Woods v Eaton [2009] NTSC 49

PARTIES:	WOODS, Charmaine Suzanne
	v
	EATON, Donald John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	NO JA 18 OF 2008 (20807919)
PARTIES:	WOODS, Danielle Fenton
	v
	EATON, Donald John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	NO JA 19 OF 2008 (20810833)
DELIVERED:	18 SEPTEMBER 2009
HEARING DATES:	24 AUGUST 2009
JUDGMENT OF:	REEVES J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION ALICE SPRINGS

CATCHWORDS:

APPEAL
Justices Appeal – new evidence – discretion to admit – principles to be applied – whether new evidence likely to be credible – s 176A(1)(a) *Justices Act*
(NT).

Justices Appeal – new evidence – discretion to admit – principles to be applied – whether reasonable explanation for failure to adduce evidence – s 176A(1)(b*) Justices Act* (NT).

Justices Act (NT), s 176A(1), s 176A(2), s 176A(3)

Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd (1987) 47 NTR 8
Smith v Torney (1984) 29 NTR 31
Bates v Haymon (1998) 90 FLR 55
McCarthy v Trenerry [1999] NTSC 29
Clark v Trenerry [1999] NTSC 17
Pagett v Hales [2000] NTSC 35
Petty v The Queen (1991) 173 CLR 95
RPS v The Queen (2000) 199 CLR 620
Azzopardi v The Queen (2001) 205 CLR 50
North Ganalanja Aboriginal Corporation v Queensland (1996) 185 CLR 595

REPRESENTATION:

Counsel:

Appellant:	T Berkley
Respondent:	G McMaster

Solicitors:

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

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

Woods v Eaton [2009] NTSC 49

No JA 18 of 2008 (20807919)

BETWEEN:

CHARMAINE SUZANNE WOODS
Appellant

AND:

DONALD JOHN EATON
Respondent

No JA 19 of 2008 (20810833)

BETWEEN:

DANIELLE FENTON WOODS
Appellant

AND:

DONALD JOHN EATON
Respondent

CORAM: REEVES J

REASONS FOR JUDGMENT

(Delivered 18 September 2009)

Introduction

[1] Charmaine Suzanne Woods is the mother of Danielle Fenton Woods. On 2 September 2008, both mother and daughter were convicted of assault in the

Court of Summary Jurisdiction at Alice Springs. Ms Charmaine Woods was convicted on two counts – one count of common assault and one count of aggravated assault – and Ms Danielle Woods was convicted on one count of aggravated assault. These convictions arose out of two separate incidents that occurred on 2 November 2007 at Alice Springs, both involving a Ms Ayla Laruffa.

[2] These two appeals each began as appeals against the Woods' convictions. However, at the outset of the hearing before me, Mr Berkley, for the Woods, sought to tender evidence in the appeals and also sought leave to amend both notices of appeal to add a new ground in each to the following effect:

> "the findings of guilt against the appellant be vacated and the matter remitted to the Court of Summary Jurisdiction in Alice Springs for rehearing."

[3] Since no objection was taken to the proposed amendments to the notices of appeal, I granted leave. Thereafter, the hearing of the two appeals focused on the question whether the Woods should be allowed to tender evidence in the appeals.

[4] Ms McMaster, who appeared for the Crown, told me that, should I decide that the Woods should be allowed to tender evidence in the appeals, the most appropriate course, in the circumstances, would be for both matters to be remitted to the Court of Summary Jurisdiction at Alice Springs for rehearing. Since this was also the course sought by the Woods, there was common ground on this approach. It follows that the only issue I have to

decide is whether the Woods should be allowed to tender evidence in these appeals.

The relevant legislative provisions

[5] The section of the *Justices Act* (NT) ("the Act") that deals with the tender of evidence on an appeal, is s 176A. Subsection (1) of s 176A provides that:

> "(1) Where evidence is tendered to the Supreme Court, that Court shall, unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal, admit that evidence if –
>
> (a) it appears to it that that evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal;
>
> (b) it is satisfied that that evidence was not adduced in those proceedings and there is a reasonable explanation for the failure to adduce it; and
>
> (c) it is satisfied that the appellant has complied with the requirements of subsections (2) and (3) in respect of that evidence."

The specific issues that arise

[6] It is not in issue that the Woods have given written notice in accordance with subsections (2) and (3) of s 176A of the Act (not reproduced above). Furthermore, Ms McMaster told me that the Crown did not raise any issue about the following aspects of s 176A(1):

- that the evidence would have been admissible in the proceedings before the Court of Summary Jurisdiction at Alice Springs: see s (1)(a);
- that the evidence was relevant to an issue the subject of these appeals: see s 1(a); and

- that the evidence was not adduced in the proceedings before the Court of Summary Jurisdiction at Alice Springs: see s 1(b).

[7] Ms McMaster, therefore, limited the Crown's opposition to the reception of the evidence to the following:

- that the evidence was not likely to be credible: see s 1(a); and

- that there was no reasonable explanation for the failure to adduce the evidence in the Court of Summary Jurisdiction proceedings: see s 1(b).

[8] Before proceeding to consider these issues, it is necessary to describe the two incidents in some detail and to then identify the evidence the Woods wish to tender in these appeals.

The two incidents

[9] The two incidents in question occurred on the same evening. They both involved the same alleged victim, Ms Ayla Laruffa. The first incident only involved Ms Charmaine Woods. It occurred outside the Woods' family home on Spearwood Road on the north side of Alice Springs. In his reasons for decision, the learned Stipendiary Magistrate described the incident as follows:

> "… Ayla Laruffa states that she [was] walking past Charmaine Woods' house … she saw Charmaine walk out of the house. She said Charmaine started swearing at her, stated to her, 'you're a little smart arse cunt'. She came up to her right in the front of her and punched her in the right upper chest. Ms Laruffa states she got winded, she fell to the ground and then got up and started walking away …"

[10] In her defence, Ms Charmaine Woods gave evidence and she also called evidence from her relative, Ms Sophie Woods, and her ex-partner, Mr Michael Dodd. The learned Stipendiary Magistrate found that the evidence of Ms Charmaine Woods and her witnesses was variously "unimpressive", "contrived" and "totally unconvincing". Accordingly, on the first incident, the learned Stipendiary Magistrate concluded:

> "I find that Charmaine did apply intentional force to Ayla after some swearing, possibly between the two of them backwards and forwards, but clearly I am satisfied on Ayla's evidence which is to some degree supported by Sophie Woods' evidence that there was either a punch or a push that was of sufficient force to cause Ayla to fall over. That application of force was without consent and I do find beyond reasonable doubt that it was unnecessary force and was not force to defend Charmaine Woods herself from Ayla ..."

[11] As found by the learned Stipendiary Magistrate, the second incident involved both Ms Charmaine Woods and Ms Danielle Woods. It occurred in the vicinity of Ms Laruffa's home in Mallam Crescent, which is also on the north side of Alice Springs. It occurred about half an hour or so after the first incident. The learned Stipendiary Magistrate described that incident in his reasons for decision as follows:

> "Ayla says as she was leaving her home and just having left she saw the Woods' car and then she saw Charmaine and Danielle and another woman she didn't know get out of the car. Charmaine and Danielle were armed with bottles. The other woman she didn't know had something that she called a candlestick. They assaulted her with it. She was hit, she stated, four or five times that she could recall. She called out to her mother. Her mother came to the fence and called out and the three women ran off."

[12] In relation to this incident, both Ms Ayla Laruffa and her mother, Ms Marie Laruffa, gave evidence for the prosecution. On Ms Marie Laruffa's evidence, the learned Stipendiary Magistrate concluded:

> "I did find Marie Laruffa to be an impressive witness. I accept her account that she heard her daughter calling out for help and ran from the house and got on the fence and saw three women in the act of assaulting her daughter, called out, and they immediately desisted and ran off."

[13] For her part, Ms Danielle Woods gave evidence that she knew nothing about the first incident involving her mother and Ms Ayla Laruffa. She said that she was visiting her aunt's place at Mallam Crescent in Alice Springs. In relation to the second incident, Ms Danielle Woods said that, as she got out of the car with a friend of hers, Ms Ayla Laruffa came running at her with a bottle. She said she did not know the reason for this attack. She claimed that she disarmed Ms Laruffa and there was a scuffle, but no blows were struck by either of them.

[14] It may be of some significance to the issues in these appeals that the learned Stipendiary Magistrate noted that Ms Danielle Woods gave evidence that the friend who was with her at the time was: "… now apparently … in Borroloola and wasn't called to give evidence".

[15] Ms Charmaine Woods, Ms Sophie Woods and Mr Michael Dodd each gave evidence that Ms Charmaine Woods remained at home with them after the first incident. She therefore claimed to have an alibi for the second incident.

[16] On this second incident, the learned Stipendiary Magistrate accepted the evidence of the Laruffas and rejected the evidence called by the Woods. He said:

> "And I find that evidence [of Ms Marie Laruffa and Ms Ayla Laruffa] is sufficient to satisfy me beyond reasonable doubt that there were three women who were involved in the attack, and on the basis of Ayla's evidence and the fact that I find the evidence of Woods and Dodd a contrived attempt to construct an alibi, I find that I'm satisfied beyond reasonable doubt that both Charmaine and Danielle were involved on the attack on Ayla and that bottles were used in the attack and that as a result Ayla Laruffa suffered harm. So I find the charges satisfied beyond reasonable doubt."

[17] Earlier in his reasons for decision, the learned Stipendiary Magistrate also placed some significance on the injuries suffered by Ms Ayla Laruffa and which version of the second incident provided a more cogent explanation for those injuries. He said:

> "Certainly on Danielle's account there was nothing in the instant (sic incident) that could have left Ayla in the bruised and battered state that she was found by her mother, and which was supported by the medical evidence."

[18] Nonetheless, the learned Stipendiary Magistrate appears to have come to his conclusion about the second incident based mainly upon his assessment of the credibility of the evidence of Ms Marie Laruffa and Ms Ayla Laruffa. Critical to that assessment was the number of women involved in the incident. Having accepted the evidence of the Laruffas that there were three women involved, his Honour then disbelieved Ms Charmaine Woods, Ms Sophie Woods and Mr Michael Dodd on their evidence about Ms Charmaine

Woods' alibi and thus concluded that Ms Charmaine Woods was present and involved in the second incident. His Honour also disbelieved the evidence of Ms Danielle Woods about the number of women involved and the remainder of her evidence about the nature of the second incident.

The fresh evidence

[19] The evidence that the Woods wish to tender in these appeals is that of a Ms Telena Booth. Ms Booth's evidence is contained in a statutory declaration annexed to an affidavit by Mr Goldflam, the solicitor for the Woods. From that statutory declaration it is apparent that Ms Booth is the friend who was with Ms Danielle Woods at the time of the second incident. Ms Booth says in her statutory declaration that at about 9.00 or 10.00 pm on 2 November 2007, she went with Ms Danielle Woods in Ms Charmaine Woods' car to Ms Danielle Wood's aunt's place in Mallam Crescent, Alice Springs to get some "smokes from the aunt". She says that after they obtained the smokes, they were walking back to the car when:

> "Ayla came out of the dark. She was swearing. Ayla and Danielle started fighting. There were basically just holding each other. They were two steps away from me. This was in front of the car, on the side of the road next to the footpath. They weren't hitting each other. They were pulling each other's hair. I tried to split them up. I said 'Ayla, back off'. Danielle was saying 'Let me go'. I touched them on the chest, and grabbed their hands to make them let go of their hair. I don't remember if anyone fell down.
>
> Ayla called out to her mum. I didn't see her mum. I think I saw someone – there were people in her yard looking over the fence. They were saying something but I didn't take any notice of what they said. Ayla was tipsy, from the way she was walking and talking.

> Ayla and Danielle let go of each other and I told Danielle 'let's go'. We got in the car and we went."

[20] In summary, on its face, Ms Booth's evidence:

- supports Ms Charmaine Woods' claim that she was not present at the second incident and, therefore, contradicts the evidence of Ms Marie Laruffa and Ms Ayla Laruffa that there were three women involved in the second incident; and

- supports Ms Danielle Woods' evidence as to the nature of the second incident and, therefore, contradicts the evidence of Ms Ayla Laruffa as to how that incident occurred.

[21] It is therefore not surprising that the Crown does not take any issue about the admissibility, or relevance of this evidence.

The relevant authorities

[22] Ms McMaster referred me to four decisions that she said were relevant to the construction of s 176A of the Act. First, she referred me to the decision of Asche J (as he then was) in *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8. Among other things, that decision dealt with the conditions precedent to a valid appeal under ss 171 and 172 of the Act and whether or not the Court could, or should, dispense with compliance with those provisions. Since that decision dealt with different statutory provisions to s 176A and since it gave rise to different

issues, I do not find it to be of any assistance in considering the requirements of s 176A.

[23] The second decision was that of Muirhead J in *Smith v Torney* (1984) 29 NTR 31. That decision dealt with an application under s 176A of the Act and is, therefore, of assistance in considering the requirements of s 176A. At p 33 of that decision, Muirhead J made some observations about the requirements of s 176A that the fresh evidence "is likely to be credible" and that there must be a reasonable explanation for failing to adduce the evidence at the hearing. In relation to the former, his Honour expressed the view that the likely credibility had to be assessed on a *prima facie* basis, taking an objective view of the proposed evidence. In relation to the latter, his Honour expressed the view that the explanation could be given in an affidavit, in oral evidence, or even by counsel in submissions.

[24] Muirhead J said that, if these questions were answered in the affirmative: "[the] court is **required** to receive the new evidence" (emphasis added), subject to it being relevant. Of course, relevance is not an issue in these appeals. His Honour added that the admission of new evidence was a discretionary matter and the principal consideration in the exercise of that discretion was: "essential fairness to the accused".

[25] As to what amounted to a reasonable explanation, Muirhead J quoted from a decision of the Full Court of South Australia in *Bean v Considine* [1965]

SASR 351, specifically at p 359 in the decision of Hogarth J (with which his Honour respectfully agreed) as follows:

> "… Furthermore, the appellant is called upon to give some reasonable explanation for not bringing the facts to the notice of the Court below. **It seems to me, however, that this Court should be liberal in its interpretation of what amounts to a reasonable explanation.** …" (emphasis added)

[26] The other two decisions Ms McMaster referred me to were *Bates v Haymon* (1998) 90 FLR 55 and *McCarthy v Trenerry* [1999] NTSC 29. Having considered them, I do not consider that either decision advances the matter beyond the principles set out in *Smith v Torney*.

[27] However, there are two other decisions of the Northern Territory Supreme Court that I consider do provide some assistance in considering the requirements of s 176A. First, in *Clark v Trenerry* [1999] NTSC 17, Riley J dealt with an application to tender evidence under s 176A of the Act, where the explanation for the failure to adduce the evidence in the proceedings below was that there had been an error on the part of counsel. In relation to this explanation, Riley J said (at [11]):

> "[11] As a general rule an accused person is bound by the way in which the trial is conducted on his behalf, and a conviction will not be set aside because decisions by his legal representatives as to the conduct of the trial involved errors of judgment or even negligence. However, **if the error was of such a nature as to have led to a miscarriage of justice, then an appellate court will interfere**, *Ranko Ignjatic* (1993) 68 A Crim R 333 at 336." (emphasis added)

[28] Secondly, in *Pagett v Hales* [2000] NTSC 35, Mildren J made some observations about the requirements of s 176A(1)(a) that the evidence "is likely to be credible". His Honour said (at [46]) that:

> "… The test is, not whether I consider that the evidence lacks credibility, but whether it is likely to be credible in the sense that it is capable of belief: see *Hook v Ralphs* (1987) 45 SASR 529 at 535; or, as Muirhead J put it, in *Smith v Torney* (1984) 29 NTR 31 at 33, on an objective view of the evidence, is the evidence *prima facie* credible? …"

Is the evidence of Ms Booth likely to be credible?

[29] The first specific issue that arises for consideration under s 176A is whether the evidence of Ms Booth is likely to be credible. On this issue, Ms McMaster submitted that the evidence of Ms Booth was not likely to be credible because, based on the evidence of Ms Marie Laruffa given at the trial, Ms Booth was one of the three women who were involved in the assault on her daughter. It followed, so Ms McMaster submitted, that Ms Booth's evidence should be treated as the evidence of a co-accused with the Woods and this evidence should be treated as self-serving and exculpatory.

[30] I reject this submission. At this stage of the proceedings, consistent with the observations of Muirhead J in *Smith v Torney,* I am required to assess the likely credibility of the fresh evidence on a *prima facie* basis only. The ordinary meaning of the expression "*prima facie*" is "at first sight; on the face of it; as appears at first sight without investigation": see *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 615 – 616. It follows that I should assess Ms Booth's evidence on its face, without reference to other evidence that has been given, or may be given, in these matters.

[31] On its face, I consider the fresh evidence of Ms Booth is likely to be credible. It is in the form of a statutory declaration which has been duly signed and witnessed. In that statutory declaration, Ms Booth sets out an eye witness account of the second incident. From my reading of it, there is nothing on the face of Ms Booth's statutory declaration, e.g. an inherent contradiction, or some fanciful assertion, that suggests that her evidence is not likely to be credible.

[32] For these reasons, on a *prima facie* basis, I consider this fresh evidence is likely to be credible. Beyond that, like Mildren J in *Pagett v Hales* (see at [46]), I do not consider I should make any further comment on the credibility of the fresh evidence when there is a real prospect that matter will have to be determined by the magistrate who rehears these matters.

Is there a reasonable explanation for failing to adduce Ms Booth's evidence below?

[33] The second specific issue that arises for consideration under s 176A is whether there is a reasonable explanation for the Woods failing to produce Ms Booth's evidence at the hearing before the Court of Summary Jurisdiction.

[34] The appellants relied upon two affidavits to put forward their reasonable explanation – one by Mr Goldflam, the solicitor who acted on behalf of Ms Charmaine Woods, and the other by Mr Banbury, the solicitor who acted on behalf of Ms Danielle Woods. In his affidavit, Mr Banbury deposes to the fact that he was aware that Ms Booth was a potential material witness in the

proceedings after he took over the conduct of the file on 15 July 2008. He says in his affidavit that he recalled speaking to Ms Danielle Woods and asking her about Ms Booth's whereabouts. He says: "I recall Danielle Woods saying she didn't know how to contact Telena, she did not have her phone number and that she was somewhere up near Borroloola … I recall Danielle Woods saying she expected to hear from Telena".

[35] Later in his affidavit, Mr Banbury says that on the Friday before the hearing, which was to commence on 1 September 2008, Ms Danielle Woods informed him that: "Telena Booth had not contacted her and she thought that Telena was in Borroloola or somewhere near Borroloola and she had not been in contact with her".

[36] In his affidavit, Mr Goldflam deposes to the fact that he allocated the file in relation to Ms Danielle Woods' matter to Mr Banbury and he undertook the conduct of the file in relation to Ms Charmaine Woods' matter. He says in his affidavit that:

> "When I first conferred with the appellant Charmaine Woods about these proceedings a few days before the hearing, she instructed me that she believed Danielle Woods' friend Telena Booth was living in the Borroloola area, but that she did not know any further details of Telena Booth's whereabouts. The appellant further instructed me that she did not know of anyone she could call to find out where Telena Booth was and that the Woods family had attempted to ring Telena Booth's mobile telephone without success. The appellant further instructed me that she did not know if or when Telena Booth would return to Alice Springs or resume contact with the Woods family."

[37] Based on those instructions, Mr Goldflam says in his affidavit that he concluded that there would be little prospect that Ms Booth could be located and he opined that there would be little prospect of obtaining an adjournment of the trial due to commence on 1 September 2008 because: "The information I had about Telena Booth's whereabouts was so scant that I would have been unable to support my application by reference to a time frame in which she could have been brought before the Court".

[38] Later in his affidavit, Mr Goldflam makes a frank concession formed with the benefit of hindsight that: "I misjudged the exculpatory significance of Telena Booth in the context of the case as a whole. I did not fully appreciate the extent of the exculpatory significance of her evidence until I first spoke to her in early February 2009".

[39] Elsewhere in his affidavit, Mr Goldflam gives details of his first contact with Ms Telena Booth on 9 February 2009 and the circumstances in which he managed to obtain the statutory declaration from her which she subsequently signed on 4 March 2008 (sic 2009).

[40] Of course, even if he had recognised the significance of Ms Booth's evidence at the time, there is nothing to suggest he would have been able to locate her and much to suggest he would not have. Relevant to this point is Ms Booth's statement in her statutory declaration about her whereabouts and ease of contact with her at the time. She said that:

> "In September 2008 I was hard to contact because I had lost my mobile phone. I got it back after Christmas. I was living at Sandy Ridge Outstation, about 10km from Borroloola on the other side of the river. There is no public phone there, and I do not know the postal address."

[41] Consistent with the authorities I have referred to above, I consider I should be liberal in my interpretation of what amounts to a reasonable explanation under s 176A. Furthermore, I consider my principal consideration should be the fairness to the accused persons.

[42] On this issue, Ms McMaster submitted that:

(a) There was no affidavit evidence from the appellants themselves.

The short answer to this submission is that the explanation has been given in the affidavit of the two solicitors and they were the people with the conduct of the trial on behalf of the Woods. They were, therefore, best placed to explain why Ms Booth was not called to give evidence. Furthermore, Ms McMaster did not point to anything that the Woods could have added to their evidence.

(b) I should infer that it was a deliberate tactic on the part of Mr Goldflam not to disclose the evidence of Ms Booth to the prosecution.

In his affidavit, Mr Goldflam has explained why he was not able to call Ms Booth. In the process, he frankly confessed he made a mistake in assessing the significance of her evidence. Ms McMaster did not seek to cross-examine Mr Goldflam on his affidavit and put to him that, contrary to what he says on oath in his affidavit that he made a mistake,

in fact he made a deliberate tactical decision not to disclose Ms Booth's evidence. Quite apart from this, it defies logic to suggest that Mr Goldflam did make such a tactical decision, particularly when one considers that, in her evidence, Ms Danielle Woods referred to the existence of Ms Booth's evidence (see [14] above). There is, therefore, absolutely nothing to support this submission. I reject it.

(c) *The appellants elected not to make a record of interview when they could have disclosed the existence of Ms Booth to the prosecution authorities and those authorities would then have made attempts to locate her.*

I reject this submission. The Woods had a right to remain silent and no adverse inferences can be drawn from their reliance on that right: see *Petty v The Queen* (1991) 173 CLR 95 at 99; *RPS v The Queen* (2000) 199 CLR 620 at 636 – 637; *Azzopardi v The Queen* (2001) 205 CLR 50 at 74 – 75.

(d) *Alternatively, the solicitors for the appellants should have advised the DPP of her existence and allowed them to make inquiries to attempt to locate her.*

While this is undoubtedly so, it does not detract from the explanation that has been given. Moreover, there is nothing to suggest that the Crown would have been in any better position to locate Ms Booth,

particularly given that she was living at a very remote location and was not contactable by mobile telephone.

[43] Turning then to the explanation that has been offered on behalf of the Woods. Essentially it is that Ms Booth's evidence was not adduced either because of the extreme difficulty they had in locating her, or an error on the part of their legal counsel in assessing the significance of her evidence (or a combination of the two).

[44] As to the former, I find, on the evidence, that the Woods did have extreme difficulties in attempting to locate Ms Booth. I, therefore, consider this by itself provides a reasonable explanation for their failure to call her to give evidence at the hearing.

[45] As to the latter, I am not sure that anything would have changed, if this error had not been made. Ms Booth was living in an extremely remote area and it seems most unlikely to me that she could have been located, in any event. However, on the assumption that, absent this error, some other course could have been taken, e.g. to adjourn the matter until Ms Booth was located, I consider it, too, provides a reasonable explanation. This is so because, viewed in this way, I consider this error of counsel was such that it is now likely to lead to a miscarriage of justice to the Woods if they are not able to call this evidence in their defence: compare with Riley J in *Clark v Trenerry* at [27] above.

[46] For these reasons, I consider the Woods have provided two separate reasonable explanations for their failure to adduce the evidence of Ms Booth before the Court of Summary Jurisdiction.

Conclusion

[47] Accordingly, I consider that the Woods have established that the evidence of Ms Booth is likely to be credible, at least on a *prima facie* basis, and they have provided a reasonable explanation for their failure to adduce that evidence before the Court of Summary Jurisdiction. It follows that I should admit the fresh evidence of Ms Booth, under s 176A of the Act, on the hearing of these appeals. It is then common ground that these matters should be remitted to the Court of Summary Jurisdiction at Alice Springs for rehearing (see [4] above).

[48] These appeals should therefore be allowed. The findings of guilt against the Woods should be set aside, and the convictions and sentences based thereon should be quashed. I so order. I also order that there be a retrial of the three counts against the Woods in the Court of Summary Jurisdiction before a differently constituted court.

[49] I will hear the parties on the question of costs of this appeal, the initial hearing before the Court of Summary Jurisdiction and the costs of the rehearing I have ordered.