

Yunupingu (x 3) v R

**30 November, 10 December 2004
(BR) Martin CJ, Angel & Thomas JJ
[2004] NTCCA 10**

Each appellant was found guilty by a Darwin Supreme Court jury of one count of attempting to have sexual intercourse with another person without consent.

Appeals against conviction were instituted pursuant to the certificate of the trial judge granted in accordance with 410(b) of the *Criminal Code* certifying that there is a fit case for appeals against the findings of guilt against each accused upon the ground that the verdicts were unreasonable or cannot be supported having regard to the evidence.

At trial the complainant said she was unable to identify her attackers. She said she had consumed a considerable amount of alcohol throughout the day and was, nevertheless, able to identify and remember the persons she had been drinking with. She had known two of the appellants all of her life and the third appellant for some 14 years. The Crown case for identification of the appellants as the attackers relied entirely upon the evidence of the witness G who had known the accused all his life. He described them as his nephews. On the issue of identification G was unshaken in cross-examination.

As required by the decision of the High Court in *M v The Queen* (1994) 181 CLR 487 and *MFA v The Queen* (2002) 213 CLR 606, the Court of Criminal Appeal examined the whole of the evidence to determine whether it was open to the jury to be satisfied beyond reasonable doubt that each accused was guilty. The court noted that the jury had been given full and accurate directions about the evidence of G including warnings as to identification and intoxication and that their attention had been drawn to various inconsistencies within the evidence of G, and between his evidence and that of complainant. Even allowing for the advantage the jury had in seeing and hearing the witnesses the court nevertheless found that there were a number of features of considerable concern in the evidence including the complainant's unconvincing explanation as to why she could not recognise her attackers.

The court found that the evidence of G was not capable of negating the possibility that the appellants were not the complainant's attackers because, on his own admission, G was blind drunk and his evidence was in conflict with that of the complainant as to the number of men who got on top of her. In short, his evidence was not the strong and convincing evidence required to negate the possibility that the appellants were not involved.

The court allowed the appeal holding that the jury should have entertained a doubt and that on the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt that the appellants were the attackers.

The verdicts of guilty were quashed and verdicts of acquittal entered.