

AUSTRALIA / JUDGMENT

R v DS [2022] NSWDC 441

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District Court

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Decision: Costs certificate granted

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Legislation Cited: Costs in Criminal Cases Act 1967 (NSW).

Criminal Procedure Act 1986 (NSW).

Cases Cited: Allerton v Director of Public Prosecutions (1991) 24 NSWLR 550;

Mordaunt v Director of Public Prosecutions & Anor (2007) NSWCA 121;

Nadilo v Director of Public Prosecutions (1995) 35 NSWLR 738;

R v Dunne (Supreme Court of New South Wales, Hunt J, 17 May 1990);

R v Manley [2000] NSWCCA 196.

Category: Costs

Parties: DS (Applicant)

Office of the Director of Public Prosecutions (Respondent)

Representation: Counsel:

Ms M Cusack (Applicant)

Ms K Biffin (Respondent)

Solicitors:

Ms T Vakauta (Applicant)

Ms K Biffin (Respondent)

File Number(s): DC 2020/238421

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JUDGMENT

Introduction

1. On 19 September 2022 in Lismore, a jury acquitted the Applicant on three counts on an indictment presented on 12 September 2022, alleging serious sexual assaults.
2. The three verdicts of Not Guilty were delivered by the jury after 25 minutes of deliberation. For reasons I will come to, the verdict came in my view with befitting alacrity.
3. The Applicant makes an application for a costs certificate pursuant to the Costs in Criminal Cases Act 1967 (NSW) ("the Act").
4. The Crown opposes the application.
5. The parties rely only on the material tendered in the trial.

Legal Framework

1. Section 2 of the Act relevantly provides that the judge in any proceeding relating to any offence punishable upon indictment may, where after the commencement of a trial a defendant is acquitted in relation to the offence concerned, grant to that defendant a certificate under the Act, specifying the matters referred to in section 3 of the Act and relating to those proceedings.
2. Section 3 of the Act relevantly provides that a certificate granted under the Act shall, in the opinion of the judge granting the certificate, specify that:
 1. If the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
 2. that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.
1. The issue is to be determined by reference to the first of those preconditions. It is accepted that the second is satisfied. Whilst the Applicant was not required to give up the tactical advantage of surprising any Crown witness in order to benefit from the provision, it is worth recording that there was no material in respect of which the Applicant sought to retain the element of surprise in the confrontation of the Complainant. All of the relevant material used to challenge the Complainant; the CCTV footage, the text messages between witnesses, and her account to the doctor; were all in the effective possession of the Crown for the prosecutor to make an evaluation of the case.

2. The purpose of s 3 of the Act is to confer valuable privileges upon persons who succeed in criminal prosecutions; its provisions should not be narrowly construed so as to defeat the achievement of its general purposes: *Mordaunt v Director of Public Prosecutions & Anor* (2007) NSWCA 121; *Nadilo v Director of Public Prosecutions* (1995) 35 NSWLR 738 at [743]; *Allerton v Director of Public Prosecutions* (1991) 24 NSWLR 550 ("Allerton").
3. The "institution of proceedings" in s 3 of the Act refers to the time of arrest or charge: *Allerton* at [558].
4. I am required to find the relevant facts and to assume the prosecution to have been "in possession of evidence of" all of them.
5. The fact that a prosecution may be launched where there is evidence to establish a prima facie case does not mean it is reasonable to launch a prosecution; there may be cases where there is contradictory evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence: *R v Manley* [2000] NSWCCA 196 at [12] ("Manley"). That is an important matter in the context of this case and a matter to which I will return.
6. I am required to make an objective analysis of the whole of the relevant evidence and particularly the extent to which there is any contradiction of evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case.
7. Where a case turns on matters of judgment concerning credibility and demeanour, even of a key witness, a rejection of the witness is not sufficient for a finding of unreasonableness. They are matters quintessentially within the realm of the jury and ought to be decided by it. However, where the Crown case depends on a witness that was very substantially lacking in credit, such a rejection can support a finding of unreasonableness in the Crown seeking to rely on them: *Manley*

The Applicant's Submissions

1. The Applicant submits, and it is accepted that, the Crown case relied upon the acceptance of the Complainant's evidence as to the allegations beyond reasonable doubt. It also relied upon the jury rejecting as a reasonable possibility the Applicant's version of events.
2. The Applicant seeks a finding that the Complainant was substantially lacking in credit, relying on the fact that she could not be corroborated, and indeed was undermined, by other evidence; her text messages, the CCTV footage and the account given by her to the doctor on the night in question, particularly relating to:
 1. The purchase of alcohol by the Applicant, shown by the CCTV footage to be incorrect, and given the Complainant's adamance about it in her evidence arguably shown to be false.
 2. The fact that the Complainant had gone to the Applicant's home with the intention of having sexual intercourse with him, a matter that she clearly sought in her evidence to downplay and, together with another witness, gave the same inconsistent evidence about something

that was not in her statement, a matter showing that they had colluded in this account. Furthermore, the Complainant attempted to downplay the extent to which she had an opportunity to make a clear and informed decision about leaving with the Applicant, seeking to give a false impression that she had been ushered away by him.

3. The Complainant's evidence as to her attempts to seek help from her friends, a matter that was clearly untrue; where they had contacted her, where she said no more than that she felt unsafe before hanging up to a friend who she knew could and would help her; and where she made contact with a person who was knowingly in no position to help her.
4. The Complainant's account to the doctor on the night in question that was entirely different to her account in her statement. The differences were not adequately explained. Further, she made admissions that her memory of events was comprised of "blurred episodes" and where, for example, she was unsure of whether or not she had performed oral sex upon DS, a matter that she later denied.
5. The Complainant's admission to a friend that her memory of events was blurred and that some of the things that she had said in her statement may have been wrong.
1. By way of contrast, it was submitted that the account given by the Applicant, a person of good character, was at all times cogent, consistent, believable and was supported in a number of respects by the objective evidence, such as the CCTV footage. There was, it is submitted, never any logical basis upon which his account could have been rejected by any jury.

The Crown's Submissions

1. The Crown submits that its case was not a "word on word" case, so as to engage the reasoning in *R v Dunne* (Supreme Court of New South Wales, Hunt J, 17 May 1990), and that the Complainant was supported by:
 1. Admissions by the Applicant of sexual activity with the Complainant on the relevant evening and, more particularly, digital anal penetration;
 2. The uncontested DNA evidence regarding the Applicant's DNA in the Complainant's anal canal.
 3. Evidence capable of being interpreted as the Applicant using alcohol as an excuse for his behaviour in circumstances where he told police that when he got home, he was pretty much sober.
 4. There was an immediate complaint, and any inconsistencies in it could have none the less resulted in the Complainant being accepted given the directions required to be given pursuant to s 292A of the Criminal Procedure Act 1986 (NSW) ("the CPA Act").

1. Whilst it is accepted that the Complainant may have been mistaken about particular aspects of the sequence of events, it was still open on the evidence that the jury may have determined that her account was a credible one.
2. The Crown submitted that notwithstanding any other aspects said to undermine the Complainant's account, it remained open on the evidence for the trier of fact to accept her account as to the allegations and to find it particularly compelling.
3. Accordingly, it was submitted the Applicant failed in his burden to satisfy the Court that it was unreasonable to institute the proceedings.

Factual Findings

1. At the time the proceedings were instituted, the Applicant was a young man in his late 20s, a person of good character, who not only had no criminal record, but who called unchallenged evidence that those who knew him best knew him to be respectful and kind.
2. On 14 August 2020, the Complainant, who lived in Queensland near the border to NSW, had been drinking with friends, first at an apartment and later at a bar. There she met the Applicant.
3. The CCTV footage makes clear that the Applicant did not purchase alcohol for the Complainant, a matter on which the Complainant was shown to be not only unreliable, but given her adamant evidence on the issue, potentially dishonest.
4. The Applicant did not take the Complainant's phone away and type his address into her phone. The evidence given by the Complainant was also shown by the CCTV footage to be untrue.
5. Later in the evening, the two caught an Uber to the Applicant's apartment in Tweed Heads and engaged in consensual sexual activity.
6. Contrary to the Complainant's assertion, there was no suggestion that she felt in any way pressured to go with the Applicant, or that she had intended anything other than engaging in sexual activity. The CCTV footage and her text messages clearly show that to be so.
7. It was the Crown case that during that encounter, the Applicant slapped her twice to the face and committed two acts constituting sexual intercourse without consent, knowing that the Complainant was not consenting, arising from digital anal penetration and alleged penile anal penetration.
8. Thereafter, the two engaged in what was honestly and reasonably believed by the Applicant to be consensual sexual activity.
9. The Applicant has at all times consistently denied the assault and the penile anal penetration. He said that the Complainant had instructed him to engage in the digital penetration.

10. The matter came to the attention of police when the Complainant was stopped at the border, trying to re-enter QLD without a COVID-19 border pass. She appeared at that time to be distressed. She was spoken to by police and made an immediate complaint in general terms of being sexually assaulted. She repeated that complaint to her friends who were there to meet her and some eight hours later to a doctor in the context of a forensic examination. Those complaints were made in various ways with some details being given. Those details were not consistent. I am mindful of the s 292A CPA Act directions given for the benefit of the Crown to any jury in that context, but it remains the case that for the Crown to succeed the jury would have been required to accept the Complainant's account as cogent and of such a quality that they could accept her allegations beyond reasonable doubt.
11. Police interviewed the Applicant very soon after the Complainant's examination, the following afternoon. He was at all times forthcoming and cooperative. He denied any wrongdoing. He consented to a forensic procedure to obtain his DNA.
12. By the time the Applicant had been charged, the police knew, or ought to have known the following:
 1. That the Complainant had given inconsistent versions of what happened, including matters that were demonstrated lies or otherwise unreliable when regard was had to the objective evidence; from the text messages and CCTV footage, as well as in the Complainant's account to her friends and to the doctor; and
 2. That the Applicant had no prior record. His immediate information was not only so obviously from a person who was shocked by the allegation, and was internally consistent, but was also supported by the CCTV footage and his message sent to the Complainant, trying to return her handbag to her.
1. Mindful that the test directs itself to the time of charging, it is also the case that by the time the Crown presented its indictment, it knew or ought to have known the above matters, but also knew or ought to have known that the Applicant's spontaneous and fulsome account was completely consistent with the DNA evidence, information that was given by him when he did not know he would be asked to provide DNA, much less what any result would be. The Crown relies on the presence of DNA in the Complainant's anal canal to support its case. Given the admitted digital penetration, and the acceptance that there was consensual sexual activity more generally, that fact is otherwise neutral so far as support for the Crown case is concerned.
2. The police conducted a woeful investigation in some respects, resulting in the Director of Public Prosecutions requiring further enquiries to be made. Given the time that had passed, and in one case the wrong instructions having been carried out, those enquiries came to nothing. That resulted in the Crown having no evidence from the Uber driver of the Complainant's state of distress, if any, at the time she left Tweed Heads to return to Queensland, or any conversation she had with the driver; taking no evidence from the Applicant's flatmate who was at the house at the same time as the two, and where on one

account, the Complainant had been looking around the apartment on her own, and made several trips to the bathroom; and finally not seeking the correct call charge records thereby being entirely reliant on the Complainant's account of what calls and messages were on her phone and the phones of her friends, where they ought to have known that the Complainant was unreliable. The relevance of that is that the Crown were apprised of facts such that at time of charging, the prosecution knew that a forensic disadvantage direction was inevitable.

3. At a time in the Crown case when the relevant evidence had been given and in the absence of the jury, I enquired of the Crown on what logical basis it could be said that the jury could reject as a reasonable possibility the Applicant's account given in the record of interview. The Crown initially referred to what might come in any cross-examination of the Applicant. He did not give evidence and ultimately the Crown submitted that if the jury accepted the Complainant beyond reasonable doubt they would be entitled to reject the Applicant's account.
4. Given the problems with the Complainant's evidence, there was, in my view, never any prospect that any jury, acting reasonably and following the legal directions given, could properly accept the Complainant beyond reasonable doubt, even without consideration of the Applicant's account. There was also, in my view, no logical basis upon which to reject his account. The jury agreed in a very short period of time.
5. In my view, although not required, the Crown was in fact at all times in possession of all relevant facts. It was in my view, never reasonable to institute the proceedings. Accordingly, making an objective assessment of the relevant facts assumed to be known by the prosecutor at the time the Applicant was charged, it was unreasonable to institute the proceedings.
6. That is sufficient to deal with the application in the Applicant's favour.

ORDER

1. It follows that I am comfortably satisfied that the preconditions have been met and I grant the costs certificate.

Further Matter

1. I wish to raise one final matter. It has not been a matter relevant to my determination, however, in the event that it will assist the Director General in making a determination as to whether or not to make any payment, and in hope that trials of this kind can be avoided in the future, I make the following five observations:
 1. Such was the state of the evidence that I formed the view during the trial that had the jury returned a verdict of guilt on any count, I would have presided over a clear miscarriage of justice;

2. The Applicant's apartment was improperly referred to as a crime scene prior to any record of interview being carried out, consistent with police having formed an imperfect and entrenched point of view regarding the allegations;
 3. Consistent with that view, the Applicant was charged immediately following the record of interview, without due (if any) consideration being given to his account and without checking any of the objective evidence against that account or to question the Complainant's account;
 4. In a number of respects, a substandard investigation occurred, resulting in a forensic disadvantage to the Applicant; and
 5. It is the role of the independent prosecutor from the Office of the Director of Public Prosecutions to assess the evidence in line with its Prosecution Policy when making his or her decision as to whether to present an indictment.
1. On the fifth matter, the Office of the Director of Public Prosecutions who prosecute on behalf of the Crown enjoy the power to prosecute in the public interest. They also carry the duty in wielding that power, given the lives that it disrupts and the damage it can cause, to do so with the appropriate circumspection and responsibility.
 2. A prosecutor is required to do more than shepherd incredible and dishonest allegations of sexual assault through the criminal justice system, leaving it to the jury to carry the burden of decision making that ought to have been made by the prosecutor.
 3. In making that observation, I make no criticism of the particular prosecutor in this case. She conducted herself impeccably, with restraint and fairness at all times.
 4. My observations relate to this trial ever having been run at all, having regard to the Prosecution Policy. That policy requires that consideration be given to the following matters:
 1. In deciding whether to prosecute, the public interest is the paramount consideration. It has never been the rule that whenever sufficient evidence exists, a prosecution must take place.
 2. There is a test enumerated in a written policy to be followed when deciding whether to prosecute.
 3. The primary consideration is: can it be said that there is no reasonable prospect of conviction on the admissible evidence, requiring an evaluation of the likely strength of the admissible evidence, bearing in mind that the prosecution has to prove each element of the offence beyond a reasonable doubt.
 4. It includes taking into account:
 1. Whether the complainant in particular is reliable and credible, a matter that ought not be assumed.

2. Whether the prosecution is able to exclude beyond a reasonable doubt any reasonable hypothesis consistent with the accused being innocent.
3. Whether any resulting conviction would necessarily be regarded as unreasonable or a miscarriage of justice
1. Whilst reasonable minds might differ, in my view, the test failed on each of those important indicia.
2. That is a troubling matter. The bringing and continuation of unmeritorious cases in abrogation of the prosecutor's responsibilities, or, to use the language of the provision, in failing to make an evaluation and act accordingly, imposes a burden not only on the criminal justice system, but on all of those involved in it, including complainants and, not the least of whom, any person against whom that prosecution either commences or continues.

Amendments

23 March 2023 - Heading format updated

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