of Mr Campbell at 9.00 am on 24 March 200. It is not in dispute that police spoke to Mr Campbell and Ms Sadowski at that time. I found Ms Sadowski's evidence to be somewhat confusing as to whether she was referring to what she and Mr Campbell were doing on the night and morning of the 22nd and 23rd March as distinct from the night and morning of the 23rd and 24th March.

[35] In his reasons for decision the learned stipendiary magistrate stated (tp 117) that the evidence of Ms Sadowski "was apparently truthful evidence". He also stated it was "too readily the sort of evidence that someone could give who was basing what she was saying on what normally happens". Having read the transcript of the evidence given by Ms Sadowski that would appear to be a reasonable finding by the learned stipendiary magistrate. Ms Sadowski did not make a statement to police at or close to the time of the alleged offence. The first time she made a statement of the matters which could amount to an alibi for the appellant was when she gave evidence on 24 May 2002, more than two years after the date of the alleged offence. The

learned stipendiary magistrate rejected Ms Sadowski's evidence. That finding was reasonably open to him.

[36] Mr Rowbottom, counsel for the appellant, submits that the entire evidence in respect of identification centred on a water bottle found in the premises in an area not normally accessed by the public. The bottle was found to have on the neck, DNA consistent with the appellant's DNA. There was also DNA found on the bottle that was not from the appellant.

[37] It is Mr Rowbottom's submission that for the Crown to succeed they must prove beyond a reasonable doubt that the bottle came from the shop refrigerator and all other sources had been excluded.

[38] In his reasons for decision, the learned stipendiary magistrate referred to the fact that no one had found the missing vaccines or the missing Sudafed. He went on to state (tp 113):

> "…. We have simply a misplaced bottle which is not readily identifiable and distinguishable from probably hundreds of thousands of bottles."

[39] Mr Rowbottom submits that the only Crown witness to give evidence in relation to the prior nexus between the premises and the bottle was Ms Aland and that her evidence was equivocal as to whether the bottle found in the storeroom and subsequently tested for DNA was one of the two bottles from the refrigerator.

[40] It is the submission on behalf of the appellant that the learned magistrate should have had some doubts that the bottle was actually from the refrigerator.

[41] Mr Rowbottom further submitted that the appellant was a regular customer of the shop. The Crown failed to call other staff members to negate the possibility that the appellant may have left the bottle in the shop and for example the bottle was subsequently moved by a person or persons unknown, including a staff member to the place in the storeroom where it was found by police.

[42] On this issue the learned stipendiary magistrate made the following findings in his reasons for decision (tp 112):

> "We have evidence that above that safe on a shelf was a plastic bottle that used to be Crystal Springs Water which the manager of the shop reckoned was the bottle from the fridge. She had two bottles in the fridge, there was only one bottle in the fridge, this one looked like the other one that was there. It's not suggested that she ever closely examined these bottles for identifying features, but her reaction was plainly when she saw the bottle of 'this is the bottle that belonged in the fridge' and her reaction when she saw where it was to say to the policeman that she was going to throw it away, whereupon the policeman, very wisely, stopped her."

and (tp 115):

> "It comes down to this as far as the identity of the person who was in the shop is concerned; is it a reasonable hypothesis that the bottle found near the safe was not a bottle used only by the staff and kept in the fridge away from customers but was in fact a bottle which had been used by the defendant and somehow left in the shop, perhaps put in the back of the shop by one of the shop assistants? Might it be even that the defendant had left this bottle about the place and the

person who was handling the safe had noticed it and feeling thirsty, drank from it; those are hypotheses.

To my way of thinking it is only necessary to state them, to say their words - there's not a reasonable hypothesis in that lot. I am satisfied - and I have no doubt of it - that the defendant's DNA was found on this bottle which had been in this shop at the time, that it was found on that bottle because it had got on that bottle in that shop between the hours when the manager left and the police and the manager returned.

I am satisfied that the person who put the DNA on that bottle, the defendant, was there. It's the only inference that can safely be drawn, I believe, was there at the time when someone, he or another, was attacking the safe. …"

[43] The submission on behalf of the appellant is that there was a reasonable hypothesis consistent with innocence that the learned stipendiary magistrate ought to have entertained a reasonable doubt as to the guilt of the appellant.

[44] In *M v The Queen* (1994) 181 CLR 487 Mason CJ, Deane, Dawson and Toohey JJ set out the guiding principle in considering whether a verdict was unsafe and unsatisfactory at 494 - 495:

> "… In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court

> thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. Although the propositions stated in the four preceding sentences have been variously expressed in judgments of members of the Court in previous cases, we have put aside those differences in expression in order to provide authoritative guidance to courts of criminal appeal by stating the propositions in the form in which they are set out above."

This principle was affirmed and applied by the High Court in *Jones v The Queen* (1997) 191 CLR 439.

[45] The bottle found in the storeroom is in an envelope marked Exhibit P5. It is a 1.5 litre plastic bottle described on the label as Crystal Spring. It had originally been marked MFI and was tendered at the conclusion of evidence given by Detective Sgt Michael Gunn in the Court of Summary Jurisdiction. I have already referred in some detail to the evidence given by Ms Aland relating to the water bottle.

[46] The learned stipendiary magistrate clearly accepted the evidence of Ms Aland that on the morning of 23 March 2000, Ms Aland was able to identify the bottle she found on a shelf in the storeroom and subsequently given by her to police for testing was one of the two bottles of water that had been in the fridge the night before.

[47] Mr Rowbottom, counsel for the appellant, submitted that the learned stipendiary magistrate entertained the hypothesis that the bottle may have been left in the shop and put into the storeroom by a member of staff. It is the submission on behalf of the appellant that the learned stipendiary

magistrate having entertained this hypothesis ought to have entertained a reasonable doubt as to the guilt of the appellant. In reading his reasons for decision, part of which are quoted in par 40 of these reasons for judgment, I do not consider the learned stipendiary magistrate did entertain that hypothesis. What he did was to raise the hypothesis which had been a hypothesis suggested by the defence for the purpose of addressing the submission as he was required to do. Having referred to the suggested hypothesis he then rejected it as being a reasonable hypothesis. His Worship then went on to state that he was in no doubt that the DNA was found on the bottle because the defendant had left his DNA on the bottle between the hours when the manager left the premises on the night of 22 March 2000 and the time when police and the manager returned to the shop in the early hours of the morning of 23 March 2000.

[48] I am not persuaded that in coming to this conclusion the learned stipendiary magistrate has been shown to be in error. Having read through the transcript of the proceedings in the Court of Summary Jurisdiction, I do not as an appellate court experience a doubt. There was evidence on which the learned stipendiary magistrate could find that the appellant put his DNA on the bottle between the times specified by the learned stipendiary magistrate and that this put the appellant in the shop at the time these offences were committed.

[49] Counsel for the appellant submitted that the Crown should have called evidence from other members of staff to negate the possibility that a

member of staff had picked up the bottle in the shop and placed it in the storeroom. In view of the findings made by the learned stipendiary magistrate based on the evidence of Ms Aland, I do not accept that the Crown's failure to call such witnesses was fatal to the Crown case.

[50] Mr Rowbottom, counsel for the appellant, submitted that in considering the alibi evidence given by Ms Sadowski the learned stipendiary magistrate applied the wrong test in rejecting this evidence.

[51] With respect to the evidence of Ms Sadowski the learned stipendiary magistrate made the following finding (tp 117):

> "… I've just realised a few moments ago before you mentioned the name that I was going to have to come back to this and spell out that although I said absolutely nothing whatever about her evidence I considered her evidence - I felt that it was apparently truthful evidence, but that it just didn't hold against the DNA evidence.
>
> And, it was too readily the sort of evidence that someone could give who was basing what she was saying on what normally happens. One would have hoped indeed, especially after the questioning by the police, that she would have been able to be a lot more particular, although of course, that's easily enough done too.
>
> But at least she hasn't tried to give herself an aura of truthfulness by remembering the stars of the shows she was watching and that sort of thing. But basically her evidence just did not stand against scientific evidence, and for that reason I rejected it.
>
> It was very, very wrong of me but I was speaking at length without notes not to have mentioned it. …"

[52] The submission on behalf of the appellant is that the test, at law, is not only does the Crown have to prove its case beyond reasonable doubt, but that also the defence case (if any) must be negated beyond a reasonable doubt. It is not simply good enough to "prefer" the evidence of the Crown over that of

the defence. That is contrary to law (*Liberato v The Queen* (1984-1985) 159 CLR 507).

[53] I do not accept the submission on behalf of the appellant that the learned stipendiary magistrate applied the wrong test. A complete reading of his Worship's reasons for decision, part of which I have set out in par [42] of these reasons for judgment, indicate that his Worship did apply the correct test and satisfied himself there was no reasonable hypothesis consistent with the innocence of the appellant. In stating that Ms Sadowski's evidence did not stand against the scientific evidence, his Worship was not just preferring the scientific evidence to the evidence of Ms Sadowski. He had already given reasons as to why he was satisfied beyond reasonable doubt, on the basis of evidence given by Ms Aland and the scientific evidence that the appellant had left his DNA on the bottle at the time of the offence. His Worship attached no weight to the evidence given by Ms Sadowski noting that it was the "sort of evidence that someone could give who was basing what she was saying on what normally happens".

[54] The finding of the learned stipendiary magistrate as set out in par 51 of these reasons for judgment, cannot be looked at in isolation. From a reading of his Worship's reasons for decision in total, this is not a situation where he has found the offence proved because he has preferred the evidence of the Crown to the evidence presented by the defence. His Worship has satisfied himself beyond reasonable doubt that the appellant committed these offences

and that the Crown have negated any defence. There is evidence to support the learned stipendiary magistrate's findings.

[55] I do not agree with the submission on behalf of the appellant that the finding of guilt was unsafe and unsatisfactory.

[56] I would dismiss this ground of appeal.

[57] There are also grounds of appeal relating to the sentence that was imposed. Counsel for both the appellant and the respondent have requested that submissions on these further grounds be adjourned to another date.

[58] Accordingly I will, after consulting with counsel, arrange another date for submissions to be made with respect to the appeal against sentence.

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