Maloney v Heath [2016] NTSC 62

PARTIES:	MALONEY, Johnson v HEATH, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 6 of 2016 (21562325)
DELIVERED:	2 December 2016
HEARING DATES:	13 September 2016
JUDGMENT OF:	HILEY J
APPEAL FROM:	LOCAL COURT

CATCHWORDS:

CRIMINAL LAW — APPEAL — APPEAL AGAINST CONVICTION — Complainant's motive to lie — lack of alibi evidence — consideration of the accused's evidence.

Criminal Code (NT) s 331
Criminal Law Consolidation Act 1935 (SA) s 285C
Evidence (National Uniform Legislation) Act 2011 (NT) s 137
Local Court (Criminal Procedure) Act 1928 (NT) s 60AA, s 60AI(7), s 60AG, s 163

Ashley v Nalder [2007] NTSC 23; *Azzopardi v The Queen* [2001] HCA 25,

(2001) 205 CLR 50; *Bird v Peach* [2006] NTCA 7, (2006) 17 NTLR 230; *DW v The Queen* [2004] ACTCA 22, (2004) 150 A Crim R 139; *Faatele v Cassidy* [2013] NTSC 53; *M v R* [1994] HCA 63, (1994) 181 CLR 487; *Liberato v The Queen* [1985] HCA 66, (1985) 159 CLR 507; *Palmer v The Queen* [1998] HCA 2, (1998) 193 CLR 1; *Peters v Perkins* [2015] NTSC 77; *Petty and Maiden v The Queen* [1991] HCA 34, (1991) 173 CLR 95; *Police v HM* [2007] NTMC 060; *R v Jansen* [2001] SASC 453, (2001) 80 SASR 590; *Regina v Uhrig* (Unreported, New South Wales Court of Criminal Appeal, 24 October 1996); *X7 v The Australian Crime Commission* [2013] HCA 29, (2013) 248 CLR 92, referred to.

F (1995) 83 A Crim R 502, distinguished.

REPRESENTATION:

Counsel:

Appellant:	D Bhutani
Respondent:	RK Micairan

Solicitors:

Appellant:	CAALAS
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Hil1613
Number of pages:	17

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

Maloney v Heath [2016] NTSC 62
No. LCA 6 of 2016 (21562325)

BETWEEN:

JOHNSON MALONEY
Appellant

AND:

ANDREW HEATH
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 2 December 2016)

Introduction

[1] The appellant, Johnson Maloney, appeals against his conviction on 11 May 2016 for damaging the property of his former partner, Rhiannon Fisher soon after 3am on 18 December 2015.

[2] In his amended notice of appeal the appellant identified three grounds of appeal in the following terms:

1. His Honour's considerations as to why the complainant would lie.

2. His Honour's consideration of the lack of alibi evidence.

3. His Honour's disregard for defendant's evidence.

Relevant principles for appeals under s 163 Local Court (Criminal Procedure) Act

[3] An appeal to this Court under s 163 of the *Local Court (Criminal Procedure) Act 1928* (NT) is an appeal by way of rehearing. The appeal can be both on questions of fact as well as law, however error must be shown and the error must be such as to vitiate the appealed decision.[1]

[4] The function of the appeal court is not to conclude whether it entertains a doubt about the guilt of the appellant, rather it is to determine whether the learned Local Court Judge, acting reasonably, must have entertained a reasonable doubt as to the guilt of the appellant.[2]

The hearing before the Local Court

[5] Only two witnesses were called at the hearing — Rhiannon Fisher (**the complainant**) and Johnson Maloney (**the accused / appellant**).

[6] After hearing submissions from the prosecutor and from counsel for the accused the learned judge gave the following reasons:[3]

---

[1] *Faatele v Cassidy* [2013] NTSC 53 in relation to s 163 of the *Justices Act* (NT), the predecessor of the *Local Court (Criminal Procedure) Act* (NT).
[2] *M v R* [1994] HCA 63, (1994) 181 CLR 487 per Mason CJ, Deane, Dawson & Toohey JJ at 494-5 and Brennan J at 501-5.
[3] Transcript 11 May 2016, 30-31. I have numbered the paragraphs for ease of reference later.

1. Yes, this is a matter where it has been put that it is primarily … an identification case.

2. In my view it is not really what I would call an identification case, it is really all on the credibility of the complainant. The complainant gave evidence that she heard a knock at her door in the early hours of the morning on 18 December. She had heard knocking for some time. She stated she realised who it was. She stated it was Johnson banging on the door. She heard him ask her, 'I want to talk to you, it's Johnson, I want to talk to you.' She states she didn't answer but stood there listening to him requesting entry that went for a considerable amount of time. She states that he then says, 'It's Johnson, I want to talk to you.' She stated, 'I didn't open the door' and she stated that the voice she heard and recognised as Johnson said 'If you don't come out I'm going to smash the car.'

3. She states she rang the police straight away – obviously an act which is one which would be consistent with that behaviour that was not challenged that she did other than was calling the police. She said she spoke with the police that told her not to go out. She looks out the door, she sees someone who she sees as Johnson running away. She sees him with someone else. She identifies him and a short time later when the police arrive and she goes out she finds the window of her car smashed – again, there has been no challenge to the fact that the window of the car was smashed and that she called the police immediately at the time of it being smashed.

4. So basically it's not a case really as to whether she is mistaken or not in her identity. It is really if I am satisfied beyond reasonable doubt as to her evidence. It would seem to me it is certainly just totally implausible that a stranger came up and called himself Johnson and came banging to the door and smashed the window. It seems to me implausible that Ms Fisher would make up a story like this in the middle of the night – ring police and smash her own car window and tell a story and come to court and tell a story that someone – her ex-boyfriend who she had had the relationship break-up two weeks before, had come around to her house and banged on the door and knocked on the door and smashed her window, called police, perjured herself in court. I really just find that totally implausible.

> 5. The defendant on his own account, if he was with others, had the ability to call them and give evidence. He says he was going from place to place on the night with a mate who could obviously he could – whatever he said was pretty well unaccounted – untestable without the mate being called or any of the other persons that he had been with at various stages on the evening.
>
> 6. I really just find that totally, totally implausible that Ms Fisher has really come to court and concocted all this whole thing and perjured herself in court before me and that I really find on her evidence – accepting her evidence – that it really is a matter of mistaken identity or anything like that. It couldn't be anything other than Mr Johnson unless Ms Fisher was totally making this up and concocting this story, going to court and lying about it and telling her story is not – I do find the case proven.

[7] The complainant was cross-examined about the reliability of her identification. She was also asked about her relationship with the accused and the fact that it had ended quite badly. When it was put to her that she had no real way of identifying him she said that she was with him for over a year, she knows his voice and that because she was not from Alice Springs and does not have family there nobody else knows where she lives. Then occurred the following exchange:

> And … you brought these allegations because of the ending in the relationship that ended quite sourly? --- No. It wasn't because of that. He did come to my house that morning and smashed my window. I didn't ask him to do that. I didn't want him there. I did not ask him to come there.

[8] After the close of the prosecution case counsel for the accused sought to have her evidence excluded under s 137 of the *Evidence (National*

Uniform Legislation) Act 2011 (NT) (the **UEA**).[4] After this application was rejected counsel asked his Honour to give himself a Prasad direction. This too was refused.

[9] Counsel for the accused then called his client. He denied that he went to the complainant's property on the night in question and that he damaged her property. He then described his activities from about 10:30 pm on 17 December when he had drinks at a house in Woods Terrace where Bradley Johanssen lived, until sometime well after 3am the next morning when he returned to the same house and went to bed there. Those activities included him going to the Rock Bar with Bradley Johanssen and Geridan Kennedy, then going to the Casino with Kennedy until about 3am, then going to McDonalds for a feed, then returning by taxi with Kennedy to Johanssen's house. He woke Johanssen up to let him into the house. During cross-examination it was put to him that the only person that could account for where he was between 3am and 5am was Johanssen.[5]

Ground 1 – motive for complainant to lie

[10] The appellant contends that his Honour erred because the majority of his remarks were based on considerations as to what the complainant's motive would be to lie. Counsel referred in particular to what

[4] Transcript 11 May 2016, pp16-18.
[5] Transcript 11 May 2016, p26.

his Honour said in the paragraph numbered 4 above, apart from the first two sentences and in paragraph 6.

[11] Counsel for the appellant referred to passages in *Palmer v The Queen,*[6] and *F,*[7] where courts have pointed out that a complainant's motive to lie should not become the "central theme" of a criminal trial. However both of these cases involved jury trials and somewhat different circumstances to those present here. In *Palmer* the accused was cross-examined at some length as to why the complainant would lie about her complaint of unlawful sexual intercourse. In *F* the Crown called expert evidence intended to explain the complainant's delays in making complaints and inconsistencies in her complaints by reference to a psychological theory about abused children that purported to explain delay in complaint and inconsistencies in complaint. The trial judge told the jury that the central theme of the case was: "Why would the complainant lie?" The underlying concern is that the jury may be tempted to assume that the accused has some kind of onus, for example to demonstrate that the complainant is lying, and not properly consider whether it is satisfied beyond reasonable doubt of the complainant's evidence about a critical fact.

[12] I reject the appellant's contention that the majority of his Honour's remarks were based on considerations as to what the motive would be

[6] *Palmer v The Queen* [1998] HCA 2, (1998) 193 CLR 1.
[7] *F* (1995) 83 A Crim R 502.

for the complainant to lie and that his Honour made this the "central theme" of the matter. His Honour's primary focus in most of his reasoning was the complainant's credibility. He made this very clear in the first sentence of paragraph numbered 2, before thoroughly summarising her evidence in the rest of that paragraph and in paragraph 3, and again in the first two sentences of paragraph 4.

[13] Further, it was counsel for the applicant who introduced the possibility of the complainant having a motive to lie when he put the question set out in [6] above. That, coupled with the previous cross examination of the complainant directly challenging her honesty, required his Honour to consider the possibility of her lying as part of the process of him assessing her credibility.[8]

[14] I agree with the respondent's contention that by determining the plausibility or implausibility of certain scenarios the judge was assessing her as a witness of truth. As such, his Honour was undertaking the usual and necessary task of the arbitrator of fact.

[15] As was explained by the ACT Court of Appeal in *DW v The Queen*[9] (when considering to what extent the trial judge should have given reasons for accepting or rejecting the credibility of a witness) at [30]*:*

[8] See for example observations by Hunt CJ at CL in *Regina v Uhrig* (Unreported, New South Wales Court of Criminal Appeal, 24 October 1996) at pp 16-17 quoted and referred to by Brennan CJ, Gaudron and Gummow JJ in *Palmer v The Queen* at [6] and [10] – [11].
[9] [2004] ACTCA 22, (2004) 150 A Crim R 139.

> …Furthermore, judgments about the credibility of witnesses can rarely be explained with complete clarity… It may be impossible to explain precisely even the clearest impressions that have been formed. *In some cases there may be other factors such as the inherent plausibility or implausibility of the witnesses' account or its consistency with other evidence that may support the judge's impression* but in other cases he or she may be unable to do more than make a generalised reference to the demeanour of the witness… We are satisfied that it is a necessary implication of his Honour's judgment, when read as a whole, that he accepted the evidence of the various complainants and rejected the evidence of the appellant substantially because of his impression of their demeanour *as well as other factors such as the inherent plausibility or implausibility of their accounts* in the circumstances revealed by the evidence." (emphasis added)

[16] I reject this ground. His Honour's approach to the assessment of the complainant's evidence was appropriate and unremarkable.

Ground 2 – lack of alibi evidence

[17] The appellant contends that his Honour erred in two respects: first, in accepting and relying upon evidence of something said in the course of a directions hearing, contrary to s 60AI(7) of the *Local Court (Criminal Procedure) Act*; second, in saying what he did say in paragraph numbered 5 in [6] above about the failure of the defendant to call alibi evidence from one or other of the men who he was with that night.

Matters raised during directions hearing

[18] Counsel for the accused had indicated during a directions hearing, on 10 February 2016, that alibi evidence may be adduced and there was

discussion about the provision of alibi notices. No such notices were given and no alibi witnesses were called at the hearing. The appellant contends that his Honour erred in using this discussion when considering the accused's credit.[10]

[19] S 60AI(7) of the *Local Court (Criminal Procedure) Act* states that:

> Unless parties to the directions hearing agree otherwise, evidence of anything said or done in the course of the directions hearing, or any document prepared for the directions hearing, is not admissible in any proceedings, in any court or tribunal or before any person acting judicially.

[20] At the commencement of the hearing there was discussion about an order that had been made during that directions hearing requiring any alibi notice to be provided by 11 March, together with any taxi receipts in relation to the alibi. The prosecutor also informed the Court that the day before the hearing counsel for the accused had sent an email to the prosecutor's office stating that the accused may present alibi evidence to the effect that the appellant was at the casino at the time. His Honour then asked counsel why notice was not given in accordance with the order made at the directions hearing. Mr Bhutani replied:

> Your Honour, there won't be the attention of the defendant calling that alibi evidence today. It may be the position of defence that Mr Maloney will give evidence on his own behalf as to where he was on that evening but there is no corroborating

[10] Appellant's Written Submissions [27].

> alibi evidence as such. … There was no requirement to give that notification.[11]

[21] After the accused had given evidence about his activities that night, in the company of one or other of Geridan Kennedy and Bradley Johanssen, and had been cross-examined about that, the prosecutor attempted to ask him why he had not told the police about those other people and why he had not called alibi evidence as had been foreshadowed at the directions hearing. Following objections and further discussion, the prosecutor abandoned this line of questioning and asked more questions about his movements that evening and the movements of Kennedy and Johanssen. She did not even ask the accused where those people were now or why they have not been called to give evidence.

[22] Nothing further was said by the prosecutor or by his Honour, including in his reasons, about anything that had transpired during the directions hearing. The only person who raised this issue again was counsel for the accused when he told his Honour during submissions that the alibi referred to during the directions hearing was Geridan Kennedy and that he was in Queensland.

[23] I reject the contention that his Honour used the information gleaned from the directions hearing in the course of his deliberations. It was

[11] Transcript 11 May 2016 p5.

abundantly clear from the appellant's own evidence at the hearing that he claimed he was at all material times in the presence of at least one other person who could provide him with an alibi if his evidence was true.

Relevance of lack of alibi evidence

[24] The appellant contended that his Honour erred in that he "used the fact that an alibi witness was not called as speaking to the credibility of the accused"[12], in "drawing a negative inference from the accused's failure to call an alibi witness" and thereby "impinged on the defendant's right to silence",[13] and "used the failing to give greater weight to the prosecution case".[14]

[25] The appellant relied on principles based upon an accused's right to silence, such as those stated in *Azzopardi*,[15] and *Petty and Maiden.*[16] However, those principles primarily relate to cases where the accused has exercised his right to not give or call evidence.

[26] In *Azzopardi* the plurality referred to the need, where an accused does not give evidence or fails to provide a relevant explanation, for the trial judge to give:

[12] Appellant's written submissions at [28].
[13] Appellant's written submissions at [36].
[14] Appellant's written submissions at [37].
[15] *Azzopardi v The Queen* [2001] HCA 25, (2001) 205 CLR 50 (***Azzopardi***).
[16] *Petty and Maiden v The Queen* [1991] HCA 34, (1991) 173 CLR 95.

> adequate directions to the jury about the onus of proof, the absence of any obligation on the accused to give evidence, and the fact that the accused does not give the evidence is not an admission, does not fill gaps in the prosecution's proofs and is not to be used as a make-weight.[17]

[27] In the present matter, the accused did give evidence and purported to give an explanation to the effect that he was not the culprit because he did not attend the complainant's house at that time. It cannot be said that the judge used his evidence to fill gaps or as a make-weight.

[28] In any event, it is well established that rights, such as rights of silence, may be modified by statutory provisions such as s 60AG of the *Local Court (Criminal Procedure) Act* and s 331 of the *Criminal Code* (NT), requiring an accused to serve an alibi notice on the prosecution within a certain time frame should the accused person intend to rely on "evidence of alibi".[18]

[29] Under s 60AA of the *Local Court (Criminal Procedure)Act* the legislation adopts the definition under s 331(6) so that "evidence of alibi" means:

> evidence tending to show that by reason of the presence of the accused person at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

---

[17] *Azzopardi* at [67].
[18] *R v Jansen* [2001] SASC 453, (2001) 80 SASR 590 (***Jansen***) at [17] and *X7 v The Australian Crime Commission* [2013] HCA 29, (2013) 248 CLR 92 at [48] and [122].

[30] In *Jansen* the South Australian Supreme Court (Court of Criminal Appeal) considered requirements under s 285C of the *Criminal Law Consolidation Act 1935* (SA), relevantly similar to s 331 of the *Criminal Code*, for an accused person to serve an alibi notice in the context of a similar definition of "evidence of alibi" and the trial judge's comment to the jury that:

> … the fact that an alibi notice was not given is something which you can take into account, but only on the issue of the accused as a credible witness. In this case it does not, of itself, prove that he was the robber of the supermarket, because if you think about it, there are all these other likely explanations as to why he wouldn't make full disclosure to the police. In the end, though, it is a matter for you, if you consider it is a lie, it has the capacity to cause you to question the reliability or credibility of him as a witness.

[31] At his trial the accused had given evidence to the effect that he was not at the supermarket where the offending had occurred and he refused to identify a particular person with whom he was present elsewhere at the relevant time. The Court, Doyle CJ, Nyland and Besanko JJ agreeing, considered that the accused's evidence "was evidence tending to show that he was within a particular area at the time of the alleged offence, and so evidence tending to rebut the allegations made against him." Accordingly the trial judge was entitled to make the comment that he made to the jury.[19]

[19] *Jansen* at [20] – [21].

[32] Similarly, in the present matter the judge would have been entitled to take into account the failure of the accused to provide an alibi notice and or call other alibi evidence in the process of assessing the credibility of the accused's evidence.

[33] There is nothing remarkable about his Honour's observations in paragraph numbered 5 in [6] above. There is no basis for concluding that his Honour imposed some onus upon the accused to prove an alibi or otherwise reversed or misunderstood the onus of proof that was at all times upon the prosecution.

[34] This ground of appeal is not made out.

Ground 3 – Consideration of accused's evidence

[35] The appellant contends that:

(a) "[o]ther than the brief consideration about the lack of evidence presented, his Honour gave no other consideration to the evidence that was given";[20]

(b) His Honour drew a negative inference from this lack of evidence and failed to correctly consider the evidence of the accused; and

(c) His Honour erred in failing to provide adequate reasons for disregarding the accused's testimony.

[20] Appellants Written Submissions [39].

[36] Mr Bhutani referred to extracts from a 2007 decision of the Court of Summary Jurisdiction in *Police v HM*,[21] where the learned magistrate expressed reservations about rejecting the testimony of an accused person just because the court preferred the evidence of the complainant. I do not think that the learned magistrate was saying that the evidence of an accused person should never be rejected in circumstances where the evidence of the complainant is preferred. If that is what was intended, I respectfully disagree.

[37] In a great number of matters, particularly one-on-one cases, a court is necessarily placed in the position of conflicting evidence between complainant and accused, and is required to decide whether the complainant's evidence is sufficient for the prosecution to prove its case be reasonable doubt, notwithstanding conflicting evidence. It is trite that the court needs to consider and assess the evidence given by and on behalf of the accused. If that evidence is sufficient to create a reasonable doubt as to his or her guilt, the accused will be found not guilty. Even if the court rejects the evidence of the accused, the court still has to be satisfied of guilt beyond reasonable doubt, based upon all of the evidence, including that of the complainant and the accused, in order to reach a verdict of guilty.[22]

[21] [2007] NTMC 060.
[22] See for example *Liberato v The Queen* [1985] HCA 66, (1985) 159 CLR 507.

[38] In the present matter there was a clear conflict between the evidence of the complainant and that of the accused. His Honour provided a detailed summary of the complainant's evidence and in the process rejected the accused's contention that she was lying. There was little more that could have been said about the accused's evidence. His defence was based upon his evidence that he was not there and upon his counsel's cross examination of the complainant.

[39] Necessarily, the major focus of his Honour's attention, both in the course of submissions during the hearing and in his reasons, was the reliability of the complainant's evidence, particularly in relation to the identification. There was no challenge to her credibility concerning her other evidence including that a male person banged at her door early in the morning when she was asleep and threatened to smash her car; that she called the police immediately after her car window was smashed; and that the person who had banged at her door and who she saw run away was the person who had smashed her car window.

[40] His Honour was a very experienced judge and was well aware of the onus of proof and how to treat the evidence of an accused. The issue was a relatively straightforward one – whether he was satisfied beyond reasonable doubt that the accused was the person who woke up the complainant, threatened to smash her car and proceeded to do so. He was in the position, very familiar to him, of hearing and watching the

evidence of the two primary witnesses, and reaching firm conclusions about credibility. His decision was not based upon any lack of evidence or disregard of the testimony of the accused.

[41] The reasons which his Honour gave, ex tempore, were not defective as was asserted by counsel for the accused. It is well recognised that ex tempore reasons given in the criminal jurisdiction of this busy court cannot be expected to contain the same structure and detail that one would expect in written reserved decisions of a superior court.[23]

[42] The appellant has not demonstrated error let alone manifest error on the part of the learned judge.[24]

[43] This ground of appeal is not made out.

[44] Accordingly the appeal is dismissed.

---

[23] Cf *Bird v Peach* [2006] NTCA 7, (2006) 17 NTLR 230 per Martin (BR) CJ at 232. See also, *Peters v Perkins* [2015] NTSC 77 at [11].
[24] Cf *Ashley v Nalder* [2007] NTSC 23 [4] - [6].