*Sanderson v Rabuntja* [2014] NTSC 13

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| PARTIES: | SANDERSON, Melissa Deborah<br><br>v<br><br>RABUNTJA, Melvin |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 2 of 2014 (21345544) |
| DELIVERED: | 11 April 2014 |
| HEARING DATES: | 11 April 2014 |
| JUDGMENT OF: | RILEY CJ |
| APPEAL FROM: | J Birch SM |

**CATCHWORDS:**

*Criminal Code 1983* (NT), s 188(2)

*Evidence (National Uniform Legislation) Act 2011* (NT), ss 18(2), (6), (7), 65

*Peach v Bird* (2006) 17 NTLR 230; *Semple v Williams* (1990) 156 LSJS 40, applied.

*Dennis v Davis* [2010] NTSC 35; DPP v Nicholls [2010] VSC 397; *Fleming v The Queen* (1998) 197 CLR 250; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, referred to.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | T Jackson |
| Respondent: | M Aust |

*Solicitors:*

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| Appellant: | Office of the Director of Public Prosecutions |
| Respondent: | Central Australian Aboriginal Legal Aid Service Inc |

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

*Sanderson v Rabuntja* [2014] NTSC 13
No. JA 2 of 2014 (21345544)

BETWEEN:

**MELISSA DEBORAH SANDERSON**
Appellant

AND:

**MELVIN RABUNTJA**
Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 11 April 2014)

[1] On 10 February 2014, the respondent came before the Court of Summary Jurisdiction in Hermannsburg to face a charge of having committed an aggravated unlawful assault upon his wife, contrary to s 188 of the *Criminal Code 1983* (NT). The presiding magistrate dismissed the charge and the appellant, who was the informant in the proceedings, appeals against that decision.

[2] The complaint of the appellant is that the magistrate erred in his interpretation and application of s 18 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('the Act') which deals with the compellability of spouses in criminal proceedings and, also, in the application of s 65 of that Act which makes provision for the admissibility of evidence of a person who made a previous representation but who is not available to give evidence about an asserted fact. Finally, the appellant complains that the

magistrate failed to give adequate reasons for the rulings made and denied the appellant procedural fairness.

[3] The proceedings commenced on 10 February 2014. The respondent pleaded not guilty to the charges and the prosecutor announced that the first witness would be the wife of the respondent, the alleged victim. The transcript of the proceedings reveals that his Honour endeavoured to explain the operation of s 18 of the Act to the witness and, in so doing, asked her a series of questions to which there was no audible response. The last three of those questions were as follows:

> If you don't want to give evidence then you can just tell me that is what you want to do? --- (No audible response).
>
> So- did she say "no"? --- (No audible response).
>
> That means "no", you don't want to give evidence? ---.

[4] His Honour then invited the witness to remain outside the court room and proceeded to discuss the matter with counsel. The prosecutor advised that the wife was the only eyewitness to the alleged offence and that she was the key witness. His Honour heard further submissions from the prosecutor and then provided the following reasons for decision:

> (The complainant), who is an aboriginal woman from Ntaria community has come into court and spoken to me before giving any evidence in these proceedings and I have endeavoured to explain to her as best I can her legal rights under s 18 of the *Uniform Evidence Act* and that includes explaining to her, her right to object to giving evidence because there may be some likelihood that harm, either direct or indirect, may be occasioned to their personal relationship and I have to be satisfied under that section that the nature and extent of that harm outweighs the desirability of having the evidence given.

> Despite the huge number of these sorts of domestic assaults that the court has to deal with on a daily basis, and clearly there is a strong public policy view and an interest from the community as well as the courts that people who come before the court charged with serious violent offences are prosecuted and that has always been the case. Despite the large number of these matters that do come before the court this is the second application I've had to deal with since the enactment of this new evidential procedure and is not, in my view, a common application, although from time to time the court is required to inform witnesses who are in domestic relationships with defendants as to their rights.
>
> As I have mentioned it is my experience and it is not very often that a person seeks to object to giving evidence on the basis of the likelihood of being harmed which may be occasioned.
>
> I note from submissions from Mr O'Brien, the prosecutor in the matter, that this is an oath on oath case and without (the complainant's) evidence it will not be available to the prosecution to call further evidence by way of photographs or medical material to corroborate anything she might say in relation to this incident.
>
> I had an opportunity to observe her demeanour when she came into court and like many people she seems concerned and somewhat timid about giving evidence in the proceedings, but I am satisfied she fully understood what I explained to her and following an explanation indicated that she did not wish to give evidence in the proceedings.
>
> Taking into account those matters that I need to turn my mind to under s 18(7) set out at (inaudible) and I indicate that I have, (given) consideration to each of them where inapplicable (sic! applicable) as well as, of course, general discretions under the Act.
>
> It seems to me in this particular case having heard from (the complainant) in a limited way, that it would not be in her interests for me to compel her to give evidence in the proceedings and I will not do so.

[5] Following the ruling, the prosecutor sought to tender the complainant's statutory declaration pursuant to s 65 of the Act which permits the admission of such evidence if a witness is "not available to give evidence

about an asserted fact". His Honour refused to receive the statutory declaration into evidence ruling that the witness was not relevantly "unavailable". The prosecutor tendered two other statutory declarations and closed the case. His Honour then dismissed the charge.

**The legislative scheme – competence and compellability**

[6] Section 12 of the Act states that, except as otherwise provided by the Act, every person is competent to give evidence and, a person who is competent to give evidence about a fact is compellable to give that evidence.

[7] Section 18 of the Act deals with the compellability of spouses. Section 18(2) provides that a spouse, de facto partner, parent or child of a defendant may object to being required to give evidence as a witness for the prosecution. There was no dispute that the complainant in this matter fell within the scope of this provision. The obligation rests upon the court to ensure that any relevant witness is aware of the effect of s 18 and of the right to make an objection.[1] In the present case it was accepted that the complainant had given the necessary notice of objection. Sub-sections 18(6) and 18(7) then provide:

> (6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:
>
> > (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence; and

[1] *Evidence (National Uniform Legislation) Act 2011* (NT) s 18(4).

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:

(a) the nature and gravity of the offence for which the defendant is being prosecuted;

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;

(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;

(d) the nature of the relationship between the defendant and the person;

(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.

[8] In considering the objection, the court must first determine whether there is a likelihood that harm "would or might" be caused to the witness or to the relationship between the witness and the defendant if the witness is required to give evidence. It is unlikely to be difficult for an objector to establish that harm "might" be caused to the relationship in such circumstances. The second issue to be addressed, namely whether the nature and extent of the harm outweighs the desirability of having the evidence given will, in most cases, be more difficult. This requires the court to balance competing public interests, being the interest in enforcing the criminal law and having all

relevant evidence available to the court compared with the interest in maintaining marital and family relationships.[2] The determination involves the exercise of a judicial discretion. The matters to be taken into account in the process are set out in the non-exhaustive list found in subsection 18(7) of the Act.

[9] Where the question of whether a witness is competent or compellable depends on the court finding that a particular fact exists, a voir dire may be conducted pursuant to the provisions of s 189 of the Act. The applicable standard of proof is on the balance of probabilities.[3]

**The obligation to give reasons**

[10] The failure of a judge or a magistrate in a criminal trial to give adequate reasons for judgment is an error of law.[4] This does not mean that it is necessary to provide a "tedious examination of detailed evidence or minute explanation of every step in the reasoning process" that leads to a conclusion but requires the judicial officer to "state generally and briefly the grounds which have led him or her to the conclusions reached concerning disputed factual questions and to list the findings on the principle contested issues".[5]

[11] What constitutes adequate reasons for decision will depend upon the circumstances of the particular case. In the case of magistrates, it has been

[2] The Australian Law Reform Commission, *Evidence*, Report no. 38 (1987) at [80].
[3] *Evidence (National Uniform Legislation) Act 2011* (NT) s 142.
[4] *Fleming v The Queen* (1998) 197 CLR 250 at 260; *Dennis v Davis* [2010] NTSC 35 at [9]-[19].
[5] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259.

noted that they often work under considerable pressure dealing with very busy lists in circumstances that may not permit careful preparation. In relation to ex tempore reasons delivered in such circumstances, Olsson J said in *Semple v Williams*:[6]

> It is necessary to take a broad view of (ex tempore reasons) and ascertain the essential thrust of the reasoning processes applied, without being unduly critical of the precise modes of expression used or according them a degree of definitiveness which was never intended.

[12] The reasons for decision in this case were delivered in a busy court sitting in Hermannsburg and those observations have application.

**The application of s 18**

[13] In the present matter, the magistrate was required to determine whether there was a likelihood of harm to the complainant or to the relationship between the complainant and the defendant and then to determine whether the nature and extent of that harm outweighed the desirability of having the evidence given.

[14] Having observed the demeanour of the complainant and having noted that "she seems concerned and somewhat timid about giving evidence" the magistrate concluded that she did not wish to give evidence in the proceedings. His Honour went on to say that he had turned his mind to the matters set out in s 18(7) of the Act along with the "general discretions under the Act" and then concluded:

[6] (1990) 156 LSJS 40 at [40] approved by the Court of Appeal in *Peach v Bird* (2006) 17 NTLR 230.

> It seems to me in this particular case having heard from (the complainant) in a limited way, that it would not be in her interests for me to compel her to give evidence in the proceedings and I will not do so.

[15] In my opinion, the magistrate misdirected himself. His Honour did not consider the necessary matters referred to in s 18(6) of the Act and, in particular, whether there was a likelihood that harm would or might be caused to the witness or to the relationship between the witness and the defendant if she gave evidence. There was no attempt to identify any harm for the purpose of weighing that harm against the desirability of having the evidence given. The sole concern addressed was whether it was in the interests of the witness to give evidence.

[16] Even if it be assumed that the magistrate did conclude that harm of a relevant kind might be caused, his Honour did not go on to conduct the necessary balancing act and determine whether the nature and extent of any such harm outweighed the desirability of having the evidence given.

[17] As part of that balancing act, it was necessary for the magistrate to give consideration to the matters set out in s 18(7) of the Act. Those matters "must" be taken into account. The magistrate could not have taken them into account because the relevant information was not available to the court. I will consider each of the subsections in turn.

[18] His Honour did not refer to the nature and gravity of the offence for which the defendant was being prosecuted.[7] This was an offence of aggravated assault under s 188(2) of the *Criminal Code* 1983 (NT) which carries a penalty of imprisonment for two years. The circumstances of aggravation included that the victim was a female and the offender was a male, the assault was with a weapon and it resulted in harm. His Honour did not seek, and was not provided with, any information regarding the allegations to be made against the defendant. Other than the information disclosed in the charge, there was no basis upon which his Honour could determine the nature and gravity of the particular offence.

[19] In relation to the substance and importance of the evidence of the complainant and the weight likely to be attached to it,[8] the magistrate was informed that the evidence to be given by the witness was vital to the Crown case. She was the only eyewitness and the only person able to give direct evidence of the alleged assault. However, his Honour was not informed of the anticipated content of her evidence nor provided with any basis for assessment of the weight likely to be attached to that evidence.

[20] As the hearing proceeded, it became clear that there was no other evidence concerning the matters which the evidence of the complainant would address.[9] This important consideration was not discussed by his Honour.

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[7] *Evidence (National Uniform Legislation) Act 2011* (NT) s 18(7)(a).
[8] *Evidence (National Uniform Legislation) Act 2011* (NT) s 18(7)(b).
[9] *Evidence (National Uniform Legislation) Act 2011* (NT) s 18(7)(c).

[21] The magistrate was informed that the relationship between the witness and the defendant was one of husband and wife but he was not informed as to the nature of the relationship in any more detail.[10] His Honour was not informed whether the witness and the defendant actually lived together, whether they saw each other on a regular basis, whether any threat to the well-being of the witness existed, or whether there was any other aspect of the relationship that might be relevant to the issue to be addressed. There was no evidence of any identified harm that would or might be caused to the complainant or her relationship with the defendant. There was no evidential basis for an assessment of the nature or extent of any harm that may be suffered.

[22] There was no discussion of the substance of the evidence proposed to be given by the complainant and no information provided as to whether she would be required to disclose a matter received in confidence from the defendant.[11]

[23] Allowing for the pressured circumstances in which the matter was heard the reasons for decision were, in my opinion, inadequate and did not reveal the factual findings made or the reasoning process undertaken in accordance with the legislative requirements. The Court did not discharge its obligation to provide adequate reasons.

[24] The appeal is allowed.

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[10] *Evidence (National Uniform Legislation) Act 2011* (NT) s 18(7)(d).
[11] *Evidence (National Uniform Legislation) Act 2011* (NT) s 18(7)(e).

**The application of s 65**

[25] In light of the ruling, the appellant sought to introduce the evidence of the complainant under s 65 of the Act on the basis that the witness had, through a statutory declaration, made a previous representation and was not available to give evidence about asserted facts in the statutory declaration. The magistrate declined to consider whether the statutory declaration should be admitted into evidence having concluded that the witness was not "unavailable" for the purposes of the Act.

[26] A person is to be regarded as not available to give evidence about a fact for the purposes of the Act in circumstances addressed in the Dictionary to the Act.[12] Relevant for present purposes, a person will not be available where:

> (g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give evidence, but without success.

[27] In my opinion, the complainant fell within that provision and his Honour erred in concluding otherwise.[13] His Honour also erred in failing to go on to consider whether the evidence could be received under s 65 of the Act bearing in mind the exclusionary provisions contained in Part 3.11 of the Act.

**Conclusion**

[28] The appeal is allowed. The matter is remitted to the Court of Summary Jurisdiction to be dealt with according to law.

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[12] *Evidence (National Uniform Legislation) Act 2011* (NT) cl 4(1)(g) of the Dictionary.
[13] See *DPP v Nicholls* [2010]VSC 397; (2010) 204 A Crim R 306 to the same effect.