

Campbell v Gokel

**8 February 2005
(BR) Martin CJ, Angel & Southwood JJ
[2005] NTCA 2**

The appellant was convicted in the Darwin Court of Summary Jurisdiction of one count of unlawfully damaging property, one count of unlawfully entering a building (a pharmacy situated in a shopping centre) at night time and one count of stealing and sentenced to 18 months imprisonment on each count to be served concurrently. The sentence was suspended upon certain conditions.

The case against the appellant, which was entirely circumstantial, included evidence from the manager that a bottle of water which had been in a fridge at the close of business at 8.10 pm on the night the offences were committed, was found the following day on a nearby shelf. A DNA profile obtained from a sample from the rim of the bottle gave the same profile as the appellant's DNA. For the purpose of the proceedings the appellant admitted that it was his DNA. The prosecution case was that the only rational conclusions were, first, that the bottle found on the shelf was a bottle removed from the fridge by an offender and, secondly, that the appellant handled the bottle while in the premises committing the offences.

Before the magistrate, evidence was led that the appellant had been a customer at the pharmacy approximately 2 to 3 weeks before the offences and that he had been to the pharmacy on approximately five occasions. For the appellant it was submitted that he may have left the water bottle in a public area of the premises and that the bottle was then removed by staff members and placed on the shelf. The appellant did not give evidence.

The offender subsequently appealed to the Supreme Court against the findings of guilt and severity of sentence. On 23 July 2003, the Supreme Court dismissed each appeal against conviction and adjourned the appeal against sentence to a date to be fixed. The decision of the Supreme Court is reported as *Campbell v Gokel* [2003] NTSC 81.

The offender then appealed to the Court of Appeal against the order of the Supreme Court dismissing the appeal against conviction on the grounds that the Supreme Court had erred-

1. in finding that the convictions were safe and satisfactory, and
2. in failing to properly consider whether the prosecution had proved that the offence occurred at night-time, i.e., between 9.00 pm and 6.00 am.

The Court of Appeal unanimously dismissed the appeal.

As to ground 1 the court held that in light of the unchallenged positive evidence before the magistrate from the manager that (i) there were two bottles of water in the fridge when the premises closed on the evening of the offending, (ii) that the following day the fridge was open and one bottle was missing and (iii) that the bottle of water which had been in the fridge was on the shelf, it was open for both the magistrate and the judge on appeal to find that the bottle on the shelf was the bottle which had been in the refrigerator when the manager left the premises the previous evening. Once that finding was made it almost inevitably followed that the bottle had

been removed from the fridge by an offender and that either the appellant removed the bottle from the fridge or handled it in the premises after a co-offender had removed it from the fridge. Further, there was no evidence to support the appellant's contention that he had visited the shop at or about the relevant time.

As to ground 2, given the appellant's concession that it was open for the magistrate to find that two persons seen exiting the premises by police at 2.50 am were the offenders, the court held that it was open to the magistrate and the judge below to reject the proposition that the offenders had entered the premises some time after 8.10 pm but before 9.00 pm and then remained in the pharmacy for something in excess of five hours or, having entered the pharmacy, spent the next five hours both in the pharmacy and elsewhere in the shopping centre.