

CITATION: *Police v Bush & Hampton* [2009] NTMC 050

PARTIES: VIVIENNE BALCHIN  
v  
JOHN LEONARD ROBINSON BUSH  
VIVIENNE BALCHIN  
V  
KENNETH JAMES HAMPTON

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal Jurisdiction

FILE NO(s): 20929289 and 20929292

DELIVERED ON: 28<sup>th</sup> October 2009

DELIVERED AT: Darwin

HEARING DATE(s): 23<sup>rd</sup> and 26<sup>th</sup> October 2009

JUDGMENT OF: Ms Fong Lim RSM

**CATCHWORDS:**

Criminal – identification – evidence of co – offender-corroboration – adverse witness- section 18 of Evidence Act (NT)

*Davies v DPP* [1954] AC 378  
*Shepherd v R* [1990] 170 CLR 573

**REPRESENTATION:**

*Counsel:*

Complainant: Ms Horvatt  
Defendants: Mr Cassells for Bush  
Mr Burrows for Henwood

*Solicitors:*

Complainant: Director of Public Prosecutions  
Defendants: NAAJA, Maleys

Judgment category classification: C  
Judgment ID number: [2009] NTMC 050  
Number of paragraphs: 33

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

No. 20929289 and 20929292

*[2009] NTMC 050*

BETWEEN:

**VIVIENNE BALCHIN**  
Complainant

AND:

**JOHN LEONARD ROBINSON BUSH**  
Defendant

AND:

**KENNETH JAMES HAMPTON**  
Defendant

REASONS FOR DECISION

(Delivered 28<sup>th</sup> October 2009)

**Ms FONG LIM RSM**

1. The defendants have been jointly charged with unlawfully damaging property preparing to steal, stealing and unlawfully entering a building with intent to steal at night-time. In the early hours of the 31<sup>st</sup> of August 2008 the XXXmart sex shop in Winnellie was broken into and cash stolen. The offenders damaged a door to gain entry.
2. The crime was recorded on security cameras. The recording shows two persons entering the shop with pieces of clothing over their heads to disguise themselves. They go directly to an area behind the counter look for keys on a hook, open the bottom drawer of the filing cabinet and leave once they remove cash bags from that filing cabinet.
3. The issue in relation to both defendants, Bush and Henwood, is a matter of identification, were they the people who committed the crimes.

**Was Hampton one of the persons captured in the security camera footage? .**

4. Hampton was identified by Richard Henwood as one of the men in the video footage by his clothing and his stature having known Hampton for a long time. He was also sure it was Hampton because he had driven with Hampton and others to the complex where the XXXMart is located at the time of the crime. Henwood stayed in the car with Daniels while Hampton and Bush got out. Henwood waited for them to return. After he heard some noises Henwood and Bush returned to the car running and got back into the car.
5. Video footage of the break in shows two men of relatively similar build as Hampton and Bush. One was taller and lankier than the other was shorter and stockier. In relation to each other I observed Hampton to have similar build to the taller person in the footage and Bush relatively similar to the shorter person.
6. Hampton is also shown in video footage taken at the Mirambeena apartments about an hour and a half after the crime wearing very similar clothing as one of the offenders shown on the security footage taken from the XXXMart.
7. Hampton gave evidence in his defence denying any involvement in the crimes.
8. Further circumstantial evidence which corroborates some involvement by Hampton is the fact that the keys to the filing cabinet from which the money was taken were found in the residence where he lived with his brother. Empty plastic money bags were also found at Hampton's residence and in Hampton's possession.
9. The evidence of Henwood must be viewed with caution because he is a co-offender (see *Davies v DPP* [1954] AC 378). Henwood was involved in these crimes and has previously pleaded guilty to receiving some of the

stolen money. He has served 8 days in imprisonment for that crime. His evidence must be viewed with extreme caution and not the sole basis of a finding of guilt of Hampton or Bush without corroboration.

10. Henwood was clearly anxious about giving evidence and claims there have been threats made to him by Bush while they were both in the holding cells and his answer to many of the questions about the details of what took place on that night was “I can’t recall”. He explained his patchy memory as being a result of a car accident he had however became evasive when asked about the details of that accident and did not support that claim with medical evidence.
11. Henwood’s recall alone cannot be the basis of the finding of guilt. I must also be satisfied that the evidence excludes any other reasonable explanation consistent with innocence (see *Shepherd v R* (1990) 170 CLR 573).
12. Evidence was called from Mr Daniels who confirms he was with Henwood, Bush and Hampton that night drinking alcohol. He cannot recall much except that later that night he got into a car with the three of them and then he passed out. The next thing he remembers is being woken by Bush in front of his mother’s flats the next morning.
13. In his oral evidence Hampton says he was working on his car all night while regularly checking in on his baby who was being looked after by “Kat” and “Julie”. He denies ever leaving his flat that night after returning from Palmerston, until they left to go to the Mirambeena. Hampton’s evidence is corroborated by Ms Bogdanoska in relation to this detail.
14. Bogdanoska gave oral evidence which confirmed Hampton’s version of events however she was ruled to be an adverse witness under section 18 of the *Evidence Act*. She clearly gave a contradictory statement to the police the next day and her explanation that the statement contains a story in the policeman’s own words not hers, is totally unbelievable. Bogdanoska’s

written statement was proved through the police officer who took it and accepted by her as her statement even though she did not adopt its content. Bogdanoska's evidence as to what happened on that night is unreliable and not capable of supporting Hampton in any credible fashion.

15. Bogdanoska also proved her unreliability by accepting the footage from the Mirambeena showed the clothing she wore that night but was evasive when asked to confirm that the clothing Hampton was wearing in that footage was what he was wearing that night. She does, without hesitation, identify herself and Hampton in the footage and by doing so confirms the clothing he was wearing was what he was wearing at the time of that footage.
16. Hampton accepts that he was wearing similar clothing as the offender shown in the security footage from XXXmart (P2) however suggests that the black shirt and tracksuit bottoms he was wearing that morning at Mirambeena were very common and could have been worn by anyone. He also states he was not wearing those pants all night and only changed into them while driving to Mirambeena with "Kat" and "Julia".
17. There are some internal inconsistencies in Hampton's evidence. He accepts in his record of interview that he says he was "driving around with the girls having a bit of fun" before they went to the Mirambeena however his oral evidence is that he went to the Mirambeena to get the baby away from the noise at the flats. If he were so concerned for the baby's welfare is it likely that he was driving around at about 4:00am having a bit of fun? I find that highly unlikely. Hampton says he changed in the car on the way to Mirambeena and that he always had spare clothes in the car. If he were at home immediately before going to Mirambeena why didn't he change at his home? His explanation how he came to be wearing those clothes is also unbelievable.
18. Hampton's confirmation in his oral evidence of Mr Daniels evidence that he had passed out in the car is consistent with Hampton being in a car with

Daniels and Henwood and Bush that later night yet he insisted in other parts of his evidence that he did not go anywhere that night except to drive around with the girls.

19. Hampton's suggestion that Henwood and Bogdanoska may be the reason why the keys were found in flat is not supported by the evidence either. Mr Street, a totally independent witness, states he locked the shop up that night and the keys to the filing cabinet were where they are usually left. The keys were not there the next morning after he inspected the premises after the break-in and were returned to him by the police a couple of days later. Those keys were those found at Hampton's residence. The only credible explanation is that the keys were taken there by one of the offenders. Bogdanoska was clearly not one of the offenders as she is of a very slight stature and does resemble either of those people in the footage and no-one positively places Henwood inside the kitchen area of the residence that night.
20. It is accepted by the prosecution that this is a case built on circumstantial evidence. If I am to be satisfied beyond a reasonable doubt that Hampton committed the crimes all those pieces of circumstantial evidence put together must not support reasonable explanation consistent with innocence. I do not have to be satisfied beyond a reasonable doubt on each of those strands of evidence but that the evidence as a whole including Henwood's evidence. (see *Shepherd v R* (1990) CLR 573)
21. If I were only relying upon the evidence of Henwood placing Hampton at the scene of the crime and also identifying him off the CCTV footage I could not be satisfied beyond a reasonable doubt of Hampton's guilt. However the other pieces of circumstantial evidence put together as discussed above, especially the presence of the keys in Hampton's residence, the fact that Hampton was dressed in strikingly similar clothing to that worn by one of the offender's caught on the security footage only an

hour and half later, corroborate Henwood's evidence and satisfy me beyond a reasonable doubt that Hampton is guilty of all three crimes as alleged.

22. **Was Bush one of the offenders captured on the security camera footage?**

The identification of Bush on the footage also comes from Richard Henwood. Henwood says he recognises Bush on the footage because he recognises his shape and the shorts and shoes he was wearing as clothes Henwood had lent to Bush earlier in the evening. Henwood was adamant that the person in the footage wearing shorts and the dark shirt with what seems like a towel over his head was Bush.

23. Henwood also places Bush at the scene of the crimes in the same way as he places Hampton at the scene of the crimes.

24. In addition to the evidence of Henwood the police conducted a search of Hampton's car where they found shorts matching the clothing of one of the person in the video footage from the XXXmart. Hampton's explanation is that the shorts either belonged to Henwood or Bush in any event they were not his shorts.

25. Bush elected not to give evidence in his defence.

26. The same caution about Henwood's evidence must be taken in relation to his identification of Bush. He is a co-offender and his evidence must not be relied upon for a ruling of guilt unless corroborated.

27. In the case of Bush the only evidence that corroborates Henwood's evidence is that all other witnesses agree Bush was at Hampton's residence that night. The shorts seized by the police under warrant were clearly shorts of a similar colour as those worn in by the footage however the item of clothing in the CCTV footage of the stealing worn by the second offender were clearly longer than shorts. It is not clear whether they reach the offender's ankles or somewhere in between his knees and ankles.

28. Henwood says he recognises the shorts as the ones he lent to Bush that night and intimated that they looked longer on Bush because Henwood is clearly taller than Bush and the length of the shorts would look longer.
29. Unlike Hampton, Bush was not identified at the Mirambeena in similar clothing and was arrested by the police the next day wearing long black tracksuit pants. Bush was not found in possession of the similar shorts the shorts seized by the police were found in Hampton's possession.
30. Without any other corroborating evidence I cannot be satisfied beyond a reasonable doubt that Bush is guilty of any of the crimes and he must be found not guilty and discharged from remand on these matters.

**Conclusion:**

31. Kenneth Hampton is found guilty of all charges and his bail is revoked.
32. Bush is found not guilty of all charges and is discharged
33. I will hear the parties on sentence.

Dated this 28<sup>th</sup> day of October 2009.

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**Tanya Fong Lim**  
RELIEVING STIPENDIARY MAGISTRATE