The Queen v Burton [2004] NTSC 11

PARTIES:	THE QUEEN v RODNEY BURTON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AS 9927612
DELIVERED:	18 March 2004
HEARING DATE:	16 March 2004
DECISION OF:	RILEY J

REPRESENTATION:

Counsel:

Prosecution:	S. Geary
Defence:	S. O'Connell

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Defence:	Central Australian Aboriginal Legal Aid Service

Decision category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Burton [2004] NTSC 11
No AS 9927612

BETWEEN:

THE QUEEN

AND:

RODNEY BURTON

CORAM: RILEY J

REASONS FOR DECISION

(Delivered 18 March 2004)

[1] At the commencement of these proceedings I was asked to rule on the admissibility of the evidence given by the alleged victim at the committal proceedings. Between the date of those proceedings and the present the victim died of natural causes. In accordance with cultural requirements I will refer to him as Mr Windy.

[2] The accused is charged with having caused grievous harm to Mr Windy on 30 November 1999. Shortly after that event, on 15 December 1999, he made

a statement to police in the form of a statutory declaration. In the course of the statutory declaration he said:

> "I cannot remember anything about what happened the night I got stabbed. All I remember was that I was drunk and the next thing I know I woke up in the Alice Springs Hospital. I was drinking at Areyonga and then I can't remember anything else.
>
> When I was in the Alice Springs Hospital I only heard stories about what happened. Carolyn Windy, my sister and Theresa Wilson, my cousin, told me that Rodney Burton had stabbed me. I don't know why he stabbed me but I know that he gets drunk all the time and causes trouble. I don't remember anything about that night but all I know is that I woke up in the hospital and I had been stabbed in the stomach."

[3] The matter did not proceed to a committal hearing until 24 April 2001. The committal did not then resume until October 2002. On the morning of 11 October 2002 the prosecutor informed the Deputy Chief Magistrate that he had spoken with Mr Windy and he described Mr Windy as being "severely under the weather". Her Worship noted that "around this town that probably really does mean something" and the prosecutor agreed. The evidence of Mr Windy was then delayed until the afternoon. When he was called the prosecutor indicated that he produced Mr Windy and her Worship observed: "Right, in body, I gather, but not in soul". The prosecutor indicated that there had been an improvement. I am informed that in the meantime the prosecutor had spoken with Mr Windy and decided not to call him as part of the Crown case. The prosecutor confirmed that Mr Windy had no memory of the incident. He offered him up for cross-examination and Mr Windy was then cross-examined by counsel for the defence.

[4] In the course of his evidence Mr Windy confirmed that on the night he had been "real drunk" and "full-drunk". He talked of an argument between himself and the accused and then, for the first time, said: "He had a knife". Mr Windy was asked about his earlier statement made to the police and agreed that he had spoken with police on that occasion. He agreed that he had said to police that he was too drunk to remember anything. Counsel then asked him about the knife and he said: "I don't remember". However, he then went on to add: "Yeah, he cut me". The issues were not further explored.

[5] Both counsel agreed that the deposition is admissible in evidence pursuant to s 152 of the Justices Act. That section is in the following terms:

> "The deposition of any witness, taken at the preliminary examination is admissible as evidence upon the trial of the defendant, upon proof –
>
> (a) that the witness is dead, or so ill as not to be able to travel; and
>
> (b) in the case of a witness for the prosecution, that the deposition was taken in the presence of the defendant, and that he, or his counsel or solicitor, had a full opportunity of cross-examining the witness,
>
> and without further proof."

[6] Counsel for the defence, however, invited me to exclude the evidence in the exercise of my discretion. Both counsel agreed that the effect of s 152 was to make the evidence admissible notwithstanding the hearsay rule but that there remained an overriding general discretion to exclude the evidence

because its prejudicial effect outweighs its probative value or that for some other reason its use would deprive the accused of a fair trial. In my view that is correct.

[7] The mere fact that the witness will not be available to be further cross-examined is not a sufficient ground for concluding that the evidence is not admissible. S 152 of the Justices Act is designed to address that very issue and, provided there has been "a full opportunity" for cross-examination, the evidence can be admitted. However evidence may be excluded where the reception of that evidence would be "unfair to the accused in that it might place him at risk of being improperly convicted, either because its weight and credibility cannot be effectively tested or because it has more prejudicial than probative value and so may be misused by the jury": *Dietrich v The Queen* (1992) 177 CLR 292 at 363.

[8] In this matter I directed that the evidence should be excluded. I did so because of the surrounding circumstances which may be regarded as quite unusual. In my view the weight and credibility of the evidence of Mr Windy cannot be effectively tested and the evidence has more prejudicial than probative value.

[9] The circumstances that led me to my conclusion that the evidence should be excluded are as follows. It is clear that on the night of 30 November 1999 Mr Windy was heavily intoxicated. He was, as he said, "full-drunk". When interviewed some 2 weeks later he said that he had no memory of the events

of the night other than that he had been drinking and that he woke up in hospital. Other information had been conveyed to him by his relatives. He did not have any independent recollection. He was not required to give evidence until the committal proceedings, almost 3 years later. On that occasion he was spoken with by the prosecutor who concluded that Mr Windy was "severely under the weather", which I take to mean was seriously intoxicated. He was so intoxicated that the prosecution asked that the taking of his evidence be delayed. When he gave evidence later on the same day, after lunch, his condition was said to have improved. Notwithstanding that improvement, the prosecutor who then appeared declined to lead evidence from him in support of the prosecution case. The prosecutor interviewed Mr Windy and confirmed that his evidence remained as it had been in 1999, that is, his instructions to the prosecutor were that he had no independent memory for the events. This information was provided to me in the course of submissions. It does not appear in the transcript which is sought to be admitted into evidence.

[10] The prosecutor offered Mr Windy up for cross-examination and defence counsel, perhaps imprudently, chose to commence to cross-examine him. It was then, for the first time, Mr Windy gave evidence of some of the incidents that occurred on the night. He was asked a preliminary question as to whether he had told the police something quite different and he agreed that he had. No further questions were put. In particular there was no exploration of why his story had changed. Further, there was no exploration

of whether he was, in 2002, simply recounting what he had earlier claimed he had been told by his sister and cousin, rather than what he observed himself. It cannot be known whether the failure to explore with Mr Windy the changes and inconsistencies in the evidence on that occasion resulted from some oversight on the part of counsel or from the exercise being foreshortened because of the physical condition of the witness or for some other reason. Whatever may have been the reason, there was no attempt to test the weight and credibility of the fresh evidence on that occasion.

[11] S 152 of the Justices Act requires that the defendant or his counsel must have "a full opportunity of cross-examining the witness" before the deposition of the witness becomes admissible. In the present case that opportunity existed and, the other criteria having been met, the evidence was admissible. However in determining whether to exclude the evidence in order to secure a fair trial, it is appropriate to consider whether the opportunity to cross-examine the witness was utilised. In this case, apart from some preliminary questions, it was not. The witness is now deceased and the opportunity for the weight and credibility of his evidence to be tested has been lost. We are left with his contradictory accounts, the latter of which emerged in quite unsatisfactory circumstances. The evidence he gave at the committal begs many questions. It is the inability to cross-examine the deceased witness that has led to my conclusion that the evidence should be excluded in the interests of a fair trial. That inability to test the weight and credibility of the evidence has resulted in a disproportion

between the probative value of the evidence and the prejudicial effect that may flow from its admission.

[12] The evidence is not excluded on the grounds of unreliability. The reliability of a witness and the weight to be given to the evidence of a witness claimed to be unreliable are matters for a jury to consider in light of warnings given by the trial judge: *Kotzmann* (2002) 128 A Crim R 479 at 487; *Rozenes v Beljajev* (1994) 126 ALR 481 at 505-506; *Doney v The Queen* (1990) 171 CLR 202 at 212-214. In the present case the exclusion is based upon the inability to cross-examine the deceased witness and effectively test the weight and credibility of the evidence. This inability, in my view, means that the evidence ought be excluded in order to secure a fair trial.

[13] In those circumstances I ruled that the evidence should be excluded.

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