

CITATION: *Kerry Rigby v RS* [2022] NTYJC 001
PARTIES: Kerry RIGBY
v
RS
TITLE OF COURT: YOUTH JUSTICE COURT
JURISDICTION: YOUTH
FILE NO(s): 22208515
DELIVERED ON: 3 October 2022
DELIVERED AT: DARWIN
HEARING DATE(s): 28 September 2022
DECISION OF: Greg Macdonald

CATCHWORDS:

Criminal law – Identification – Clothing - CCTV – Proof beyond reasonable doubt – Warning - Body worn footage – *Youth Justice Act 2005* (NT), s 18

Criminal Code Act 1983
Evidence (National Uniform Legislation) Act 2011
Youth Justice Act 2005
Youth Justice Regulations 2006
Local Court (Criminal Procedure) Act 1928
Domican v The Queen (1992) 173 CLR 555 at 561
Smith v The Queen (2001) 206 CLR 650
Murdoch v The Queen [2007] NTCCA 1; 167 A Crim R 329
R v Stamp [2012] NTSC 18
Stamp v The Queen [2012] NTCCA 15
The Queen v Dookheea [2017] HCA 36
Morluk v Firth [2017] NTSC 91

REPRESENTATION:

Counsel:

Prosecution: Ms L Hopkins

Defendant: Mr J Meany

Solicitors:

Prosecution: DPP

Defendant: Territory Criminal Lawyers

Decision category classification: B
Decision ID number: [2022] NTYJC001
Number of paragraphs: 16

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

Claim No. 22208515

BETWEEN:

Kerry RIGBY

Informant

AND:

RS

Defendant

REASONS FOR DECISION

(Delivered 3 October 2022)

Judge Macdonald

Background

1. This is a decision in relation to 4 charges brought against RS on 18 March 2022, following an unlawful entry by a number of youths at premises in Driver Avenue (the premises), Palmerston, on 14 March 2022. The charges alleged are; trespass, damage property, unlawful entry of a dwelling house and stealing, contrary to Section 5 of the *Trespass Act 1987* (NT), and sections 241(1), 213(1) and (4) and 210 of the *Criminal Code* (NT), respectively.
2. On 28 September 2022 RS pleaded not guilty to each of the four charges and a contested hearing ensued.

Evidence

3. Due to the nature, depth and importance of her relationship with RS, his mother was excused from giving oral evidence under section 18 of the *Evidence (National Uniform Legislation) Act 2011* (NT) (ENULA). The owner of the premises then gave evidence, followed by investigating member Senior Constable Clifford Giles.
4. CCTV from the premises recorded on 14 March 2022, together with photographs of a Chicago Bulls cap, a tricolour T-shirt and a pair of red and black puma runners, jewellery and a bundle of Indonesian rupiah seized by police at RS's residence on 15 March 2022, were also tendered into evidence. Due to 'unavailability', the mother's statement minus paragraph 6 became Exhibit P3, by consent.¹

¹ Noting that clause 4(1)(g) of Part 2 of the ENULA Dictionary would have applied to the witness.

5. Body worn footage (BWF) from attending members of police on 15 March was ultimately not received into evidence. Although the court understood RS was cautioned in the presence of his mother prior to the attending members conducting any investigation at his residence (which investigation was, I understand, with the clear consent of his mother and, in due course, with RS's cooperation and assistance), it appeared that a requirement prescribed by s 18 of the *Youth Justice Act 2005* (NT) and r 3 of the *Youth Justice Regulations 2006* concerning access to and provision of legal advice was lacking.² Defence counsel's primary objection to the BWF was on the basis of hearsay, however the BWF comprises two components, being words and images. Application of s 59 of the ENULA is to a previous "*representation made by a person*" and, in my view, a muted edition of the BWF would not fall within the s 59 proscription.³ That is, the hearsay rule may apply to the audio but not the visual.
6. The prosecution case was comprised entirely of circumstantial evidence, with identification being the central issue. There is no direct evidence of RS being one of the youths who trespassed, damaged, unlawfully entered and stole at the premises.
7. In relation to the CCTV, the law recognises the dangers inherent in relying upon identification evidence as proof of guilt.⁴ In the circumstances of this case, I have given myself a clear warning, as required by decisions such as *Domican* and *Smith*, concerning the risks in the use of the CCTV and any reliance placed on it as evidence of guilt.⁵
8. It is uncontroverted that various relevant physical evidence, namely clothing, jewellery and rupiah, was seized at RS's residence a day after the break in, including with his cooperation. That evidence was exhibited in photographic form. It is also the case that at least one other youth was present at RS's home when police attended on 15 March 2022.
9. The prosecution bore the onus of proving beyond reasonable doubt that RS was one of the youths depicted on CCTV in the backyard of, then inside, the premises.⁶ Every defendant has a right to silence, and is entitled to put the Crown to proof on any charge.

² Although a possible consideration, declining to receive the BWF did not rest on any positive ruling that s 18 of the YJA applies to 'field interviews' prior to any arrest. However, it was understood that (despite the obvious practical and operational difficulties it would present) the words "*before ... causing the youth to do anything in connection with the investigation of the offence*" were on their face relevant to the particular circumstances of NT Police's attendance (without a Warrant) at the premises and interaction with RS. If some or all of s 18 applied to the interactions at RS's residence on 15 March, s 90 of the ENULA was available to apply.

³ Noting such footage would constitute a "*document*", but 'made' by a machine rather than "*a person*".

⁴ *Domican v The Queen* (1992) 173 CLR 555 at 561, *Smith v The Queen* (2001) 206 CLR 650 and *Murdoch v The Queen* (2007) 167 A Crim R 329.

⁵ Here, although the evidence is not fleeting or occurring in challenging environmental circumstances, it is pure identification evidence (as opposed to 'recognition' evidence as in *R v Stamp* [2012] NTSC 18 and *Stamp v The Queen* [2012] NTCCA 15). It has been unnecessary to include or rely upon exhibit P3 for the purpose of determination. Consideration of Part 3.9 of the ENULA was therefore unnecessary.

⁶ Section 5 of the Code establishes the presumption of innocence.

Consideration

10. The youth depicted on CCTV was wearing a Chicago Bulls cap (including a brim sticker) a three tone T-shirt comprising dark grey, light grey and black horizontal panels, and red and black runners of apparently identical appearance to the pair seized. Although distinctive, I infer that each of the cap, T-shirt and runners were not bespoke, and are readily available through commercial retail outlets. None of the items of clothing could individually be in and of themselves conclusively found to be the same items found at RS's house. However, taken in combination or together as 'a lot', there is no reasonable doubt that the cap, shirt and runners located in RS's house are the same items as worn by the youth depicted at the premises.
11. That conclusion gives rise to significant reasonable suspicion, but not proof to the necessary standard that RS is the youth depicted in the CCTV. Defence counsel established on the evidence that at least one other youth was present at RS's house on 15 March 2022 when police attended. The fact of another young person being at that house at the time police attended and seized the physical evidence is not, of itself, significant. I consider judicial notice may be taken of the proposition that teenage youths ordinarily have frequent visitors to their home, sleepovers, and generally spend significant time hanging out with their peers.⁷ RS's home is a safe place due to his mother's positive and supportive attitude to being a parent, and I have no doubt RS has friends at his home regularly. That is the context in which reasonable doubt must be approached.
12. It is quite conceivable that some other youth known to RS was wearing the clothes seized, then left them in RS's bedroom. Knowledge of the existence and location of the jewellery and rupiah would be equally explicable given the real possibility that RS could have been given that contraband by some other youth.
13. The relevant youth at the premises had, for most of the footage, covered the majority of his face with black fabric, appearing to be a T-shirt. Nonetheless, the apparent height, slim physique, and shoulder-length brown hair of the youth bears a very definite resemblance to RS. Of most significance is that, over the period 2 minutes 10 seconds to 2 minutes 23 seconds on the third item of CCTV footage comprising exhibit P2, the youth's face covering falls almost entirely away, such that only the youth's chin and bottom lip are obscured. In addition, the youth looks in the direction of, albeit not directly at, the camera, enabling a reasonable view of the youths eyes.⁸ Although from a distance of more than 5 metres, that footage depicts a narrow, well-defined and noble face, with distinctive eyes, bearing a striking similarity to RS. Although reasonable minds may differ, it is possible some reasonable doubt might subsist on the basis of that portion of the CCTV alone.
14. Regardless, the combination of the physical evidence seized at RS's home together with the CCTV referred to leaves no reasonable doubt that RS is the youth depicted on the CCTV from the premises. I note that a significant and material difference exists

⁷ Section 144 of the ENULA.

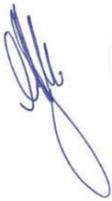
⁸ I note the defence submission that it is impermissible for the court to obtain a closer view of physical evidence (be it CCTV or any other evidence which can only be considered by visual examination) by, for example, magnification, is not accepted.

between a reasonable doubt and a fanciful doubt.⁹ In my opinion, any doubt which could possibly remain following full consideration of the evidence referred to would be fanciful in nature.

15. Lastly, I note the submission at hearing that no alternative charge to property offending was available. For example, 'receiving stolen property'. Despite that s 323 of the Code is couched in terms of "indictment", which is not the procedure of the Youth Justice Court, an alternative charge may nonetheless be open. However, that question need not be decided in the circumstances.¹⁰

16. RS is guilty on counts 1, 2, 3 and 4 as charged.

Dated this 3rd day of October 2022



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Judge Greg Macdonald
Youth Justice Court Judge

⁹ *The Queen v Dookheea* [2017] 36 at [32] to [36], applied in *Morluk v Firth* [2017] NTSC 91 at [39].

¹⁰ It was also suggested that any alternative charge would now be time-barred, however s 52 of the *Local Court (Criminal Procedure) Act* would have no application to counts 2, 3 or 4 in the circumstances.