R v Foster [2014] NTSC 47

PARTIES:	The Queen
	v
	FOSTER, Troy
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21337136
DELIVERED:	10 October 2014
HEARING DATES:	10 and 11 September 2014
JUDGMENT OF:	KELLY J

REPRESENTATION:

Counsel:

Plaintiff:	T McNamee
Defendant:	I Read SC

Solicitors:

Plaintiff:	Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission

Judgment category classification:	C
Judgment ID Number:	KEL14007
Number of pages:	4

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

R v Foster [2014] NTSC 47
No. 21337136

BETWEEN:

THE QUEEN
Plaintiff

AND:

TROY FOSTER
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 10 October 2014)

[1] An application was made to discharge the jury on the basis of inadvertent disclosures made by the defendant in giving evidence. I refused the application. These are my reasons for doing so.

[2] During cross-examination, the defendant was asked:

> And you'd been staying there, what for long time before this incident?

[3] He responded:

> I come from Berrimah in April.

[4] Later, in cross-examination the following exchange occurred:

> Q: "So you've got a good memory for someone who was very drunk then? – Yeah, it took me one year to think of in Berrimah, to clear my mind.
>
> ……
>
> Q: "So your memory is much better now than it was say, last week because you looked at that footage in here? – Yeah, I went that back there in Berrimah and thinking, that's what I was doing I follow Jane"

[5] Counsel for the defendant submitted that the jury should be discharged because the jury might make the connection between "Berrimah" and prison, assume that the defendant had been in prison on an earlier occasion and accordingly would speculate as to the defendant's bad character.

[6] The defence relied on *R v Knape*[1] in which the Victorian Court of Appeal held:

> "However, if evidence of bad character is inadvertently and improperly given there is undoubtedly a discretion in the trial judge to determine whether or not the jury should be discharged, a discretion to be exercised according to the circumstances of the particular case. An examination of the authorities leads us to the view that unless it can be said, upon the evidence, that the irregular disclosure could not in any way affect the judgement of the jury in coming to their decision of guilty or not guilty, the trial judge should exercise his discretion in favour of the accused."[2]

[7] It was submitted further that the resulting prejudice could not be cured by an appropriate direction, and indeed, that any direction had the potential to highlight a problem that may not exist: there was some difficulty in following the evidence of the defendant who spoke a heavily intonated form

[1] [1965] VR 469
[2] Ibid at 473

of Aboriginal English and the jury might not have picked up the word "Berrimah" or, if they did, have made the connection with the prison.

[8] Mr Read SC for the defence pointed out that the trial had only proceeded for a net two days, the complainant's evidence had been recorded, thus avoiding her having to give evidence again, and it could be expected that the evidence of the other prosecution witnesses being uncontroversial could be agreed at a later trial.

[9] The Crown opposed the application.

[10] There is no inflexible rule requiring the jury to be discharged if there is any inadvertent disclosure of the fact that the defendant has been to prison. The question is whether it is necessary to discharge the jury in the interests of ensuring a fair trial, having regard to the nature of the trial and the extent of the prejudice caused by the disclosure.[3]

[11] In this matter, I did not think that it was necessary to discharge the jury to ensure a fair trial. The jury already had evidence of the defendant's bad character in material properly placed before them. He had pleaded guilty before the jury to the charge of aggravated assault, and admitted in his evidence that he had breached a Domestic Violence Order and had assaulted the complainant. In my view, learning (through his own answers to questions which were not designed to elicit that information) that the

[3] *R v Boland* [1974] VR 949 at 866; *R v George, Harris and Hilton* (1987) 9 NSWLR 527 at 532 – 533; *R v Vaitos* (1981) 4 A Crim R 238 at 243

defendant had been to prison was highly unlikely to have a more prejudicial effect on the minds of the jury than the material already properly before them. Moreover, in relation to the second reference he made to being in Berrimah (though admittedly not the first), the defendant was talking about thinking over his evidence for this trial for the last 12 months in Berrimah; the events at issue in the trial occurred approximately 12 months ago; and the jury had heard evidence that he was arrested the day following the incidents in issue. If the jury made the connection between "Berrimah" and "prison" the natural (and correct) assumption for them to have made would have been that he was in Berrimah awaiting trial for the serious charges for which he was then on trial. That would not cause them to suppose anything more about the defendant's bad character than they had already been made aware of through his guilty plea to assault and his evidence of having assaulted the complainant and breached the DVO.

[12] In the circumstances, I considered that there was unlikely to be any additional prejudice to the defendant from the inadvertent disclosures, and that any (minimal) additional prejudice there might have been could be cured by a strong warning against inappropriate reasoning.