Longmair v Bott [2010] NTSC 30

PARTIES:	EMMANUEL LONGMAIR
	v
	STEVEN BOTT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20931201
DELIVERED:	4 June 2010
HEARING DATES:	13 May 2010
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

EVIDENCE – IDENTIFICATION – Appeal on conviction against going armed in public – reliability of identification evidence of a sole prosecution witness – whether recognition evidence was safe - lack of corroborating evidence - whether Magistrate able to be satisfied beyond reasonable doubt – honest, positive and confident witnesses are capable of mistaken identification – Appeal allowed

Criminal Code s 69
Justices Act s 163(1)(b)

Domican v The Queen (1992) 173 CLR 555
Davies and Cody v The King [1937] 57 CLR 170
R v Turnbull [1977] QB 224
Carr (2000) 117A Crim R 272
Marijancevic (1993) 70 A Crim R 272

Kelleher v The Queen (1974) 131 CLR 534
Reg v Turnbull [1977] QB 224
R v Burchielli [1981] UR 611
The Queen v Smith (2001) 206 CLR 650
The Queen v Feiloakitar (1993) QCA 552
Garlic v Pitkethly (1992) 65 Crim R 12;
Parker v Espinosa (1996) 85 A Crim R 336.

Brewer, Weber, Semmler, “Eye Witness Identification”, Chapter 6, Psychology and the Law, The Guilford Press.
Ligertwood, Australian Evidence, 3rd Edition, Butterworths

REPRESENTATION:

Counsel:

Appellant:	Chris McGorey
Respondent:	Simon Lee

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Appellant:	NAAJA
Respondent:	ODPP

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

Longmair v Bott [2010] NTSC 30
No. 20931201

BETWEEN:

EMMANUEL LONGMAIR
Appellant

AND:

STEVEN BOTT
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 4 June 2010)

Introduction

[1] At the conclusion of a contested hearing in the Court of Summary Jurisdiction at Wadeye, the Appellant was found guilty of one count in contravention of s 69 of the *Criminal Code*. Section 69 *Criminal Code* provides as follows:

> **69 Going armed in public**
>
> Any person who goes armed in public without lawful occasion in such a manner as to cause fear to a person of reasonable firmness and courage is guilty of a crime and is liable to imprisonment for 3 years.

[2] The particulars of the charge were that on 13 September 2009 the Appellant did go armed in public at Wadeye, with two lengths of "*steel rio wire*", without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and courage.

[3] This count was heard jointly with a number of other charges. Of the other charges, one was dismissed by the learned Magistrate at the conclusion of the prosecution case and two were withdrawn. On the *go armed in public* count the appellant was convicted and sentenced to two months imprisonment cumulative on sentences of imprisonment imposed on unrelated offences.

[4] This Appeal is against the conviction for the offence of *go armed in public* contrary to s 69 *Criminal Code*. The sole ground of appeal is "the learned Magistrate erred in finding the identity of the offender as that of the Appellant beyond reasonable doubt".[1] An appeal lies as of right to the Supreme Court on a ground which involves error or mistake on a matter or question of fact, law or a matter or question of both fact and law.[2] This Appeal raises matters of mixed fact and law.

The Evidence Before the Court of Summary Jurisdiction

[5] Brevet Sergeant Steven Bott, who was stationed at Wadeye at the relevant time was the sole witness called at the contested hearing. No other evidence was called on behalf of the prosecution. No physical exhibits were

[1] A further ground of appeal concerning an alleged failure on the part of the learned Magistrate to sufficiently warn on the dangers of identification and recognition evidence was withdrawn.
[2] Section 163(1)(b) *Justices Act*.

tendered. The Appellant did not give evidence. On the basis of Brevet Sergeant Bott's evidence, the learned Magistrate was satisfied beyond reasonable doubt the perpetrator was the Appellant. In short, Brevet Sergeant Bott's evidence was that he recognised the Appellant as the offender when he was attending the scene of a disturbance.

[6] He told the Court of Summary Jurisdiction he knew the Appellant, having dealt with him several times over the three years he had been stationed at Wadeye. On the days leading up to 13 September 2009, he noted there was a lot of fighting in Wadeye; there were a lot of disturbances which involved groups of young boys from the different camps fighting each other. He mentioned there were groups from Bottom Camp and Creek Camp. He said generally the young boys would settle down during the day but at night and in the early morning there were problems between the different groups.

[7] In the early hours of the morning of 13 September 2009 he attended to one area of Wadeye dealing with some unrelated trouble. After the sun came up he received a report of more fighting near the oval at Creek Camp. He gave directions for two other officers to patrol the area; he proceeded to the oval himself as a result of the complaint about the further disturbance. At the oval he saw large groups of persons from Creek Camp and Bottom Camp. Brevet Sergeant Bott said they were throwing rocks, yelling and swearing at the members of each others' groups; the young boys were moving in waves as a group; a large group of the boys had formed near the intersection at the oval. This large group was closer to the Bottom Camp houses so he made a

decision to try to and ensure people from Bottom Camp stayed at home; he would try to move the Creek Camp people back to where they had come from.

[8] As he approached the intersection there were quite a few young boys present. He called out loudly for everyone to go home and stay in their houses. He told the Court one group would not listen or comply with that direction or request. He said he saw Emmanuel Longmair; (the Appellant in these proceedings) "at the front of this group". The person he recognised as Emmanuel Longmair had two steel bars which he was hitting together. Brevet Sergeant Bott told the Court "he knows me and I know him" and "he gestured with those metal bars out the front of him – at the front of him". He said he was "sort of hitting them together in front of – in front of his face. I saw his face…". By "gesturing" he meant "had them out towards the front of him, so he was like presenting them sort of thing, to show them off". He said "he was looking at me as he was doing this".

[9] Brevet Sergeant Bott told the Court he was 15 to 20 metres away from Emmanuel Longmair and the group, keeping his distance for safety reasons and also to ensure his vehicle was not damaged. He said he had a pepper ball launcher with him; it was like a paint ball gun; it launches balls of plastic which contain capsicum dust and is a non lethal alternative used for crowd dispersal. After shooting the pepper ball launcher he believed it struck the person he recognised as Emmanuel Longmair once. He said he thought the person he recognised as Emmanuel Longmair turned so the

pepper ball hit him on the back of his body. After that, he said both Emmanuel Longmair and the rest of the group "took off" – going to various houses. He said he stayed there for a minute to let them get back to their houses. He saw the person he recognised as Emmanuel Longmair run through the gap of a fence and up on to a rise near Gerald Longmair's house; he saw him on the verandah and observed he kept hitting the steel bars and was "sort of dancing, like showing off sort of thing, for safety reasons, I left him to be". Brevet Sergeant Bott said the sun was up and fully covering the ground. It was about seven in the morning.

[10] Brevet Sergeant Bott told the Court that Emmanuel Longmair was arrested the next day. His name was given to the TRS (Territory Response Section). Brevet Sergeant Bott said he did not want to create further trouble by arresting Emmanuel Longmair at the time of the incident. He thought Emmanuel Longmair would not continue offending once the groups of young persons were separated. Although he did not arrest Emmanuel Longmair, he charged Emmanuel Longmair later on 14 September 2009.

[11] In cross-examination Brevet Sergeant Bott agreed that as he approached the group in his vehicle he was watching the road as well as the group and that he was not able to place a hundred percent attention on the one person while the vehicle was in motion. He agreed he pulled up in his vehicle about 15 to 20 metres away from the group; there was brief interaction with the pepper gun and the group dispersed and agreed after that dispersal there the

distance between himself and the members of the group was greater than 15 – 20 metres.

[12] In terms of whether Emmanuel Longmair possessed any particular characteristics of shape or height that were distinctive in the context of Wadeye, he said "yeah well he looks – they have that look, he was wearing a black hoodie, he was looking straight at me. I went off his facial features, that is how I recognised him". He said he had dealt with him a few times and knows him. He agreed with the proposition that to recognise him, he could not rely on his body shape and height as distinctive features, given there were many persons of similar appearance at Wadeye.

[13] Brevet Sergeant Bott was asked about the "hoodie". He told the Court the hoodie had come up to his face; that he could see his face but he would not be able to say if he had long or short hair; he could not see his hair colour or hairstyle; he agreed the hoodie partially covered his face up to about the eyebrows and that was from a distance of 15 to 20 metres. He agreed with the following: there were other males moving around the person he recognised as Emmanuel Longmair, however he said he was "pretty much" in the centre front; the recognition was based on facial features; he said he was definite and certain of the recognition. It was suggested to him that at a distance of 15 to 20 metres, it would not be easy to see the detail of someone's face. He said "there could be dramas, but I believe that my eyes are okay and I definitely saw Emmanuel looking straight at me".

[14] He agreed that at one point the bars could have been obscuring his view and that when he went to shoot the pepper ball the person turned. He said he believed he had hit him somewhere around the back region but he could not be definite. He said the person turned and ran. He agreed with the following: he could not say that he saw the red ball hit the person from 15 to 20 metres away; that once the person was at the verandah of the house he could not see his face but noted he was wearing the same clothes and holding the same steel bars; the identification on the road occurred quickly. It was put to him that on the extent of his dealings with Mr Longmair, it was not as though he was going hunting with him on a regular basis. He said it was official duties, not always in a bad respect as Emmanuel Longmair used to work at Sea Rangers so he knew him in that context. He agreed he would not place his recognition of Emmanuel Longmair at the same level as that of the recognition of a close friend. He said he had put the wrong date on his statement. He apologised for that and spoke of being tired. He told the Court there had been numerous offenders over a number of days at around the time of the incident leading to the Appellant being charged.

Reasons Given by the Learned Magistrate

[15] The relevant part of the learned Magistrate's reasons dealing with the identification issues are as follows:[3]

> "It is clear that the identification of the defendant is the main issue in this matter. And I have to be satisfied beyond reasonable doubt that

[3] T 38-39.

> the defendant was the person whom Sergeant Bott saw brandishing the two iron bars in the manner in which he described.
>
> The recognition by Officer Bott of the defendant comes from a strong base. He has been in the community of Wadeye as a police officer for some three years. He had had several dealings with the defendant, including when the defendant was involved in the Sea Rangers. And his observation of the defendant on this occasion was of a long enough length of time for him to observe that Mr Longmair was looking directly at him whilst brandishing these lengths of steel.
>
> The fact that the observations was from 15 to 20 metres away and the defendant had a hood over part of his head, is something which I must warn myself and needs to be considered and taken into account.
>
> So too however, does the time of day, that it was light, the sun had risen. And that the defendant was out in front of the group of boys in this situation. Taking into account all of those things and the reliability of Officer Bott in his evidence, I am satisfied beyond reasonable doubt that the defendant was the person holding the steel bars on that occasion."

The Relevant Principles

[16] On the Appeal, both counsel referred to classical cases illustrating the relevant principles on the evaluation of identification evidence, including cases of recognition of persons known to the identifying witness, the dangers inherent in such evidence and the need for appropriate warnings.[4] The case before the learned Magistrate was clearly one of identification or recognition of a person known to the witness. There is no question on Appeal nor before the Court of Summary Jurisdiction concerning the honesty and integrity of Brevet Sergeant Bott. The relevant cases emphasise

[4] See eg. *Domican v The Queen* (1992) 173 CLR 555 at 561-562 and 565; *Kelleher v The Queen* (1974) 131 CLR 534; *Reg v Turnbull* [1977] QB 224: R v Burchielli [1981] UR 611; The Queen v Smith (2001) 206 CLR 650; *Carr* (2000) 117 A Crim R 272; *Davis and Cody v The King* (1937) 57 CLR 170.

however, significant caution must still be exercised in relation to honest witnesses who appear confident of the identification.

[17] Although the cases refer principally to trials before juries, it is accepted the principles apply to judicial officers sitting alone.[5] Further, it is not simply a matter of the warning but of the application of the underlying principles to the proof process.

[18] The authorities illustrate that both the Courts and disciplines such as psychology have long been aware of the unreliability inherent in this form of testimony.[6] Although many of the cases and studies on the inherent unreliability of identification testimony concern the question of reliability of identifications made of persons unknown to the identifying witness, the Courts have also emphasised that honest mistakes are easily made, even when the perpetrator is known to the identifying witness. What was emphasised on behalf of the Appellant before this Court drew on observations of the *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, (London, HMSO, 1976)[7] acknowledging that cross-examination is a tool with limited usefulness in testing a witness's ability to recognise faces. Further, that demeanour is not a useful guide to accuracy in disputed identification cases.

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[5] *Garlic v Pitkethly* (1992) 65 Crim R 12; *Parker v Espinosa* (1996) 85 A Crim R 336.
[6] See eg. Brewer, Weber, Semmler, "Eye Witness Identification", Chapter 6, Psychology and the Law, The Guilford Press.
See eg. *Davies and Cody v The King* [1937] 57 CLR 170 at 182-183.
[7] Known also as the "Devlin Report", noted in Ligertwood, at 208, fn 98; 215, fn 119.

[19] In relation to "recognition" cases, there is authority for the proposition that in the context of a jury trial at least, a *Domican* direction is not required in relation to recognition evidence given by a witness who had known the accused for many years.[8] *Marijancevic* concerned the identification of the perpetrator by an uncle, before and after the crimes had been committed as part of a circumstantial case. In those circumstances a warning was not required. The identifying witness had seen and heard his nephew in domestic circumstances. As part of the circumstantial case and given the relationship, a warning was not considered necessary. In *Carr*[9] the Tasmanian CCA cited and relied on Lord Widgery CJ's statement in *Turnbull*:[10]

> "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".

[20] Further, the judgment in *Carr* states:[11]

> "As *Boardman* and *Turnbull* illustrate, "recognition" cases will often involve just as much danger of mistaken identification as cases involving persons first seen at the times of their alleged crimes. It would therefore be illogical to hold that a warning as to the dangers of mistaken identification of the sorts discussed in *Dominican* need never be given in a recognition case. Obviously, such a warning would be inappropriate when the witness is familiar with the appearance of the accused and the circumstances of the recognition leave little scope for any chance of mistake. (emphasis added)

[8] *Marijancevic* (1993) 70 A Crim R 272.
[9] (2000) 117 A Crim R 272 at 289.
[10] *Turnbull* at 289.
[11] Per Blow J at 289 with whom Cox CJ agreed.

> Whether such a warning is necessary in a recognition case must depend on all the relevant circumstances, including the degree of familiarity of the witness with the accused, the circumstances in which the accused was previously seen by the witness or known to the witness, and the circumstances in which the accused is alleged to have been seen by the witness at or about the time of the crime".

Application of the Principles

[21] This case is not so clear in terms of previous dealings between Brevet Sergeant Bott and Emmanuel Longmair that it can be said there is little scope for mistake. At their highest, (apart from other difficulties associated with this identification), the past dealings were described as being "several times" or a "few times". This included official duties and also activities or associations with the Sea Rangers. This is hardly as strong as recognition of a close family member or close friend. I reiterate this is not to question Brevet Sergeant Bott's honesty and genuine belief about this matter. It is one of the factors that makes scrutiny of this type of evidence difficult. Although this is not case where the warning of the learned Magistrate is challenged, the fact that warnings are required in these circumstances illustrate the high level of caution that Courts must proceed with in these cases.

[22] The learned Magistrate placed significant reliance on the recognition evidence coming from "a strong base". This was a reference to several previous dealings with Emmanuel Longmair. Noting the weight of

testimony by honest, positive and confident witnesses is difficult to assess, Ligertwood summarises the position as follows:[12]

> "The factor most likely to mitigate the need for, or nature of, the warning is the witness's acquaintance with the accused before observation. Some Judges imply that where the witness is well acquainted with the accused the warning need only be cursory, but others seek to play down the significance of previous acquaintance, for example, the Court in *R v Turnbull*[13] declared:
>
> > "Even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that the mistakes in recognition of close relatives and friends are sometimes made".
>
> In practice, the significance of this factor will be assessed in combination with other relevant factors such as the length and nature of the acquaintance, the uniqueness of the person identified, and the circumstances under which the suspected criminal was first observed".

[23] In this case the interaction between the identifying witness and the suspect was not particularly strong when compared with the familiarisation between witness and suspect in cases such as *Marijancevic*. It is accepted however that Brevet Sergeant Bott had greater familiarisation than a stranger would have; his three years in Wadeye mean it is unlikely he would be mistaken due to cross racial factors as discussed in *The Queen v Feiloakitar.*[14]

[24] The problem here, is that the circumstances allowed significant scope for mistake. Accepting there was some familiarity even a "strong base" as the learned Magistrate found for recognition between Brevet Sergeant Bott and

[12] Australian Evidence at 216, 3rd Edition, Butterworths.
[13] [1977] QB 224 at 228.
[14] (1993) QCA, 552, 14 December 1993; Brewer, Eyewitness Identification, supra at 190.

Emmanuel Longmair, the factors that in my view make acceptance of this identification beyond reasonable doubt erroneous are:

- The viewing conditions were poor in terms of the brief exposure duration between Brevet Sergeant Bott and the person he identified as Emmanuel Longmair;
- The distance of 15 – 20 metres initially and then further away when the group disbursed;
- The fact the initial viewing took place while the witness was still driving a motor vehicle;
- The placement of the “hoodie” over a substantial part of the suspect’s face;
- The recognition was based on facial features, however there was nothing distinctive described to differentiate the suspect from others in the group save that he was at the front of the group for some of the brief time;
- The suspect’s face was also obscured for part of the time by the iron bars;
- The witness was also observing large numbers of other young persons at the time of observing the suspect;

- The witness was unable to state unequivocally whether from the distance of 15 – 20 metres the pepper ball made contact with the offender.

[25] The identification also took place in circumstances where Brevet Sergeant Bott had some concerns for his own safety and damage to the police vehicle. Brevet Sergeant Bott also indicated in his evidence that through tiredness and given the extent of his duties in the particular circumstances at Wadeye, he had made an error on the date of his statement. That last factor is not significant but when added to the less than ideal circumstances of the identification lead me to the conclusion that error has occurred in finding this to be an accurate identification beyond reasonable doubt.

[26] Neither the Appellant nor the Respondent seek to impugne the learned Magistrate's reasons or directions. In any event, failure to give appropriate warnings does not by itself mean that an Appellate Court will interfere with a verdict. This is particularly so, if the identification is corroborated by other evidential material. In *Turnbull*, for example, the corroborative evidence concerning use of a van and possession of house breaking implements was held to be a significant factor in confirming the disputed identifications of *Turnbull and Camelo.*[15] Here the Appellant was arrested the day after the incident. No irons bars were produced or said to be in his possession and no clothing was produced that was said to be the clothing

[15] Turnbull, supra at 234.

worn at the time of the offence. Evidence of that type would have supported the disputed identification.

[27] The Respondent points to the fact that the lighting was good, the Officer knew the suspect and the suspect was at the front of the group. The learned Magistrate was also influenced by these factors suggesting they must be taken into account with the factors tending to weaken the identification. Very few of the factors that tend to weaken the identification were referred to by the learned Magistrate in the ex tempore reasons however, as is sometimes the case, the rushed nature of proceedings in busy Bush Courts mean that issues may not be developed as fully in submissions to the Court of Summary Jurisdiction as they are on Appeal.

[28] I have come to the conclusion error has occurred in the Court of Summary Jurisdiction by finding beyond reasonable doubt the identity of the offender was the Appellant. Reviewing the evidence objectively the conviction is unsafe. This is not a situation where the Court of Summary Jurisdiction is in a better position to assess credit and demeanour. It is accepted the evidence was given with certainty and honesty.

Orders

[29] The Appeal is allowed. The finding of guilt and conviction are quashed.

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