CITATION: *Police v Kontro* [2008] NTMC 043

PARTIES:	ANDREW KEVYN LITTMAN
	v
	INGRID IRENE KONTRO
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal Code (NT); Justices Act (NT)
FILE NO(s):	20710155
DELIVERED ON:	20 June 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	18 October 2007, 25 February 2008, 10 June 2008
JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

EVIDENCE – ADMISSIBILITY EXPERT EVIDENCE – FIRE INVESTIGATOR

Criminal Code (NT)

Clark v Ryan (1960) 103 CLR 486
Weal v Bottom (1996) 20 ALJR 436

REPRESENTATION:

Counsel:

Informant:	Mr Sharafeldin/Mr Berkley
Defendant:	Mr Smith

Solicitors:

Informant:	ODPP
Defendant:	NTLAC

Judgment category classification:	C
Judgment ID number:	[2008] NTMC 043
Number of paragraphs:	15

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20710155

[2008] NTMC 043

BETWEEN:

ANDREW KEVYN LITTMAN
Informant

AND:

INGRID IRENE KONTRO
Defendant

REASONS FOR DECISION

(Delivered 20 June 2008)

JENNY BLOKLAND CM:

Introduction

1. Ingrid Irene Kontro ("the Defendant") pleads not guilty to two charges, namely *unlawfully set fire to property, namely a large cushion, that was so situated that a building, namely Unit 20, 25 Sunset Boulevard, was likely to catch fire from it*: (contrary to s 240(b) *Criminal Code* (NT)) and *aggravated criminal damage where the loss caused was greater than $5,000, namely $25,740.00*: (contrary to s 251 *Criminal Code* (NT)). Both charges require the relevant act, omission or event be proven to be intentional or foreseeable as governed by s 31 *Criminal Code* (NT). The matter was listed as a committal but at the outset counsel for both parties indicated consent to the charges being determined summarily.

The Evidence

2. Although substantial evidence was given concerning the circumstances of the evening of the alleged offending (14 April 2007), at the highest, the lay

evidence establishes opportunity on the part of the Defendant. There were no eyewitnesses to any act of intentional ignition.

3. Overall the evidence establishes that the Defendant visited Paul Williams at his residence at Unit 20, 25 Sunset Boulevard. The Defendant had a previous relationship with Mr Williams and there was an ongoing friendship or casual relationship. The evidence establishes the Defendant became intoxicated at Mr William's residence and fell asleep in his bed. Mr Williams in the mean time had dinner as he had planned with some friends. Those friends gave evidence but nothing significant turns on their evidence. The Defendant joined them. The evidence of the dinner guests indicates the Defendant was intoxicated, as, it would appear was Mr Williams. After the dinner the guests left, and the only persons left in Mr William's unit were the Defendant, Mr Williams and his new flat mate, Mr Samuel Gray.

4. The Defendant accompanied Williams to his room and Samuel Gray went to his own room. Some time later Mr Williams went to his neighbour's unit, (unit 21) to have a drink. The Defendant went onto the balcony of Mr William's unit to have a cigarette and then re-entered the unit when there was no-one else present in the living area. Mr Gray was in his room. It is during this time the prosecution alleges Ms Kontro set fire to a cushion on the couch in the living area, most likely using a cigarette lighter. The fire spread from the cushion to the couch and onto curtains and blinds. The prosecution alleges the Defendant then left the unit, first entering the neighbour's unit saying she had to go. The Defendant left in her vehicle after Mr Williams opened the gate with a remote control.

5. At this point (or very shortly after), Mr Williams noticed smoke coming out of the door of his unit. He went inside and alerted Mr Gray. They were able to extinguish the fire but there was extensive damage estimated at $25,740. Photos tendered give some idea of the damage: (Exhibits P1, 5 and 6). The Defendant denied lighting the fire when she was questioned by police stating

she was alone in the unit on the balcony when Mr Williams was with his neighbours. She told police she finished a cigarette and left the unit but there was no fire when she left and she knew nothing about the fire.

6. Although the circumstances of the fire at a prima facie level implicate the Defendant, there is clearly not enough evidence on those circumstances alone to find the Defendant lit the fire with the requisite intent or foresight. Although I broadly accept the prosecution hypothesis that the Defendant was alone in the living room for some time prior to the fire and therefore had *opportunity*, I moderate that acceptance due to the fact that the primary witness against the Defendant (Mr Williams) was firstly under the influence of alcohol on the evening. Further, while giving his evidence he appeared overly defensive to the point of aggressive and at times his answers were unresponsive. He agreed that when he was in a relationship with the Defendant he had set fire to a mattress that she was lying on. Overall I have some concerns on whether he is ill disposed towards the Defendant sourced from issues outside of the scope of this hearing. I note that he denied people were smoking inside his unit on the night in question, (he said he had a rule against it), yet his flatmate Mr Gray clearly stated that he, Mr Williams and the Defendant were smoking on the evening in question and that they could have walked through the lounge with lit cigarettes. He said Mr Williams had a lit cigarette with him when he came inside to answer the phone. Where the evidence of Mr Williams conflicts with the evidence of Mr Gray, I prefer Mr Gray's evidence. I note there is no suggestion of motive on the part of the Defendant that would assist in explaining why she would intentionally set fire to the couch.

7. Over objection I allowed expert opinion evidence to be given by Mr Steve Osborne. That evidence, leading to an inference that the fire was intentionally lit, coupled with the Defendant's opportunity led me to find a prima facie case against the Defendant.

Expert Evidence

8. As noted, the prosecution called Mr Steve Osborne, District Officer with the Northern Territory Fire and Rescue Service. Mr Osborne advised the Court he had attended in excess of 20 to 30 fires, over a period of five-seven years; had observed controlled fires for fire investigation; attended training courses and achieved a Certificate IV in Fire Investigation. Mr Osborne acknowledged some limitations in his experience and acknowledged he did not have university qualifications. I was impressed he did not attempt to over state his experience and was content to be open to scrutiny. In my view the combination of his experience and training placed him in a situation where he could give evidence that would be of assistance to the Court, in particular about the way fires begin and behave. That assistance was beyond what an ordinary person without his experience could give. Although he may not be in a position to give technical or certain scientific evidence, in my view the type of evidence he gave clearly came within that which is contemplated in *Clark v Ryan* (1960) 103 CLR 486 and *Weal v Bottom* (1996) 20 ALJR 436. I see no reason why fire investigation or investigation of the cause of fire should not be considered an area of organised knowledge susceptible to expert evidence. The situation with fire investigation is readily analogous to accident investigation, the subject area in those cases. Similarly, I see no reason why a person qualified by experience and some training should not be able to give evidence on the usual behaviour of fires and determining their causes. Mr Osborne had not previously given evidence in Court. Although I accepted his evidence and accepted his opinion was honestly and genuinely held, I also accept that his opinion was open to genuine critique by the expert witness called on behalf of the Defendant (Mr Ross Brogan) who, in my view held superior expertise.

9. In short, Mr Osborne's examinations of the scene led him to the conclusion that the fire could not have started by a cigarette being lodged in the cushions on top of the lounge or elsewhere on the lounge but must have been

ignited from underneath the couch at a point indicated in the photos he took. His opinion was that the heat source would have had to be applied for some 30 seconds before there was ignition. His evidence added considerably to the prosecution's thesis that the fire must have been deliberately lit because having ruled out a cigarette being the source and having ruled out electrical or other sources, his opinion leaves no other conclusion but deliberate ignition. Given the defendant's opportunity, the ultimate inference could be drawn if his opinion was fully accepted.

10. In coming to his conclusion, Mr Osborne changed his view on the point of origin of the fire. His original scenario was the cushions on the left hand side of the couch being the point of origin and that someone had set fire to the cushion. On further reflection he came to the conclusion that the fire point was lower, on a point indicated in the photographs tendered that was lower than the cushions. He said he changed his mind because the natural progression of the fire would have been up and out so to get the lower burn he identified wouldn't have been possible on the first scenario. He also took into account that a piece of paper in front of the couch was undamaged. He thought the heat source would have been around thirty seconds to one minute - although he said he regretted not carrying out an experiment to explore that. He said he relied on watching fires of upholstered chairs on other occasions. He said the second theory he had about the fire was consistent with the "V" pattern present in all fires. He said there were several "V" patterns present in this fire including on the couch from the lowest point of combustion to the two arm rests and beyond; a further "V" pattern on the wall behind indicating the spread of the flame across the louvered windows and door frame; he also pointed out other damage from the fire he thought was consistent with his theory. He also said that the evidence did not support more than one source of the fire. He noted the smoke alarm had been activated but explained the difficulties with giving a time frame for the activation of the smoke alarm.

11. Mr Osborne was asked what would happen if a lit cigarette was dropped on the flat surface of the couch and he said it would burn a scar and cause some melting but would not result in ignition. He said that for a cigarette to cause combustion it would have to be nestled into a niche between the cushions where there could be heat reflection and the heat contained sufficiently long enough where it can cause ignition. Mr Osborne made reference to the literature on the point and said a cigarette would take a minimum of 20 minutes located in that position for combustion to take place. He also explained there was a high level of self extinguishment with cigarettes.

12. Mr Ross Brogan gave evidence on behalf of the Defendant. Mr Brogan was clearly qualified with Graduate Certificates and Diplomas in fire investigation; being involved in training fire investigators since 1987 and now teaches fire investigation at Charles Sturt University; he has also been through the ranks of the NSW fire brigade having been a recruit in 1970; he has been involved in controlled burning and has given evidence for the Coroner, the prosecution and he said he was involved in excess of 100 cases before all types of courts and arbitrators; he is involved in various international fire investigation organisations. Although I respect the work of Mr Osborne and was prepared to acknowledge him as an expert witness, clearly Mr Brogan has more authority by virtue of his levels of study and more extensive experience. I accept however that Mr Brogan essentially critiqued Mr Osborne's opinion by being provided with his report, the photos and other relevant material that he described. He did not have the benefit of attending the scene in person as Mr Osborne did, however, in terms of reviewing the basis of Mr Osborne's opinion and the conclusions, his opinion is persuasive.

13. Mr Brogan told the Court he did not agree with the amended "point of origin" in Mr Osborne's report as there was not enough evidence for Mr Osborne to come to that conclusion; he said if that was where the fire had started there would have been more damage going back into the couch; he

said there was insufficient evidence to say whether there were multiple points; he said the fire could have started between the cushions because of the burning on both sides of the cushions. He said Mr Osborne had come to a conclusion without knowing the fuel type and he did not test the upholstery himself. He referred to the opinion of Mr Osborne's that fire retardants would have impacted on the fire; he said there was no test done so that could not be conclusive. He said the investigation was not carried out scientifically and there were no Australian standards or legislation in relation to fire retardants on home furnishings as had been asserted by Mr Osborne. He said there was insufficient evidence to say the fire was deliberately lit. He gave other details on why the point of origin given by Mr Osborne was not correct. He said he could not rule out that cigarette could be the source if a cigarette fell between the cushions. He said there was not enough evidence to prove or disprove the cigarette hypothesis.

Conclusions

14. As is well known, in circumstantial cases a finding of guilt should not be made unless the prosecution have negatived all reasonable hypothesis consistent with innocence. The scenario that one of a number of intoxicated persons may have dropped a cigarette between the cushions on the couch that subsequently ignited has not been negatived. There is evidence to form the basis for this hypothesis. The strength of the expert opinion evidence of Mr Osborne urging the opposite conclusion has been significantly reduced by the evidence of Mr Brogan. The charges have not been proven beyond reasonable doubt.

15. The charges will be dismissed.

Dated this 20th day of June 2008.

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Jenny Blokland
CHIEF MAGISTRATE