CITATION:	*Wanambi v Whittington* [2019] NTSC 49
PARTIES:	WANAMBI, Dylan v WHITTINGTON, Robert
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 51 of 2018 (21831289)
DELIVERED:	19 June 2019
HEARING DATE:	4 December 2018
JUDGMENT OF:	Hiley J

CATCHWORDS:

CRIMINAL LAW – Appeal from Local Court – whether finding of guilt unsafe and unsatisfactory – reasonable doubt said to arise from unreliability of victim's evidence due to her intoxication – what inferences can be rationally drawn by a reliable witness who hears and sees things that occurred at the time of the alleged assault – finding and relevance of lies told by the defendant

CRIMINAL LAW – Appeal from Local Court – whether finding of guilt unsafe and unsatisfactory – special advantages of a Local Court Judge when assessing the demeanour of Aboriginal witnesses whose first language is not English

Criminal Code Act 1983 (NT) s 188

Ashley v Nalder [2007] NTSC 23; *Bunting v Gokel* [2001] NTSC 24; *Campbell v Gokel* [2003] NTSC 81; *Chamberlain v The Queen [No 2]* [1984] HCA 7; 153 CLR 521; *Chidiac v The Queen* [1991] HCA 4; 171 CLR 432; *GAX v The Queen* [2017] HCA 25; 344 ALR 489; *M v The Queen* [1994] HCA 63; 181 CLR 487; *Morluk v Firth* [2017] NTSC 91; *SKA v The Queen* [2011] HCA 13; 243 CLR 400; *The Queen v Dookheea* [2017] HCA 36; 262 CLR 402; *Warford v Firth* [2017] NTSC 75; *Wurramarba v Langdon* [2017] NTSC 5; 264 A Crim R 386, referred to.

REPRESENTATION:

Counsel:

Appellant:	E Scoufis
Respondent:	R Everitt

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Hil1904
Number of pages:	26

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

Wanambi v Whittington [2019] NTSC 49
No. LCA 51 of 2018 (21831289)

BETWEEN:

DYLAN WANAMBI
Appellant

AND:

ROBERT WHITTINGTON
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 19 June 2019)

Introduction

[1] On 24 August 2018 the appellant/defendant was found guilty in the Local Court at Katherine of one count of aggravated assault contrary to s 188(1)&(2) of the *Criminal Code*.[1]

[2] The prosecution case was that sometime after 7 pm on 23 July 2018 the defendant assaulted the complainant, Vanessa Marawili, by hitting her to the face and kicking her to the back. The offending is said to have occurred sometime after 7 pm on the veranda at the front of a house at 71 Acacia Drive, Katherine.

1 Aggravated because the complainant suffered harm and is a female and the appellant is a male.

[3] The appellant has appealed against the finding of guilt on the basis that the finding was unsafe and unsatisfactory, alternatively that the finding involved specific error, namely the dismissal of the defendant's evidence in full.

Relevant legal principles

[4] Where the complaint on appeal is that the finding was unsafe and unsatisfactory, it is the task of the appellate court to review the whole of the evidence and ask whether, making due allowance for the advantage experienced by the court or jury at first instance, there is a doubt as to the appellant's guilt which that court or jury ought to have experienced.

[5] The High Court summarised the relevant principles in relation to appeals from a jury verdict in *M v The Queen*[2]:

> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it 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.
>
> …
>
> 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

2 (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at 493-495.

> given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.[3] 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 advantage 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[4]. 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[5].
>
> (underlining added by me)

[6] In *The Queen v Dookheea* [2017] HCA 36 Kiefel CJ, Bell, Gageler, Keane, Nettle and Edelman JJ observed at [39]: "a reasonable doubt is not just any doubt that the members of a jury as a reasonable jury might entertain, but is rather what a reasonable jury considers to be reasonable doubt."

[7] The statements of principle identified in *M v The Queen* have been consistently applied by this Court in appeals against findings of guilt made in the lower court.[6]

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3 Ibid, 494-495.

4 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 618-619; *Chidiac v The Queen* (1981) 171 CLR 432 at 443-444.

5 *Chidiac v The Queen* (1981) 171 CLR 432 at 443, 451, 458, 461-461.

6 See for example *Morluk v Firth* [2017] NTSC 91 at [33] – [37] per Grant CJ ; *Warford v Firth* [2017] NTSC 75; *Wurramarba v Langdon* [2017] NTSC 5 at [43] – [44] per Barr J; *Bunting v Gokel* [2001] NTSC 24 at [19] per Mildren J; *Ashley v Nalder* [2007] NTSC 23 at [3] per Martin (BR) CJ; *Campbell v Gokel* [2003] NTSC 81 at[44] per Thomas J.

[8] In *Morluk v Firth*[7] Grant CJ, referring to the first paragraph of the passage from *M v The Queen* quoted above, said, at [24]:

> That question also governs the determination of an appeal on that ground from a summary trial by judge alone. The determination of that matter turns on the appeal court's own assessment of whether it was open to the tribunal below to be satisfied of the appellant's guilt to the criminal standard.[8] This is not to say that the appellate court must disregard the advantages in fact-finding which the trial judge enjoys by reason of hearing the evidence in its entirety and in its context, and having opportunity to assess the demeanour of the various witnesses while they are giving evidence. However, the approach properly taken in the event that the appeal court has some doubt on its own assessment of the evidence was described in *M v The Queen* in the following terms:[9]
>
> > It is only where a jury's [or trial judge'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.

[9] In my view there may well be circumstances where an experienced Local Court judge hearing evidence, particularly in a bush court, from Aboriginal witnesses whose first language is not English, will have a far greater "*advantage in seeing and hearing the evidence*" than would a juror hearing the evidence and observing the witness in a jury trial, and also an appeal court. The transcript of evidence provided to an appeal court does not normally reveal particular features regarding the demeanor of the witness that would have been apparent to the Local

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7 [2017] NTSC 91.

8 *GAX v The Queen* (2017) 344 ALR 489 at [25]; *M v The Queen* (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ; *SKA v The Queen* (2011) 243 CLR 400 at [11]-[14] (405-6) per French CJ, Gummow and Kiefel JJ.

9 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ.

Court Judge. These might include periods of silence before questions are answered, which might explain why some of the answers recorded should not be construed literally. It is well known that some Aboriginal people will not respond to questions in the same way as one might normally expect of a person whose first language is English. Silence might indicate that the witness does not understand the question but is reluctant to say so, and may be followed by an answer that might be gratuitously accepting what the witness thinks the questioner is putting to him or her. This is why considerable care should be taken when asking leading questions and construing answers given in response. Other well-known features of Aboriginal witnesses which may have been observed and taken into account by the Local Court Judge but are not apparent from the transcript, might include avoidance of eye contact, gesture and other physical movements. In those kinds of circumstances an apparent lack of credibility in the evidence may well be "*explained by the manner in which it was given*", to quote from the passage above in *M v The Queen* that I have underlined.

[10] In *Morluk v Firth*[10] Grant CJ pointed out that there are numerous reasons why an appeal court might conclude that a verdict or decision is so unsafe or unsatisfactory that it should be set aside. His Honour

10 [2017] NTSC 91.

noted however that the standard of beyond reasonable doubt does not require absolute certainty. In some cases a reasonable doubt may not exist even where the evidence of an important witness such as a complainant is found to be unreliable in some or even all respects. Apparent inconsistencies within the evidence of a particular complainant might be expected, particularly if the complainant was heavily intoxicated at the time of being the subject of violence. In some cases inferences will need to be drawn from the evidence of other witnesses.

Main evidence

[11] The prosecution led evidence from the complainant, Maria Moles and Constable Gouverneur, and tendered photographs showing evidence of bleeding and swelling of the complainant's lips and bloodstains on the concrete floor near the front door of the house at 71 Acacia Drive. The defendant gave evidence.

[12] The judge found that he could give no weight to the complainant's evidence, and he did not believe her, because she was heavily intoxicated at the time of the incident. His Honour formed the view that she had reconstructed her account of the incident. Neither party to this appeal disagreed with these conclusions.

[13] The judge also rejected important parts of the defendant's evidence, finding that he had lied on at least two occasions. Counsel for the

appellant contended that his Honour dismissed the whole of the defendant's evidence and erred in his conclusions that the defendant had lied.

[14] Notwithstanding that some of the facts below emerged solely from the evidence of the complainant and/or the defendant, the following matters appear uncontroversial:

(a) The complainant and defendant were staying at 71 Acacia Drive, Katherine. The owner or tenant of the house there was the complainant's brother.

(b) On the morning of 23 July the defendant went to town to go to the Katherine Show. He found the complainant outside Woolworths drinking rum from a bottle. He considered that she was drunk.

(c) Later that day he found her again, outside McDonald's. She was drinking with other people, maybe 10. She was still drinking from the same rum bottle. He drank some of that. She drank more than him. They were there together for at least an hour or so.

(d) The complainant got into an argument with another woman, Tina. The defendant said that the complainant and Tina were pushing each other and had a fist fight.

(e) The defendant said that he grabbed the complainant by the arm and told her they were going home. She began to say strange things and run onto the road. The complainant was picked up by police and taken home. Meanwhile the defendant walked home and got there before the complainant.

(f) At 71 Acacia Drive, the complainant and the defendant were at the front veranda of the house. They argued and there was some physical interaction between them, which included some hair pulling and pushing.

(g) The complainant did sustain an injury to her lip. At about 7.40 pm Constable Gouveneur observed bleeding and swelling to her lips and also swelling to her left eyebrow.

[15] The complainant's evidence included the following:

(a) She agreed that she was very drunk and said that she and the defendant were angry with each other. There had been arguments about the defendant and his girlfriend, Tina. Earlier that day she and Tina had argued, slapping each other in the face. The pain was such that she took panadeine forte.

(b) She and the defendant were outside on the veranda of her brother's place at 71 Acacia Drive. The defendant was blind drunk. He hit her in the face and kicked her in the back. He hit her with a

closed fist. She said that she was standing when the defendant punched her and sitting when he kicked her.

(c) During cross-examination she conceded that when the defendant got up to go to bed she tried to pull him down and grabbed his shirt. She then got up and started grabbing his hair. He tried to push her away at this stage. She also conceded that when she saw the photos of her face the next morning her brother and others may have suggested to her that it was the defendant who punched her.

(d) During re-examination she reiterated that she was angry with the defendant. She said she was sitting down and he came along and punched her in the face and kicked her in the back. She remembers him doing this to her. However she also said that she was trying to pull his hair and to kick and punch him, and that she hit the defendant with an open hand maybe three times before he punched her.

[16] The defendant gave evidence about seeing the complainant in Katherine, first outside Woolworths and later near McDonald's. He was drinking with her for at least an hour near McDonald's. Later in the afternoon the complainant was arguing with Tina, who had been sitting with the defendant. The two women had a fist fight. Family members stopped the fighting. The defendant said that after the fight

the complaining was bleeding “a little bit” from the inside of her mouth. He took hold of the complainant by the arm and told her that they should go back home to 71 Acacia Drive. At some stage she was running onto the road. She was picked up by police and they drove her home. He said he got there first.

[17] When he was asked in chief to tell the Court more about the fight between Tina and the complainant he said: “They were fighting because I think Vanessa didn’t like Tina to be there drinking with us. I don’t know, maybe got jealous of her sitting with me.” During cross examination it was put to the defendant that the complainant was upset because she thought he had been stopping with Tina. He said: “No, not for that.” Then occurred the following exchange:

> That’s not why she was upset? --- She was upset for that but we was drinking together by ourselves. Yes. And then I don’t know why but Tina and Vanessa started arguing after that.
>
> …
>
> Do you think Vanessa thought you’d been stopping with Tina? --- No, she didn’t.
>
> So when they had that fight, Vanessa and Tina, you don’t know …? --- I don’t know why they was fighting.
>
> Were they saying anything when they were fighting? --- I didn’t hear anything about that.
>
> …
>
> And you don’t know why they were fighting? --- Yes, I don’t know what they was fighting over.

[18] The defendant gave the following evidence in chief about what happened on the veranda.

> And what happened between you and Vanessa on that veranda? --- I was trying to tell her let's make the beds, go to sleep, but she just kept on bringing up the issue about Tina or trouble.
>
> And what was she saying about Tina? --- She was saying that tell me the truth, are you with Tina, you with Tina or what, tell me the truth.
>
> And what were you saying to Vanessa? --- Have a sleep, have a rest, let's go to sleep. Get sober and we'll talk about it sober.
>
> And then - and what happened then? --- We were arguing, getting angry at each other, both angry. I was getting angry, that's why I got up. I wanted to walk away.
>
> And when you – you said you got up and wanted to walk away, was Vanessa standing up then or was she still sitting down? --- We both got up at the same time and she pulled my shirt, pulled me back down.
>
> And then what happened? --- And then she grabbed a hold of my hair. She was pulling it really hard. I felt pain. And all of a sudden I just told her to - I pushed her away and it looked like I was in pain because I hit her with this arm, this hand. I wanted her to get her hands of my hair, I was paining, but I could force her, I pushed her but didn't mean it.
>
> And just for the record, the defendant is making a kind of motion with both arms outward.
>
> And what happened when you did that? --- From there I had to pick her up, but then she kept on throwing herself. And then the second time I grabbed her she got up. And then we went inside to the kitchen and she thought I was threatening her but I was telling her to make the beds so we can go to sleep.
>
> And then what happened after that? --- And then the police came and (inaudible).
>
> Dylan, did you ever punch Vanessa in the mouth? --- No.

[19] During cross-examination the defendant said that the complainant was still "jealousing" him and they both were getting angry because she

kept going on about it. He said that he just wanted to go to sleep but that she wouldn't go to sleep. He said he pushed her away because he was trying to get her hands off his hair which she had been pulling. She sat on the chair and pulled his head down, "really hard", and that's when she fell on the ground. He said he picked her up and "then we walked in together in the house. I was telling her: "Come on, I'm taking you to the bed, you're going to go to sleep. Have a rest because you are drunk." Then occurred the following exchange:

> She was screaming at that stage? --- I was trying to tell her to make the beds and everything and she was screaming, yes.
>
> When you were outside on the veranda, she was screaming then as well, wasn't she? --- I was asking for the sheet to make it, I wanted to make the bed.
>
> When you were outside on that veranda, she was yelling out for you to stop, wasn't she? --- No.

[20] Maria Moles was staying at 71 Acacia Drive with her husband. She thought the house belonged to her auntie, the complainant. His Honour was impressed with her testimony, describing her as being "in her own way, an impressive witness" and later as a "very, very impressive witness". I have no reason to disagree with those descriptions of her as a witness. Her evidence included the following:

(a) The police dropped the complainant off and "told us that she was a little bit drunk". When asked whether she saw anything wrong with the complainant, she said: "No she looked all right,

everything was fine, everything was all right." She just looked horrors, out of it. "

(b) The complainant came inside to the lounge room. The complainant told her that she had had an argument with her husband's family. She said that "her husband and her had a bit of a punch up and then from there his sister and mum or somebody jumped in and gave her a hiding from there." The argument was about a girl who was jealousing her husband.

(c) The complainant then went outside. Ms Moles heard some arguing and looked around the corner and saw the complainant having an argument with her husband. Much of that was in language that she could not understand. She did hear the defendant say, in English: "Go back and say sorry." "She looked like she was upset and very scared at the time." "She was sitting down, he was standing over the top of her."

(d) Ms Moles went back inside and then:

> … I heard properly like somebody was screaming for help and crying. And then I saw some bit of – when I looked out the window I saw some punching and some hitting. And I was a bit worried for … my son was screaming, didn't know what to do. And then it just got worse and worse, like she was just hurting in pain, asking for help. And I could see her husband, you know, hiding a little bit and then I just end up calling the police, because I don't have violence around my auntie's house. …

> When you say there was punching, who was punching? --- Her husband was punching her.
>
> Did you see her punching him? --- No, I didn't see at the time.
>
> And you said he was giving her a hiding? --- Yeah, like giving her a punch in the face and just punching her and that's all – that's all I seen.
>
> And how was he punching her, did you see? --- On her - it looked like on the face (inaudible).
>
> Could you see his hands? --- No, I couldn't really, it was dark time at that time and where I was standing I could only see on the corner of it, that's all.

(e) It appears that Ms Moles did not actually see any punches land. It was dark at the time and there was a corner of the house interfering with her view. The complainant and the defendant were close to the front door, about four metres away from where she was in the kitchen. In cross examination:

> … You said you saw some punching? --- Yes. That's when I stand at the kitchen window and I could see some bit of punching and hitting.
>
> And when you were standing at the kitchen you couldn't see everything that was going on, could you? --- No. But I could see mainly him and I could see his arm moving. So I knew - and I could hear her like crying and screaming. So to me it looked like he was punching her.
>
> You could see his arm moving, you could hear her screaming ---? --- And I could see the shadow of them, for the shadow, yep.
>
> But you couldn't actually see him punching her? --- No.
>
> That was the thing that was missing? --- Yeah.
>
> What you've done is probably very reasonable, you've assumed that what he's doing is punching her? --- Yep.

And probably goes without saying, but there was a gap between the time that you went back inside and then the time you came out and saw them from the kitchen window? --- Yeah. I went inside for five, 10 minutes and then just sounded bit more worse outside, I went to have another peak, to have a look to see what was happening.

And so you don't know what happened during that gap? --- Yeah, through that, I don't really know what happened between the gaps. I could just hear yelling and screaming, that's all and people – and her and her husband talking in language.

HIS HONOUR: So what did you see on that third occasion when you looked? --- I only just seen like him, like his shadow and everything was - looked like he was punching and she was screaming out asking for help, call policeman, to me it looked like. And the thing, when I walked outside and saw the blood and I was a bit more panicking, thinking.

(f) When asked, in chief, about hearing screaming Ms Moles said:

Yeah, I heard her screaming asking for help, "Somebody help" and then I heard her saying, "Can you stop it or I'll call the policeman." And then I heard them - he started like crying, her husband started to cry a bit and say, "don't ring the policeman, don't" and then they just started speaking in language.

And what did you do after that? Is that when you call the police? --- Yeah, from there when she got worse I was panicking and then I end up telling my auntie to call the police for me.

When you say she got worse, what do you mean by that? --- Like she sounded like she was … because I heard a big bang before. I was not sure if it was a hit or something like that. All I heard is a big bang and heard her screaming, like screaming out, "help, help, somebody help me, somebody help me." And then, "Can you stop it, can you stop it" and then just started speaking in language. Didn't understand much.

That big bang that you heard, was that before you saw the punching or after? --- After, yeah, they started punching and then I walked inside and then she was screaming and then I

> came out and he was still hitting her little bit, went back in. And then she was screaming and then I heard a big bang and that's when she screamed out loud.
>
> …
>
> Did you see anything other than punching? --- No, that's all, just like they were arguing and just hitting each other. I didn't see her hitting or anything but I couldn't see out the corner. That was just like I could see a little bit where he was standing and I could see the shadow of it.

(g) Later, at the police station Ms Moles could see that a little bit of the complainant's lip was swollen. When Ms Moles asked the complainant about that she said: "Yeah, my husband punched me." Ms Moles told the police that the bit of blood outside on the concrete was not there before.

[21] Constable Gouverneur estimated that the complainant was about 5'4" tall, 50 kg in weight, and the defendant 6 foot and 85-90 kilos.

Findings and conclusions of the judge

[22] Counsel for the appellant said the following about the findings made by the judge:

(a) He could not believe the evidence of the complainant. His Honour said:

> I can give no weight to Vanessa Marawili. She was a lady who was so drunk, and having woken up with a nasty busted lip reconstructed her account from events told [to] her by relatives.

(b) He accepted the evidence of Maria Moles who he characterised as an "impressive witness".

(c) He summarised the crux of Ms Moles' evidence in this way:

> She agreed on the first occasion when her auntie was on the ground sitting and the defendant was standing, she didn't see any contact there. They were arguing. On the second occasion she could see through the window of the kitchen. She could see the motioning of the defendant. It looked like he was punching his auntie. She couldn't see him properly. Nonetheless, the auntie was screaming and begging for mercy. There were shadows. It was dark.

(d) In relation to the defendant's evidence, the learned Local Court Judge made the following remarks:

> He would have the court believe that he didn't know what the fight was about between Tina and Vanessa. That was a lie. He knew very well what it was about. He said that he was not screaming on the – sorry, Vanessa was not screaming on the veranda when they were out on the veranda. That was also a lie. I believe entirely Maria Moles in that – on that front, the screaming was continuous, was pointed and it sounded very much like a plea for mercy. He was lying about that also. He said he was very angry at the continuous questioning by his wife and he just got up and demanded to go to bed. He didn't hit her. I don't believe him. I reject his account in that regard.

(e) Ultimately, therefore, his Honour rejected the defendant's evidence based on two supposed "lies". The appellant submits that it was not reasonably open to the learned Local Court Judge to find that the defendant had positively lied to the Court.

(f) His Honour did not make any comment in relation to the defendant's demeanour.

(g) His Honour concluded that although Ms Moles saw the defendant's arm motioning only, he could infer beyond a reasonable doubt that based on her evidence, the defendant punched the complainant at least once to an unknown part of her body.

(h) The learned Local Court Judge could not be satisfied of where the blow was inflicted because Ms Moles hadn't seen it make contact with the complainant and the injuries depicted in the photograph were possibly explicable by the complainant's earlier physical altercation with Tina.

(i) He found that the complainant was the initial aggressor and had pulled the defendant's hair and angered him. The defendant had then "pushed her away and perhaps even struck her in a fashion that might have been regarded as defensive conduct" but, given the complainant's pleas for mercy, the defendant's actions went "well beyond self-defence". The difficulty for the learned Local Court Judge is that these findings were based on the evidence of the complainant and the defendant that he expressly rejected.

[23] After His Honour expressed his conclusions about the two lies told by the defendant, he said:

> However, I have also reached the position where I don't believe the victim. I can give no weight to Vanessa Marawili. She was a lady who was so drunk, and, having woken up with a nasty busted lip, reconstructed her account from events told her by relatives.
>
> Where does this leave me? It leaves me with the evidence of Maria Moles, truthful, patient and satisfied historian of the events on the night in question, in my estimation. And true it is she does not see the fist connect with the head after she initially views the arguing when she's seen what's happening through the window of her kitchen. She can see the motioning to strike of the defendant only. She can hear the begs for mercy of her auntie. It seemed they were protracted, alarming and continuous.
>
> I infer, and I satisfied beyond a reasonable doubt, on the evidence of Maria Moles only that the defendant has punched the victim at least once in the head – sorry, withdraw that – at least once. I don't know where the blows landed. But I am satisfied on the evidence of Maria Moles that the begging and whimpering victim was struck by the angry defendant who had been sick and tired, firstly, of the demands for answers about Tina; and secondly, had been attacked by the victim who – a small woman and a large man, albeit – well, medium size man, had pulled his hair which had angered him and he had indeed pushed her away and perhaps even struck her in a fashion that might have been regarded as a defensive conduct.
>
> But having been enraged by that conduct and by the continuous questioning had gone on with it, and I am satisfied of that given that protracted begs for mercy of the victim that he had gone on with the assault, gone well beyond self-defence and had at least once struck her somehow, location unknown, to the body and on that basis I find him guilty.

Ground 1 – that the finding of guilt was unsafe and unsatisfactory

[24] In addition to the submissions concerning the judge's findings referred to in [22] above, counsel for the appellant made the following points in her written submissions:

26. The appellant submits that the finding of guilt based almost exclusively on Maria Moles' evidence was unsafe and unsatisfactory. That is because her evidence was not adequate to ground a finding that the defendant committed the assault beyond reasonable doubt.

27. Having rejected the evidence of both the complainant and the defendant, the learned Local Court Judge was left with Ms Moles account, the evidence of Constable Gouverneur and the photographs in exhibit P1.

28. Ms Moles' evidence was insufficient to support a finding of guilt for the following reasons:

    (a) She did not see the beginning of the altercation (and therefore cannot say if the complainant was physically violent towards the defendant);

    (b) It was dark and she was several metres away from the altercation;

    (c) She could not see the complainant because her view was obscured, which also means that she could not exclude the possibility that the complainant was violent towards the defendant;

    (d) She could not actually see the defendant hitting the complainant. She described seeing "shadows" and the defendant's arm moving. She therefore could not say where (if anywhere) the defendant's arm made contact with the complainant's body.

29. The appellant submits that, based on Ms Moles' evidence, it was not possible for the learned Local Court Judge to conclude that the defendant had struck the complainant. It was also not possible to exclude the reasonable possibility of a consensual fight or that the defendant was acting in defensive conduct. Ms Moles' evidence that, at a certain point in the altercation, she could see the defendant's arm moving is equally consistent with the defendant's version of events as it is with the prosecution case. The defendant gave evidence that he had to push the complainant away as he was "paining" from her pulling his hair. This is completely consistent with Ms Moles' evidence.

30. The appellant takes no issue with the finding that Ms Moles was an impressive witness, but regardless of her demeanour, submits that her evidence was simply not adequate to ground a finding of guilt.

31. The appellant further submits that the balance of the evidence does little to bolster the finding of guilt. Constable Gouverneur's evidence was of little moment. The injury depicted in the photographs tendered as exhibit P1 was explicable by reference to the complainant's fight with Tina. Moreover, it is notable that Ms Moles did not notice any injuries to the complainant's face either when she returned home or after the altercation with the defendant. She only noticed them upon her arrival at the police station.

32. Equally, the blood on the veranda does not substantially assist the prosecution case. Ms Moles gave no evidence in relation to when exactly she had looked at the concrete floor prior to the altercation and how long after the altercation she noticed the blood there. All she said was "police asked me if it was there before and I said no". Her evidence on this point was insufficiently detailed to tie the complainant's injuries to the deposit of blood on the concrete. Importantly, she saw the complainant straight after the incident and did not notice any injuries on her, which would indicate that she was not actively bleeding.[11]

33. The Local Court Judge's difficulty in making findings based predominantly on Ms Moles' evidence is highlighted by his own reliance on evidence that he had earlier dismissed. He dismissed the complainant's evidence and the defendant's evidence but then went on to make findings consistent with the complainant's evidence that she was the initial aggressor and that the defendant pushed out at her.

34. Ms Moles did not give any evidence on these points. The appellant respectfully submits that the learned Local Court Judge cannot have it both ways: he cannot wholly reject the evidence of those two witnesses and then use it as a basis to make factual findings resulting in a finding of guilt.

[25] During oral submissions counsel for the appellant submitted that the evidence of Maria Moles was not sufficient for the judge to be satisfied beyond reasonable doubt that the appellant had struck the complainant. I disagree. I see no reason to fault the reasoning of His Honour in the

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three paragraphs set out in [23] above following the words: “Where does this leave me?”

[26] Like the primary judge, I accept the evidence of Maria Moles. Of particular importance is her evidence about the screams and calls for help by the complainant. These continued for some time, perhaps more than five minutes, during which Ms Moles saw the defendant standing while the complainant was sitting down, and saw the defendant’s arm moving as if he was punching the complainant. His Honour was quite correct to rely on this evidence notwithstanding the defendant’s denials. Ms Moles should not be criticised for inferring, and saying, that she saw the defendant punching the complainant and giving her a hiding. Even if she did not see a punch land on the complainant, which she readily admitted when asked that particular question, she saw and heard things which justified her rationally drawing those inferences.

[27] In addition to that evidence his Honour was entitled to have regard to the objective evidence of a fresh injury to the complainant’s face, the blood on the concrete and the making of the complaint to the police.

[28] Counsel for the appellant also pointed out that Maria Moles did not see the beginning of the argument and the altercation on the veranda. Accordingly, there was no evidence upon which the judge could be

satisfied beyond reasonable doubt that the assault was consensual or occurred in self-defence.

[29] I think it fair to infer that the complainant was largely responsible for the argument about jealousing and pulled the defendant's hair in an attempt to prevent him from walking away from the argument. However, any consent to the defendant using reasonable force to remove his hair from the complainant's grip stopped short of the defendant punching her, and stopped when she was screaming out for help. In any event, the defendant denied punching her at all. He was not suggesting that she was consenting to him punching her, or that he believed that it was necessary to punch her in order to defend himself. His Honour was entitled to conclude that the defendant continued with as assault on the complainant during her protracted begs for mercy that Ms Moles heard.

[30] It seems to me that the evidence justifies the conclusions reached by the judge. More relevantly, none of the evidence causes me to have a reasonable doubt about the guilt of the appellant, let alone conclude that his Honour should have had a reasonable doubt.

[31] I have reached these conclusions on the basis of the transcript and thus without any regard to the additional advantage that the Local Court Judge had in observing the demeanour of the various witnesses. Had I

felt the need to do that I would have been all the more inclined to defer to the additional advantage of the judge in seeing and hearing the witnesses. See my comments in [9] above about the particular advantages held by experienced Local Court judges when observing the demeanour of some Aboriginal witnesses and assessing the credibility of their evidence. Although this matter was heard in Katherine both the complainant and the accused normally lived in a remote community in Arnhem Land and English was not the main language of either of them.

Ground 2 – Erroneous dismissal of the defendant's evidence

[32] Counsel for the appellant contended that the learned judge erred in two major respects in relation to the defendant's evidence:

(a) he rejected the whole of the defendant's evidence; and

(b) he was wrong to conclude that the defendant lied:

(i) about his knowledge of the reason for the fight between the complainant and Tina; and

(ii) when he said that the complainant was not screaming when they were out on the veranda.

[33] Even if his Honour did commit those errors it does not follow that the appeal should be allowed.

[34] Counsel contended that the judge rejected the whole of the defendant's evidence on the following two bases:

(a) after concluding that the defendant had told the two lies and that he did not believe the defendant's denial about hitting the complainant, and then repeating that he could give no weight to the complainant's evidence, His Honour said: "Where does this leave me? It leaves me with the evidence of Maria Moles, truthful, patient and satisfied historian of the events on the night in question, in my estimation."

(b) when sentencing the defendant the judge said "I disbelieved Mr Wanambi and found that he had lied in evidence before me."

[35] I reject counsel's contention that his Honour rejected the whole of the defendant's evidence. Before expressing his views about the lies the judge recited some of the defendant's evidence and appears to have accepted it. Moreover, after he referred to the lies and said that he did not believe the defendant's evidence that "he didn't hit her" his Honour said: "I reject his account in that regard." That was the end of his Honour's discussion about the evidence of the defendant. Clearly, all that he was rejecting was the defendant's evidence about his knowledge of the fight between the complainant and Tina, the

complainant not screaming when they were out on the veranda and the defendant not hitting the complainant.

[36] In relation to the lies, it is trite that one must take particular care when assessing the evidence of some Aboriginal people particularly where their primary language is not English or where a particular question or concept is complex. Having said that I do consider that his Honour was entitled to conclude that the defendant was not being truthful when he was giving the answers which he described as lies. Even if they should be characterised as untruths as distinct from lies, his Honour was entitled to take those things into account in assessing the reliability of the defendant's evidence. In particular, the defendant's evidence about the complainant screaming when he was telling her to make the beds was quite different to Ms Moles' evidence about the complainant "screaming for help and crying" while they were still on the veranda, while what she thought was punching and hitting was occurring, and which sounded "worse and worse" during the 5 or 10 minutes when she went back inside the kitchen.

[37] I do not consider that his Honour made the errors asserted.

Disposition

[38] Neither ground are made out. I dismiss the appeal.
