R v Bourke [2008] NTSC 17

PARTIES:	THE QUEEN
	v
	BOURKE, MICHAEL JAMES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20631177
DELIVERED:	17 April 2008
HEARING DATES:	7 April 2008
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Statutes:

Criminal Code (NT), s 102
Police Administration Act (NT)

Citations:

Attorney-General's Reference (No 1 of 1983) [1983] 2 VR 410
Doney v The Queen (1990) 171 CLR 207
Questions of Law Reserved on Acquittal (No 2 of 1993) (1993) 61 SASR 1
R v ARD [2000] NSWCCA 443
R v Everuss (Supreme Court of Victoria, per Hampel J, 17 June 1987)
Walton v Gardiner (1993) 177 CLR 378

REPRESENTATION:

Counsel:

Crown:	J Lawrence with E Farquhar
Accused:	P Elliott

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Bourke [2008] NTSC 17
No. 20631177

BETWEEN:

THE QUEEN

AND:

MICHAEL JAMES BOURKE

CORAM: MILDREN J

REASONS FOR RULING

(Delivered 17 April 2008)

[1] In this matter the accused is charged with three counts of aggravated assault and one count of attempting to destroy evidence contrary to s 102 of the Criminal Code.

[2] The Crown case is that one Graham Kunoth was taken into protective custody under the provisions of the Police Administration Act at a location somewhere between Three Ways and Tennant Creek. On the way to the Tennant Creek police station, Kunoth was misbehaving and using bad language. On arrival at the Tennant Creek police station he was still misbehaving. The accused was present at the watch house at 11.37 am when this occurred and when Kunoth was placed into a cell.

[3] Approximately two hours later the accused called for a Constable Menzies and an Aboriginal police auxiliary constable to report to the watch house. There Constable Menzies and the accused "gloved up" and the accused asked for a key to the prisoner's cell. The accused, Constable Menzies and an Aboriginal Police Auxiliary Sandy then proceeded to the prisoner's cell. The watch house keeper, Rebecca Del Nido, remained seated at her desk where she had access to a monitor which showed pictures from a camera located in the cell.

[4] The Crown case is that Kunoth was standing at the door of his cell when the police approached the cell. The accused opened the cell door and then hit Kunoth two blows to the face. Kunoth responded and was then arrested and handcuffed whilst lying on his stomach. The Crown alleges that the accused then kicked Kunoth twice in the head. The Crown further alleges that the accused then picked up Kunoth and dragged him out of the cell and down a passageway to an adjoining cell occupied by another prisoner. On the way down the passage, the accused allegedly kicked Kunoth twice more to the head. The cell was opened and Kunoth was deposited therein and left lying on his stomach still handcuffed. Whilst lying in the cell he was kicked twice more. The handcuffs were removed and the accused left the cell. The Crown acknowledges that the accused was also bleeding as a result of Kunoth's response to the initial assault.

[5] On the way back to the watch house Constables Menzies said to the accused words to the effect that "that'll be on tape". The accused then went to the

breath analysis room where the tape machines were kept. Another police witness was in the room watching the cricket at the time. The tapes were on. The Crown case is that the accused lifted a flap to access the controls to the tape and pressed the stop button. It is further alleged that the accused rewound the tape and then pressed record.

[6] The Crown alleges that Miss Del Nido reported the matter to an officer and the CIB attended shortly thereafter. At about the same time Miss Del Nido asked the accused what she should put in the log sheet. The accused, who was the acting shift supervisor at the time, said to her that she should record that he went into the cell, that the prisoner punched the accused to the head and that he then removed the prisoner to another cell. Accordingly that is what she recorded in the log sheet.

[7] When the CIB seized the tapes and examined them it was found that at 1.57 pm the tape had stopped and was rewound 53 seconds and later the tape recorded again. However, the rewinding by 53 seconds in fact took the tape back a period of two hours before 1.57 pm. In fact nothing in relation to the actual events was taped over.

[8] Counsel for the accused submitted that the Court should grant a stay in relation to count 4 on the indictment. It is well established that a stay may be granted in the exercise of the Court's inherent jurisdiction where the proceedings would be unjustifiably oppressive and vexatious such that they would constitute an abuse of process. Further, it has long been established

that regardless of the proprietary of the purpose of the person or persons responsible for the institution and maintenance of the proceedings the proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail: *Walton v Gardiner* (1993) 177 CLR 378 at 392 per Mason CJ, Deane and Dawson JJ.

[9] It was submitted that the test as to whether proceedings can be seen to be foredoomed to fail is the same as that where there is a no case submission at the conclusion of the Crown case. Reference was made to the unreported decision of *R v Everuss* (Supreme Court of Victoria, per Hampel J, 17 June 1987) where his Honour said:

> "The correct test is whether the accused can lawfully be convicted, that is whether the Crown's evidence taken at its highest, can support a verdict of guilty by a properly directed jury, applying the correct standard of proof.
>
> The question whether the accused can properly be convicted is a question of law, based though it must be on the judge's examination of the facts. But it does not depend on the judge's view of the credibility of witnesses or on the existence of competing inferences. It is concerned with whether the evidence is capable of proving the elements of the charge against the accused.
>
> In a case which depends on circumstantial evidence, the question must depend on whether, in the trial judge's view, such evidence is capable of excluding conclusions other than one of guilt."

[10] His Honour in addressing the question this way purported to apply the decision of the Full Court in *Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410.

[11] However, it is to be noted in that case that the Full Court held that a trial judge is neither bound or entitled to direct the jury to acquit if at the close of the Crown case (a) the Judge thinks that a reasonable hypothesis consistent with the innocence of the accused is capable of being inferred from the evidence, or (b) inferences of fact could be properly drawn which were consistent with the innocence of the accused and other inferences of fact could equally properly be drawn which were consistent with the guilt of the accused. The Full Court said at 415-416:

> "The question whether the Crown has ultimately excluded every reasonable hypothesis consistent with innocence is a question of fact for the jury and therefore, if the Crown has led evidence upon which the accused *could* be convicted, a trial judge should not rule that there is no case to answer or direct the jury to acquit simply because he thinks that there could be formulated a reasonable hypothesis consistent with the innocence of the accused which the Crown has failed to exclude. Similarly a trial judge should not rule that there is no case for the accused to answer because he has formed the view that, if the decision on the facts were his and not the jury's, he would entertain a reasonable doubt as to the guilt of the accused. It is always a question for the jury whether a reasonable doubt exists as to the guilt of the accused and as Menzies, J explained in *Plomp's* case [*Plomp v R* (1963) 110 CLR 234 at 252] in a case based on circumstantial evidence, the necessity to exclude reasonable hypotheses consistent with innocence is no more than an application to that class of case of the requirement that the case be proved beyond reasonable doubt."

[12] In the case of *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1 at 5, King CJ, with whom Bollen J agreed, said:

> "It follows from the principles as formulated in *Bilick* [*R v Bilick* (1984) 36 SASR 321] in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide on the basis that the jury will draw such of the

> inferences which are reasonably open as are most favourable to the prosecution. It is not his concern that any verdict must be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence: *Attorney-General's Reference (No 1 of 1983)* (1983) 2 VR 410; *Thorp v Abbotto* (1992) 34 FCR 366. He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence…
>
> There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which were reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence."

[13] I should also refer to the decision of the High Court in *Doney v The Queen* (1990) 171 CLR 207 where the Court said, per Deane, Dawson, Toohey, Gaudron and McHugh JJ, at 214-215:

> "It follows that, if there is evidence (even tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."

[14] Counsel for the accused, Mr Elliott, submitted that there were two defects in the Crown case. First it was put that there is evidence that where an incident such as occurred in this case occurs, the tape should be seized. Therefore it was put that no inference could be drawn from the fact that the accused went into the breath analysis room and did something to the machine. It was put

that there was no evidence that the accused rewound the tapes or pressed the play button. Further there was evidence that others were in or near the room who had the opportunity to rewind or record over the tape. In other words it was submitted that there simply no evidence of identity as to who the person was who committed the crime charged in count 4 of the indictment.

[15] In response to that submission, the Crown submitted that the tape itself shows that it was stopped at 1.57 pm. Although there were five people altogether in the watch house there was only the accused and one other person in the room at that time. The evidence from the tape shows that the tape was rewound and it started to record again only 57 seconds later. The evidence of the only other person in the room was that he did not touch it. I consider therefore there is evidence on which the jury might infer that it was the accused who rewound the tape and recorded over it.

[16] Next it was put that the Crown must prove that the accused knew that the tapes might be required in evidence in a judicial proceeding and that the Crown must exclude that the accused's actions were not done for some other reason such as that he might have thought that the tape could be used by his superiors in disciplinary proceedings or that what the accused did was simply done in blind panic. As there were in fact no proceedings on foot at that time, it was put that the jury would be left to guess as to what the proper inference as to his intent might have been.

[17] It was conceded that it is not necessary for the Crown to prove that the only reason that the accused acted as he did was because he knew that the tapes might be required in evidence in a judicial proceeding. If that is one of the reasons why he acted as he did that would be sufficient.

[18] In my opinion, it is a reasonable inference open to the jury that the accused did what he did for the purpose of preventing it from being used in evidence in subsequent proceedings against him which may brought. The accused is an experienced police officer and would be well aware that allegations of a police bashing of a prisoner, particularly an Aboriginal prisoner, in a police watch house were likely to be investigated and if there is evidence to support a criminal charge it likely to be the subject of a criminal charge. At this stage of the proceedings there is no evidence from the accused as to what may have been his intentions. Looked at the primary facts at their strongest from the point of the view of the case from the prosecution and on the further assumption that all inferences most favourable to the prosecution which are reasonably open are to be drawn, the evidence in my mind is capable of producing in the mind of a reasonable person a satisfaction beyond reasonable doubt of the guilt of the accused on that element of the charge. It is not any part of my function to decide whether there is any possible hypothesis consistent with innocence which is reasonably open on the evidence.

[19] I was referred by Mr Elliott to some rulings by Judges of this Court in other cases where either a no case submission has been upheld, or a stay has been granted following the principles enunciated by Hampel J in *R v Everuss*.

[20] To the extent that those cases may have relied upon the last paragraph in the passage from *R v Everuss* to which I have referred, read in isolation, I would respectfully disagree with them as that passage, read in isolation, is not supported by the Full Court's decision in *Attorney-General's Reference (No 1 of 1983)* and is not supported by the judgment of the South Australian Full Court in *Questions of Law Reserved on Acquittal (No 2 of 1993)*. As King CJ said, the Court is concerned only "with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and *therefore* exclude any competing hypothesis as not reasonably open on the evidence" (my emphasis). I therefore ruled that the application for a stay should be refused.

[21] Alternatively, Mr Elliott sought an order that count 4 should be severed from counts 1, 2 and 3.

[22] In this case the Crown intends to rely upon evidence of the attempt to erase the tape as evidence of consciousness of guilt. I have not at this stage been asked to rule upon the admissibility of the evidence for that purpose, but I assume at the moment that it is admissible for the purpose. If so, it seems to me that it would be much fairer for the Crown to charge the accused with the

offence rather than merely lead evidence about it to be applied in general in the trial: see *R v ARD* [2000] NSWCCA 443 at [97]-[100].

[23] It was put on behalf of the accused that the existence of this count creates a real risk of a mistrial or a real risk that it may be used improperly by the jury. As counsel for the Crown, Mr Lawrence, submitted, I think any unfairness is able to be dealt with adequately by an appropriate direction. Further if count 4 were to proceed separately, it will be necessary for the evidence in relation to counts 1, 2 and 3 to be given. Mr Elliott submitted that the material facts in relation to those counts are not likely to be in dispute and could be admitted. However as I understand it, the accused's defence in this case in relation to those counts rests upon provocation and/or self-defence. Therefore it seems to me to most likely that the material facts in relation to the other counts would need to be addressed in order to make sense of count 4, even if there were significant admissions made.

[24] I therefore considered that it was inappropriate to order severance of count 4 from the indictment and refused that application.
