CASE NOTES

Pagett v Hales

Supreme Court No. JA77/1999

Judgment of Mildren J delivered 8 June 2000

CRIMINAL LAW — EVIDENCE — RULE IN *BROWNE v DUNN*

The appellant, a police officer, was convicted of aggravated assault in the Darwin Court of Summary Jurisdiction. Mr Gillies SM sentenced him to four months imprisonment.

The Magistrate found that the appellant struck a man ("*K*") on the head with a police torch after placing him in protective custody as an intoxicated person pursuant to s128 of the *Police Administration Act*.

K had been apprehended on a bench in the Smith St Mall in the early hours of 29 August 1998. The alleged assault occurred in the back of a police van beside Tiger Brennan Drive. Upon arrival at police headquarters, *K* was suffering from cuts to his head and was taken by police to Royal Darwin Hospital for treatment.

Matters in dispute between the parties at hearing included:

- whether *K* had struggled with and attempted to strike both officers while being apprehended;
- whether *K* had exclaimed "Fuck off cunts. You Nazi pigs" at that time;
- whether K's injuries were self-inflicted; and
- whether the evidence of *K*'s wife as to what she heard on *K*'s mobile telephone following his apprehension was admissible as part of the *res gestae*.

Mr Gillies SM found that *K* had not resisted apprehension and that the expletives alleged by the appellant in his evidence were a "recent invention" because they had not been specifically put to *K* during his cross-examination. His Worship also permitted *K*'s wife to give the legally controversial evidence.

K's cross-examination included the following exchange :

Q. "And that, you see, whilst you were being — and before you were placed in the police van, you were swearing, weren't you ?"

A. "No"

Importantly for the appeal, *K* later in cross-examination stated that neither party said anything at this time.

On appeal against conviction and sentence, the appellant argued that the Magistrate erred in:

- applying the rule in *Browne v Dunn* (1894) 6 R 67;
- admitting the evidence of *K*'s wife; and
- failing to properly address in his reasons expert evidence adduced by the defence.

His Honour was also referred to "fresh" evidence said to be admissible pursuant to s 176A of the *Justices Act*.

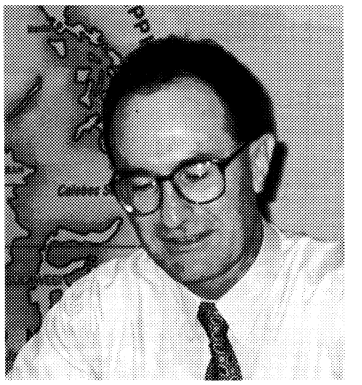
HELD

1. Appeal allowed/conviction and sentence set aside/retrial ordered.
2. Rule in *Browne v Dunn* not breached by appellant.
3. Evidence wrongly admitted by Magistrate.
4. Magistrate failed in his reasons to properly deal with expert evidence adduced on behalf of the appellant.

Mildren J stated that the rule in *Brown v Dunn* is a rule of professional practice to ensure fairness to a witness by requiring the cross-examiner to put the witness on notice if it is alleged that on a particular point he is not telling the truth. The witness is in this way afforded an opportunity to respond to the cross-examiner's instructions.

His Honour noted that the erroneous finding of "recent invention" was the first reason given by the Magistrate for rejecting the appellant's evidence.

Statements made by *K* on his mobile telephone to his wife prior to the police van stopping before the alleged assault did not form part of the *res gestae* and should not have been admitted as proof of the facts asserted therein.



Mark Hunter

Appearances

Appellant — McDonald QC / Ward Keller

Respondent — Lawrence / DPP

Commentary

The rule in *Browne v Dunn* was recently analysed in *Balance* (see Advocacy, May 2000 ed).

Compliance with the rule in relation to exclamations or conversations should in most cases be accomplished by the cross-examiner *precisely* putting his instructions to the witness.

Failure to comply with the rule in criminal proceedings may result in even an unrepresented accused being prevented from leading or giving contradictory evidence — see *Schneidas* (No.2). (1980) 4 A Crim. R 101.

Case Notes is supplied by Mark Hunter, a barrister in Darwin.