CITATION:	*Friel v Rigby* [2019] NTSC 48
PARTIES:	FRIEL, Joseph
	v
	RIGBY, Kerry Leanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 6 of 2019 (21743671)
DELIVERED:	17 June 2019
HEARING DATE:	14 June 2019
JUDGMENT OF:	Graham AJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE LAW – APPEAL – aggravated assault – whether a miscarriage of justice occurred – error in prosecution final address in respect to exculpatory witness evidence – whether judge erred in failing to consider prosecution submission witness was untruthful – whether witness was denied opportunity to re-establish credibility – rule in *Browne v Dunn* – failure of prosecution to challenge witness – unchallenged evidence – matters not put – inconsistent evidence – unfavourable witness – effect of failure to cross-examine – possible prejudice – possible breach of process – technical breach of *Browne v Dunn* – no actual miscarriage of justice found – appeal dismissed.

Criminal Code Act 1983 (NT) ss 181(1), ss 181(2)
Evidence (National Uniform Legislation) Act (NT), ss 38
Local Court (Criminal Procedure) Act 1928 (NT) ss 177(2)(f)

Browne v Dunn [1894] 6 R 6; *Kanaan v R* [2006] NSWCCA 109, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Razi
Respondent:	R Everitt

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Grah1903
Number of pages:	10

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

Friel v Rigby [2019] NTSC 48
LCA 6 of 2019 (21743671)

BETWEEN:

JOSEPH FRIEL
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: GRAHAM AJ

REASONS FOR JUDGMENT

(Delivered 17 June 2019)

Introduction

[1] On 13 March 2019, the appellant, Joseph Friel was convicted of aggravated assault of Marissa Sachs on 16 July 2017, contrary to s 188(1) and (2) of the *Criminal Code*.

[2] The matter proceeded by way of a contested hearing in the Darwin Local Court, before her Honour Judge Morris.

[3] This is a defence appeal on the grounds that a miscarriage of justice was caused by the prosecutor's final address in respect to the evidence of Ms Tarissa Pitts [Pitts]. The defence also appeal on the grounds that the judge erred at law by failing to direct herself to ignore the

prosecutor's submission that Pitts' evidence was untruthful; and/or that Pitts had been denied the opportunity to show her mettle under cross-examination and that the defence had been denied the opportunity to ask her questions in cross-examination designed to support her credibility.

Reasons for decision

[4] There were three witnesses called by the Crown, but it is the evidence of Pitts that is at the heart of this appeal. She gave evidence at the Local Court that it was she who assaulted the victim and not the appellant. The defence called no evidence.

[5] Pitts gave evidence that was exculpatory for the appellant. The prosecutor, notwithstanding that he failed to challenge Pitts when she gave evidence, submitted in his final address that the court should not treat Pitts as reliable. Defence counsel submitted that as the prosecutor had not challenged the evidence, his omission to do so was a failure to comply with the rule in *Browne v Dunn* [1894] 6 R 6 [*Browne v Dunn*], was unfair to the witness and was a factor that weighed in favour of there being a reasonable doubt. Ultimately, the Local Court judge decisively rejected the evidence of Pitts.

[6] I was referred by the appellant to the decision of *Kanaan v R* [2006] NSWCCA 109 [*Kanaan*]. In that case, the prosecutor failed to challenge the evidence of a witness and later submitted to the jury that

they should find the witness to be unreliable and untruthful which was found to be a breach of the rule in *Browne v Dunn*. However, the court went on to find that the relevant issue was whether the appellants in *Kanaan* were directly prejudiced by the conduct of the prosecutor. It was found that there was no prejudice, as there was no evidence that could be identified by the appellants that could have been called or elicited in cross-examination that would have assisted the appellants. The appellant here submits there is such evidence that would have been available to him but for the prosecution's failure to challenge the witness.

[7] The appellant claims that the failure by the prosecutor to challenge the witness denied the defence the opportunity to test the witness in a number of ways. In the first place, it could have been put to Pitts that she had signed a statutory declaration stating that she and the appellant had been arguing on the night of the incident. Secondly, it could have been put that in the same declaration she had said she was 'pissed off' with the appellant and thirdly, she had declared that she wanted the appellant to face court.

[8] It was also argued on behalf of the appellant that Pitts' degree of intoxication could have been tested in a *Browne v Dunn* cross-examination and as it was not so tested, there may have been prejudice to the appellant. It is difficult to imagine what possible prejudice there could have been, as if Pitts had conceded her evidence was doubtful, as

a consequence of the alcohol consumed on the evening, this would lessen the weight of her admission that she was the guilty party. In other words, not only would it have provided no solace to the appellant, it would have been indicative of his guilt. Furthermore, it assumes that the prosecutor would seek to open up this issue in cross-examination and, in my view, this is simply speculation.

[9] The appellant also argued that the breach of the rule in *Browne v Dunn* was a fundamental breach of process and though it was not possible to calculate what would have been the consequence of the breach, the failure to comply with the rule simpliciter was sufficient for this court to conclude justice had miscarried. When pressed, counsel for the appellant argued that in the ultimate, to use his words, the witness 'may have won the judge over'. The difficulty with this argument is that assuming that this proposition is correct, then Pitts' evidence would have been in the position it was before the *Browne v Dunn* cross-examination and defence cross-examination. It would have been uncontested, but exposed to the same scrutiny by the judge that the evidence was actually subjected to in the case. I reject the contention that a breach of the rule in *Browne v Dunn* simpliciter would bear any significance to a trial simply because it is a breach of long-standing process. Some prejudice of a tangible kind would need to be evidenced before a court would act upon a breach of the rule. There is no such evidence in this case.

[10] The rule in *Browne v Dunn* is a long-standing and important rule of fairness. If a party wishes to impeach a witness then that party is bound to give the witness an opportunity of making an explanation that may be open to that witness. The significance of the rule in criminal trials is that an eyewitness should both know and be given an opportunity to respond to a challenge to part of their evidence. It is submitted that here, the Crown did not test the evidence or question the evidence, but in submissions sought to impeach the evidence.

[11] On the face of it, there was at least a technical breach of the rule in *Browne v Dunn* by the prosecutor. The introduction of s 38 of the *Evidence (National Uniform Legislation) Act* (NT) has made it relatively undemanding for an advocate to obtain leave to cross-examine a witness who is unfavourable to the cause of the party calling that witness. However, this is not the end of the matter. The real issue is whether any prejudice to the accused can be shown by the Crown's failure to challenge the witness.

[12] There was nothing to stop defence counsel putting the propositions that he wanted to elicit from Pitts to her; cross-examination was at large. Forensically, his problem was that he had evidence that was unchallenged which, if accepted, exonerated his client. One can understand why he would not want to seek to undermine this state of affairs. The appellant argues that if the prosecutor had challenged Pitts, he could have raised in cross-examination the three matters referred to

in the statutory declaration by the witness. The appellant argued that the cross-examination was capable of restoring the credit of Pitts. Specifically, it was claimed in argument that the challenge to Pitts would have provided evidence that she was unlikely to seek to protect the appellant. There are flaws in this argument. In the first place, if the Crown had challenged the veracity of Pitts' account, the defence in cross-examination would have sought to elevate the credit of the witness by eliciting the three matters that she had previously sworn to in her statutory declaration. The defence point would have been that Pitts had no reason to lie because of her view of the appellant's conduct as expressed, in the statutory declaration. The problem about this process was that the judge would have been left with a witness who was challenged by the Crown as being untruthful and whose credit was then sought to be restored by the defence. It can hardly be said that any prejudice was likely to be caused to the defence in those circumstances. At best, the defence may have neutralised the Crown attack on Pitts. Secondly, the defence, in seeking to undermine the testimony in cross-examination, would be unlikely to advance his case. In fact, it may have made it more likely that the evidence of Pitts would have been rejected. In these circumstances, you would have had evidence of Pitts that she was the assailant, cross-examination by the prosecutor that she was not the assailant and trying to protect her partner and cross-examination by the defence that she was not

protecting her partner because of his conduct on the night of the assault. It would seem to me that the prejudice that is argued is illusory. In fact, the court would be more likely to accept Pitts' evidence if, as occurred, it was not challenged. Notwithstanding this, the trial judge rejected the evidence.

[13] It also should be noted that a party does not have to rely on the evidence of each and every witness called by that party. This is particularly apposite to a Crown prosecutor who has a duty to call all witnesses at his or her disposal. Some will be favourable to the Crown case and some will not be favourable.

[14] Furthermore, it would have been obvious to the defence and to Pitts that her evidence was subject to challenge as there were two other witnesses who were giving evidence in direct contradiction to her evidence. The defence must have anticipated, in these circumstances, that she was being called as a matter of fairness by the Crown and that ultimately the Crown would submit that her evidence should be rejected.

[15] At the hearing in the Local Court the complainant, Ms Sachs, gave evidence, as did an eyewitness Ms Sibbald and Pitts. In addition, there was some documentary evidence adduced. The Local Court judge rejected the evidence of Pitts and preferred the complainant and Ms Sibbald. The two witnesses other than Pitts both claimed that the

offender was the appellant. Their evidence was not totally ad idem, but it was contrary to the evidence of Pitts. The judge in her reasons stated as follows:

> Much of the evidence of three witnesses, all given on oath before me, is not consistent. It is not particularly unusual to have inconsistent evidence. People remember things differently…
>
> When considering each of the witness's evidence, where they differ, I accept the evidence of Ms Sibbald. This is for the following reasons. Ms Pitt's Evidence is internally inconsistent, and in my view, in some parts, palpably not possible…[1]

[16] The Local Court judge did reference the relationship of Pitts and the appellant, but when one examines the totality of the judge's findings it is clear that this issue was not a determinant. Her honour stated as follows:

> Ms Pitts was intoxicated and that may well cloud her memory. She is also in the position of the being the partner of the defendant which may well cloud her decision to be truthful to the court. Her evidence was no [not] supported or corroborated by either of the other witnesses and I reject her evidence.
>
> Ms Sibbald was sober, had a clear view, and was, in my view, after viewing her in evidence in court, attempting to tell what happened as best she recollected. It was not put to her that she colluded with Ms Sachs in relation to telling the story to the court. Indeed, their evidence is quite different in some respects and it would be unusual to collude and not come up with the same story. [2]

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1 Transcript of Proceedings, *Police v Joseph Friel* (Northern Territory Local Court, 21743671, Judge Morris, 13 March 2018) at 64.

2 Ibid.

[17] Given the above comments, it seems fanciful that if Pitts had been subjected to cross-examination by the prosecutor it would be likely that her evidence would then have been accepted by the Local Court judge, irrespective of what Pitts said in her statutory declaration.

[18] Subsequently, the Local Court judge made the remark that Ms Sibbald was a good witness, who made appropriate concessions and could not have been mistaken in what she saw or remembered. The judge's conclusion was that whilst Ms Sibbald evidence differed from the complainant, she accepted her evidence.[3] It is clear that the Local Court judge found Ms Sibbald to be a witness of truth and accepted her evidence as against the other witnesses. I would conclude that even if Pitts was cross-examined as to her motivation for giving evidence, it would have made no difference.

[19] The appeal for the above reasons is not made out.

[20] Pursuant to s 177(2)(f) of the *Local Court [Criminal Procedure] Act* (NT) notwithstanding that a court is of the opinion that a point raised might be decided in favour of an appellant it may still dismiss an appeal if it considers that no substantial miscarriage of justice has actually occurred. As previously indicated I conclude that the appeal should fail, but even if this is incorrect it cannot be said that any miscarriage of justice has occurred.

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3 Transcript of Proceedings, *Police v Joseph Friel* (Northern Territory Local Court, 21743671, Judge Morris, 13 March 2018) at 64.

[21] The appeal is dismissed.
