

*Frewen v The Queen* [2009] NTSC 5

PARTIES: GAVIN STANLEY FREWEN

v

THE QUEEN

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING APPELLATE  
JURISDICTION

FILE NO: JA 65/08 (20815434)

DELIVERED: 4 March 2009

HEARING DATES: 2 March 2009

JUDGMENT OF: RILEY J

APPEAL FROM: Ms Fong Lim

**CATCHWORDS:**

*M v The Queen* (1994) 181 CLR 487

**REPRESENTATION:**

*Counsel:*

Appellant:

I Read

Respondent:

K Sharafeldin

*Solicitors:*

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

*Frewen v The Queen* [2009] NTSC 4  
No JA 65/08 (20815434)

BETWEEN:

**GAVIN STANLEY FREWEN**  
Appellant

AND:

**THE QUEEN**  
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 4 March 2009)

- [1] On 10 December 2008 the appellant was convicted in the Court of Summary Jurisdiction of the aggravated assault of Kerryann Kimber. He was sentenced to a period of imprisonment. He has appealed against his conviction on two grounds: firstly that the finding was unreasonable and not supported by the evidence; and, secondly, that the learned Magistrate erred in finding that the evidence of a child witness was corroborative of an assault as alleged when, so it was submitted, the evidence was inconsistent with the findings of fact in respect of the charge.
- [2] The appellant and the complainant had been in a relationship and together they had one child, a daughter. The relationship had broken down and there

was in place a restraining order made under the provisions of the *Domestic Violence Act*. Notwithstanding the terms of that order the appellant and the complainant had been communicating with each other and had spent time together.

- [3] At the relevant time the complainant was living at an address in Driver with her four sons from previous relationships and the young daughter of herself and the appellant. The appellant was living at an address in Stuart Park. The allegations made by the complainant against the defendant were that on 3 June 2008 they were together at the appellant's flat in Stuart Park when he attempted to strangle her, he punched her in the leg and also made threats to kill her.
- [4] The evidence before the court was that the appellant had been at the residence of the complainant on Saturday 31 May 2008 and also on Sunday 1 June 2008 in order to spend time with the complainant and the children. He stayed overnight on the Sunday, leaving early on the Monday morning. Whilst he was at the residence a physical fight broke out between two of the sons of the complainant and the complainant and the appellant both intervened. The following day the complainant complained of being sore.
- [5] On Tuesday 3 June 2008 the complainant was visited at her home by the grandmother of one of her children. The grandmother threatened to call the Department of Family and Children Services (FACS) because she had heard

that the appellant had stayed with the family overnight. This caused the complainant some concern.

- [6] There is no dispute that on 2 June 2008 the complainant and some of her children stayed with the appellant at his residence overnight and throughout the next day. It was the evidence of the complainant that the alleged assault took place on the evening of 3 June 2008.
- [7] In relation to the alleged assault the complainant said that on the night of 3 June 2008 an argument erupted between herself and the appellant during the course of which he took her by the throat with enough force to prevent her breathing. He also pushed her causing her to fall and hit her head on the couch, after which he punched her hard on the leg. As was noted by the learned Magistrate there was objective evidence demonstrating bruising on the left wrist, bruising about the eyes and a bruise on the upper thigh of the complainant, but no evidence of any injury in the region of her neck.
- [8] The court heard from two of the sons of the complainant, one aged 13 years and the other aged 16 years. The evidence of the 13-year-old supported the evidence of his mother in that he said he saw the appellant "hit Mum and Mum fell into the chair". The son said he intervened and then the family left. The 16-year-old son said there was an argument and he saw the appellant "lunge forward towards my mum." He then turned his attention to the other children. It seems he did not see any physical contact between the

two. Neither son described having seen the appellant take the complainant by the throat.

[9] The appellant was spoken to by police and he entered into a formal record of interview. He also gave evidence in the proceedings. It was his evidence that on the Tuesday night the complainant became louder and he asked her to leave. He says that he did not hit her and that he merely pushed her towards the door because she was refusing to leave. He denied the allegations of assault.

[10] The learned Magistrate considered the credibility and reliability of the various witnesses called, including the complainant and the defendant.

[11] There was a significant disagreement as to the circumstances in which the complainant came to visit the appellant on the Monday. Her Honour preferred the evidence of the appellant that it was at the behest of the complainant that the family came to his flat. Her Honour regarded the evidence of the complainant as not being reliable on this issue. The reasons for reaching that conclusion were identified by her and have not been challenged. In addition, her Honour did not accept the evidence of the complainant that her eldest son had not previously been violent towards her. This assertion by the complainant was contradicted by evidence from the two sons who were called to give evidence. Her Honour went on to observe:

"There are many internal inconsistencies in the complainant's evidence which bring forth some doubt about the reliability of her

evidence. It is clear from her evidence that the complainant is a confused person who is not totally reliable in her evidence."

[12] The learned Magistrate was also critical of the evidence of the appellant.

She pointed to examples of his evidence where he admitted to not telling the truth to a taxi company and to his landlady. Further, she found another part of his evidence to be "unbelievable". There is no challenge to those findings.

[13] The conclusions of the learned Magistrate were expressed in the following terms:

"I accept that the complainant's evidence was unreliable regarding her continuing contact between her and the (appellant) and how she came to be at his flat on the night of 3 June. However, that does not mean that she must be found to be unreliable regarding the assault upon her and the threat made to her by the (appellant). Given the destructive nature of the relationship, the evidence of (the two sons) and the objective evidence of the obvious injuries to the complainant (sic). Most telling of her fear of the (appellant) is that shortly after this incident with the (appellant), the complainant left Darwin for Adelaide leaving her two older sons behind.

Given the above, I am satisfied beyond a reasonable doubt that the complainant suffered an assault at the hands of the (appellant) on the night of 3 June 2008. I can be satisfied beyond a reasonable doubt that he punched her to the upper thigh and applied force to her to cause her to fall onto the couch. I cannot be satisfied beyond a reasonable doubt that the (appellant) choked the complainant in the manner in which she said he did."

[14] The appellant does not point to a specific error in the analysis conducted by the learned Magistrate. It is conceded on his behalf that there is evidence capable of sustaining the verdict. However, it is submitted that upon the whole of the evidence the appellate court ought to entertain a reasonable

doubt as to his guilt. Reference was made to the principles discussed in *M v The Queen*<sup>1</sup>.

[15] It was submitted that there were "serious credit issues concerning the complainant" leading to a reasonable doubt. The complainant gave evidence which suggested that she was keen to get away from the appellant "yet her conduct and behaviour is quite at odds with this motivation". For example, and as her Honour found, the complainant went to the appellant rather than the other way around. On behalf of the appellant reference was made to the claim by the complainant that she had been grabbed by the throat, a claim which was unsupported by any of the objective evidence, including photographs taken whilst she was at Royal Darwin Hospital. Also referred to was the evidence of the complainant, which was not accepted by the learned Magistrate, that she had not previously had a physical altercation with her eldest son. It was noted that the learned Magistrate was not satisfied to the necessary standard regarding the allegation of choking and was not prepared to find that the complainant was struck to the facial area. All of this was said to arise in a context where the complainant was concerned regarding the possible further involvement by FACS which may have impacted upon her capacity to keep the younger children in her care. In all the circumstances it was submitted that the finding of guilt was unreasonable and not supported by the evidence.

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<sup>1</sup> (1994) 181 CLR 487

[16] The approach to be adopted in this matter is guided by the observations of the High Court in *M v The Queen*<sup>2</sup> where the majority (Mason CJ, Deane, Dawson and Toohey JJ) said:

"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. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[17] The appellant does not suggest that the learned Magistrate failed to address the issues of concern which have been identified. She did address those issues and, having done so, reminded herself that her concerns did not necessarily mean that the complainant was unreliable in all aspects of her evidence regarding the alleged assault. Having identified the matters of concern her Honour nevertheless found as established, to the requisite standard of proof, the allegations that the appellant punched the complainant to the thigh and applied force to her to cause her to fall onto the couch.

[18] I have reviewed the evidence. There is ample evidence to support the findings made by her Honour. The claim that the appellant struck the complainant in the thigh and that he applied force to her to cause her to fall and hit her head on the couch is clearly stated by the complainant and

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<sup>2</sup> (1994) 181 CLR 487 at 493

supported in part by the separate evidence of each of her sons. It is supported by the independent and objective evidence of the photographs of the bruising to her upper thigh and the colouring around her cheekbones. The police officers also described observations they made which were consistent with what is seen in the photographs.

[19] The appellant suggested that the injuries may have occurred when the complainant sought to separate her two sons during the altercation on the Sunday night, however, he is not supported in this regard by the evidence of others. The complainant denied the suggestion and both boys also rejected it. The 16-year-old was, to adopt the expression used by her Honour, "adamant" that his mother was not hit by the older brother on this occasion although he conceded the older brother had been violent towards his mother on other occasions. The 16-year-old was asked whether, during the altercation, his older brother did anything to his mother that could have caused her injury and he responded "no, not at all". His younger brother gave evidence to similar effect. The appellant himself did not claim to have seen any marks on the complainant following that incident. The fact that the complainant complained of being sore the following day is not inconsistent with the evidence that the older brother was not physically violent to his mother on this occasion.

[20] During argument mention was made of the failure of the prosecution to call the oldest son or his girlfriend. There was no ground of appeal directed to that issue. In any event an explanation for the failure was provided by

Constable Brunton. He had been unable to trace the eldest son and, I infer, his girlfriend.

[21] I am unable to see how the evidence of the complainant may have been influenced by the possible involvement of FACS. Nothing of assistance was suggested in the course of argument. Whether or not the appellant assaulted the complainant on this occasion, and in this manner, would not appear to have any bearing on her relationship with FACS regarding her children. If she was to be influenced in her evidence at all it would likely be to deny anything which could be suggested to have had an adverse influence on her children such as an assault in their presence.

[22] The finding by the learned Magistrate that she was not satisfied beyond reasonable doubt that the appellant had choked the complainant was, in all the circumstances, appropriate. There was no independent or objective evidence to support the claim and in all the circumstances it is understandable that her Honour could not be satisfied to the required standard of proof that the choking occurred. Similar observations apply to the findings of her Honour regarding the charge of threatening a witness. However, that does not mean that her Honour could not be so satisfied beyond reasonable doubt in relation to the other allegations of assault, supported as they were by the evidence to which I have referred.

[23] I do not accept the submission made on behalf of the appellant that the learned Magistrate erred in finding that the evidence of the 13-year-old son

was corroborative of an assault when the evidence was inconsistent with her ultimate findings of fact. His evidence was that the appellant "hit Mum and Mum fell into the chair" which is consistent with what she described save that it makes no reference to her having been choked. He also gave evidence that he saw a bruise "right around her cheekbone area" which is also consistent with her evidence of her face being pushed into the chair. Her Honour found him to be a witness who "gave his evidence in a straightforward manner" and she rejected any suggestion of collusion. His evidence was not inconsistent with the findings of fact made by the learned Magistrate.

[24] I am not satisfied that the grounds for appeal have been made out. In my view there is evidence to sustain the verdict and, having reviewed the material myself, I regard it as having been open to her Honour to be satisfied beyond reasonable doubt that the appellant was guilty of assault as the learned Magistrate found.

[25] The appeal is dismissed.

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