

CITATION: *Peter Mark Thomas v Manolis John Samarkos* [2003] NTMC 017

PARTIES: PETER MARK THOMAS

v

MANOLIS JOHN SAMARKOS

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20214209

DELIVERED ON: 28 March 2003

DELIVERED AT: Darwin

HEARING DATE(s): 18 February 2003, 14 March 2003

DECISION OF: JENNY BLOKLAND SM

CATCHWORDS:

CRIMINAL LAW – DEFENSIVE CONDUCT – DEFENCE OF ANOTHER.
Criminal Code (NT) , ss 29 (2) (a) (i), 2, 188 (2); *Zecevic* (1987) 25
A Crim R 163; Report of the Law Reform Committee(NT),
Self Defence and Provocation, (October 2002).

REPRESENTATION:

Counsel:

Informant: Mr Tim Smith
Defendant: Ms Jodi Truman

Solicitors:

Informant: Office of the Director of Public Prosecution
Defendant: Halfpennys

Judgment category classification: B
Judgment ID number: [2003] NTMC 017
Number of paragraphs: 33

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

No. 20214209

[2003] NTMC 017

BETWEEN:

PETER MARK THOMAS
Informant

AND:

MANOLIS JOHN SAMARKOS
Defendant

REASONS FOR DECISION

(Delivered 28 March 2003)

Jenny Blokland SM:

Introduction

1. This case involves the application of *s 29 Criminal Code*, namely *Defensive Conduct*, and in particular *s 29(2)(a)(i)*, where it is asserted the person believes that the conduct *is necessary to defend another person*. If the alleged conduct is justified, then no offence has been committed: *s 2 Criminal Code*. In this matter, the defendant, Mr Manolis Samarkos is charged with aggravated assault against *s 188(2) Criminal Code*, the circumstances of aggravation being that the victim, Mr Benjamin Emmett suffered *bodily harm* and that he was *unable to effectively defend himself due to his situation*.

Summary of the Prosecution Evidence

2. Mr Benjamin Emmett was enjoying himself at the Darwin Turf Club with friends on 5 August 2002, Darwin Cup Day. Mr Emmett was having some beers and a yarn with his friend, Tom Hurse. Mr Emmett saw a young man

walking along who appeared to be quite drunk. He saw two other men approach the young man and hit him. This happened about 20 – 30 metres away from Mr Emmett. Mr Emmett then proceeded with what in my view is the natural and laudable response. He called out to the aggressors, saying words to the effect *what do you think you're doing?* For his admirable community spiritedness he was rewarded with verbal abuse by at least one of the two aggressors. This account by Mr Emmett was generally supported by Tommy Hurse's evidence, who also said that in response to Mr Emmett's enquiry, one of the two men said: *Shut up you fat cunt ,otherwise you'll be next.* Mr Hurse said that after this conversation, the man left the area. In cross-examination Mr Hurse said he didn't recall whether he and Mr Emmett and Mr Wells waved at the man to come over. He later denied that they had done anything of that kind.

3. Mr Emmett's attention was then returned to talking and drinking with his friends. In cross-examination he said he recalls he was drinking beer for the day and possibly one or two rums. One of the aggressors (not the defendant in these proceedings), appeared to Mr Emmett out of the corner of his eye. Mr Emmett asked one of his friends to hold his beer for him because he sensed the aggressor was going to *come over here and pick a fight.* Mr Hurse also recalls that this occurred, and that Mr Emmett asked his friend, (Mr Wells) to hold his drink for him. Mr Emmett gave evidence that this person:

"...walked straight in and started hitting me. I sort of defended myself, blocked a few. He hit me a couple of times and I got maybe a couple on him, but I got pulled down onto the ground and there was like a scuffle".

After feeling some hits to his head, to the back of his skull, neck and to his face, Mr Emmett describes sensations that are consistent with a loss of consciousness.

4. Mr Emmett has very little memory of the events after that. The factual findings in this judgement are based on piecing together the evidence of other witnesses, none of whom saw the whole incident that began with the assault on the unknown young man and ended with the hospitalisation of Mr Emmett, who, in my view, had simply tried to stop an ugly incident as he perceived it. In cross-examination Mr Emmett said he thought the assault on the young man was a *low act*.
5. There is no doubt Mr Emmett suffered bodily harm: (*exhibit P1, Medical Report of Dr Peter Sargeant*). A number of cuts, bruises, swelling and consequent head-aches did not recede for two weeks. His nose took six weeks to heal. He believes he had a fractured nose. Mr Emmett said the blows he felt that caused the bulk of his injuries could not have been inflicted by the person who he was having the scuffle with. In cross-examination he agreed he did not know where the strikes to his head landed. He describes his memory of the whole incident as *fragmented*. He describes the two persons who assaulted the younger man as simply one being a smaller man and one being a larger man. It was the smaller man who later abused him. He thought this man had a blue shirt on. The larger man had dark hair and a pony tail.
6. Mr Emmett expressly denied that he and his friends started yelling out to one of the men. He also expressly denied that he behaved in such a way as to be *looking for a fight*. He also denied throwing a can or a drink at one of the men. Mr Hurse also denied this conduct.
7. Mr Emmett recalls he was thrown to the ground by the smaller man. He didn't recall whether he then got up and grabbed the man but he definitely knows he had a scuffle. He recalls only that there was a scuffle with punches being thrown, until there appeared to be intervention from elsewhere. He recalled people in the area yelling out. He didn't recall whether people were calling out to him to get off of the man.

8. Mr Hurse recalls that Mr Emmett and the smaller man exchanged punches very quickly and were then wrestling on the ground, taking it in turns on being on top. Mr Hurse agreed, (after his statement was put before him), that he had told police that Mr Emmett *tackled* the man to the ground. He agreed that this is one way that he would describe the incident. Mr Hurse further recalls that another person came along who helped the other man. Mr Hurse said

“...then another guy came in to help his mate out.....I can't remember exactly what he did but he sort of helped his mate out. Sort of like pulled Ben away or pushed him over or something like that, just so his mate could get the better of him.....the next thing I can see is this second person and the original guy. Ben was on the ground and they're kicking him pretty forcefully”.

He also added that both persons were kicking Mr Emmett, in the face, head, neck and upper body. On a number of particular issues concerning the fight, Mr Hurse said he was *not 100% sure*. Mr Hurse said that people in the vicinity started yelling and screaming for someone to do something and at that point, the two men ran.

9. Another witness called by the prosecution, Mr Brady Jenkins, said he recalled two individuals fighting and *going down* and another person coming in from the side and kicking someone in the head. Mr Jenkins was the first witness to identify the defendant. He had met him prior to this incident. He said that the defendant kicked one of the persons on the ground in the head. He was definite that it was *one* kick. He agreed it was hard to see what was going on. He agreed in cross-examination that the kick could have been to the shoulder.
10. A further witness called by the prosecution was Zaharo Skliros who recalled that there was a fight; that the defendant became involved when Mr Emmett was on top of the other person; and that the defendant was telling Mr Emmett to get off and she thinks the defendant *hit or something to get off*.

She heard one kick. In cross examination she said she wasn't really sure if it was a kick or a hit that she heard.

11. Wendy McKenzie stated in evidence she saw *two guys having a scuffle*. She saw that the larger man (Mr Emmett) was on top of the smaller man; the smaller man was throwing punches but Mr Emmett wasn't trying to hit back. She later qualified this by saying that she thought Mr Emmett tried to hit the other man but she doesn't think he actually *landed one*. They rolled down the hill between the two tents and it was Mr Emmett who looked like he was trying to defend himself. She agreed Mr Emmett headbutted the other man. She said she saw another bloke come out of nowhere and kick Mr Emmett in the head and *sent him flying off the guy that he was on top of*. She said this man *followed him and kept kicking, and he was aiming for his head. He made half a dozen kicks*. She followed this man through the crowd to the car park and called out to him to turn around so she could have a look at his face. She clearly believed he was the aggressor. She did agree in *cross examination* that altogether, it may have been more kicks that she saw, with some coming from the first person involved in the fight.
12. Mr Nathan Page, also called by the prosecution said that at the commencement of the fight, the initial aggressor struck *the man with the blond hair* (Mr Emmett) to the chin. The man who was punching started walking off. Mr Page said the person who intervened kicked the person on the ground three times. He said it was in the right jaw area.

Identity Issues

13. Mr Hurse described the person he called the second guy as stocky, stockish build, probably about the same height as the other guy, light hair. Sort of had a ponytail, sort of hair a bit frizzy sort of. He also said he was wearing a light coloured shirt, he was European looking with a fair complexion.

14. Mr Jenkins, who knew the defendant, described him as having the *same colour hair as he has now*.
15. I think there is no dispute that Mr Samarkos has dark hair. Ms McKenzie said she thought she would be able to recognise the person again but she said she did not think he was in the courtroom. She said he was not dark haired and in fact suggested he had light coloured hair and his hair was pulled right back in a pony tail. She said he was fairer, rounded face, not wearing glasses. She said he had fair complexion.
16. Mr Page described this person as having short black hair, shaven hair, no facial hair. He reiterated this in cross examination, *black hair* and *brownny eyes*.
17. Constable Paul Terawsy spoke briefly to the defendant on 23 August 2002. He noted that the defendant did not have a ponytail any more and the hair was cut much shorter. He also said there were lighter areas of his pony tail that looked as though his hair *had been coloured or lightened and allowed to grow out*. He agreed however that he did not know whether the defendant had ever coloured his hair. He did not arrange photo board or other identification, although he agreed he had seen a photo of the defendant and the defendant looked the same way as he did in these court proceedings.

Evidence Given On Behalf of the Defendant

18. Mr Samarkos gave evidence on his own behalf. He said that at that time he wore his hair in a ponytail. He has his hair long in the dry season and cuts it short in the wet season. He has never coloured his hair. It is dark. His father would have *flogged him* if he had ever coloured his hair.
19. He was told by another person that his friend, Michael Tsaknis had had an altercation with someone else. As he was leaving the marquee he was in on his way to leave the races, he turned to his right to see Mr Emmett throw a

can at Michael Tsaknis's chest. (In cross-examination he said he was sure of this because the next day Mr Tsaknis had a bruise in the area).

20. He said he saw Michael put his hands up to defend himself and then saw Mr Emmett come at Michael Tsaknis him with a flurry of punches. He saw the flurry of punches as he was walking towards them. He felt a knock to the back of his head, saw stars and dropped to one knee. He thought he had been hit by one of the men (not Mr Hurse) who was with Mr Emmett. His purpose in walking towards the two men was to break up the fight *before it got out of hand*. He said he thought it would get out of hand because there were three or four people involved. He thought that to be the case because of what he had been told earlier. He said there was a lot of people around the two who were fighting. He didn't see fully the first part of the fight because he had been hit on the head.
21. He wrestled with the person he thought had hit him, (Mr Wells). Mr Wells was not called by the prosecution. Mr Smith appearing for the prosecution explained that Mr Wells now lives in Queensland. That matter has consequentially not been tested. When he saw the two fighting again, Mr Emmet was on top of his friend, Mr Tsaknis. He thought Mr Tsaknis was getting his face *pummelled*. He told Mr Emmett to *get off him, get off him please*. He said Mr Emmett said, *fuck off, you're next*. Mr Samarkos said he started to push and pull Mr Emmett from his shirt and chest and upper body, trying to get him off. He said Mr Emmett was still punching Mr Tsaknis in the head. Mr Tsaknis was on his back trying to defend himself. He said he then tried to kick Mr Emmett but they both rolled onto his leg and he (the defendant) fell down and the two rolled down a slight hill.
22. He tried again to pull Mr Emmett off. He got back to his feet and kicked Mr Emmett under the left shoulder in armpit and chest area. He thought by winding him he could get him off of Mr Tsaknis. He said he had been taught in the Army that this was an area of the body that people could be

winded in. He said he was concerned because Mr Tsaknis was half Mr Emmett's size and appeared to be covered in blood. He said he was in fear for Mr Tsaknis's safety. The attempted kick, he said, didn't contact. The second one winded Mr Emmett and he was able to pull Mr Emmett off. He grabbed Mr Tsaknis and left the scene. He said he could see Mr Emmett was being assisted. In cross examination he denied it was an equal fight. This was because of Mr Emmett's bigger size and Mr Emmett being on top. He said Mr Tsaknis was being *pummelled* and he repeated that he was only concerned for Mr Tsaknis' safety. Mr Tsaknis's evidence broadly supports the defendant's version, including the description of his hair.

Relevant Findings of Fact

23. A clear picture of the facts is difficult to ascertain. I must be satisfied that the critical facts have been proven beyond reasonable doubt. Because of the understandable diversion between the witnesses accounts, I cannot be satisfied beyond reasonable doubt of the full hypothesis put forward by the prosecution.
24. I have no doubt Mr Emmett acted initially out of altruistic motives. He was concerned about what appeared to be two persons picking on another one. As Mr Wells has not been called, I cannot rule out that there may have been a beer can thrown, nor can I rule out that there may have been some jeering towards Mr Tsaknis. Nor can I rule out that Mr Wells may in fact have brought the defendant down to the ground.
25. I know that all witnesses, both for the defence and prosecution, save for Mr Page had been drinking to some degree. Overall, it may have made the evidence less precise. Further, there were many people around the fight, possibly blocking the full view of some witnesses and there may have been other participants. Mr Emmett, for the regrettable reason that he was badly hurt, cannot of course remember the full incident.

26. Mr Tsaknis acted aggressively in that he approached Mr Emmett after a verbal exchange and possibly after being hit with a beer can. Whatever occurred initially, what is critical in this situation is what the defendant understood to be occurring.
27. Those witnesses who described a number of kicks by the intervening person do not identify the defendant in court and describe him as having fairish hair and a fair complexion. It appears unlikely, on the whole of the evidence that the defendant dyed his hair blonde, and even if he had, he could not be fairly described as a person with a fair or light complexion. Without wishing at all to stereotype any particular ethnicity, the defendant simply looks classically Greek or Mediterranean. He has dark hair and an olive complexion. It is clear he had a pony tail at the time of the incident, but the other observations concerning identity, in my view, do not allow me to infer that he was the person who was seen to be inflicting multiple kicks. I had thought Mr Page's evidence may have implicated the defendant to a further degree, but he described a person with short dark hair doing the kicking. I thought he may have meant Mr Tsaknis, but he said the kicking was occurring when Mr Tsaknis was on the ground. Mr Jenkins thought there had been one kick by the defendant and Ms Skilirous thought she heard one kick or a hit.
28. I am left with the factual conclusion that the kicking was much in the manner as described by the defendant, namely one attempted kick and a further kick to Mr Emmett as I simply cannot be satisfied beyond reasonable doubt from the other versions given that anything else other than that described by the defendant did in fact occur.

The relevant law and conclusions

29. As it has been fairly raised on the evidence, the prosecution must negative the justification of defensive conduct: (*s 29 Criminal Code*). The defendant

must show, evidentially, that he believed that the conduct was *necessary*, in this instance, to defend *another person*: (s29(2)(a)(1) *Criminal Code*).

30. This relatively new provision of the *Criminal Code* focuses on the defendant's belief of what is *necessary*. Mr Smith, for the prosecution, raised the point that on one view of the evidence the defendant watched the fight and only came to the aid of his friend by assaulting Mr Emmett when his friend was finally in the disadvantaged position. It was only then that the defendant took *defensive* action. Should a defendant in these circumstances be able to successfully rely on self defence? In my view Mr Smith's argument raises a valid moral argument. If a fight is occurring and a would be rescuer does not intervene because the person they support has the *upper hand*, should later defensive conduct be justified because the balance of the fight changes and they choose to discriminate to intervene for a friend or associate? In my view the *Criminal Code* does not prohibit raising the justification in such a scenario. Provided the alleged perpetrator is not acting in concert and is not otherwise an accessory to the initial aggressor, I doubt Mr Smith's concern is covered by the *Criminal Code*. That conclusion is also on the proviso that the other elements of defensive conduct are made out.
31. The Report of the Law Reform Committee (NT), *Self Defence and Provocation*, (October 2000), that led to the current provision does not focus on the content of defence of another. In the Law Reform Committee's report, in the context of a discussion on Zecevic, it is assumed that the same underlying principles apply to self defence as they do to defence of another. My researches reveal no more about the limits of defence of another, save for limitations that have fallen into disuse. (For example, an earlier common law prohibition on raising defence of a stranger, as in a non family member). In any event, because of the evidence that the defendant fell at an early stage of the events in question, there is some doubt on whether he saw the fight in all of its phases. If I focus on his belief as I am required to do,

it appears he believed his friend, Mr Tsaknis was in danger; his friend had blood on him; Mr Emmett was bigger than Mr Tsaknis; Mr Emmett was on top of him and further, he had been told that Mr Tsaknis had been picked on by other persons prior to the fight. I conclude the defendant held the requisite belief.

32. For defensive conduct to succeed, the conduct must be a reasonable response in the circumstances as the person reasonably perceives them to be: (s 29(2)(b)Criminal Code). I have already stated what the defendant believed to the circumstances to be. The reasonableness or otherwise of his conduct must be assessed according to his reasonable perceptions. I should note here that there is other supporting evidence that for a time at least, Mr Emmett may have appeared to have the upper hand. He was on top of Mr Tsaknis and was bigger than him. The defendant feared for his friend's safety. He had asked Mr Emmett to get off. He had then pushed and pulled him. It is possible that the defendant could have taken a different course. Perhaps he could have called on other people around him to assist him to separate the two. Perhaps he could have called for security or other assistance.
33. In *Zecevic (1987) 25 A Crim R 163*, at 174 the majority referred to the need to consider proportionality or reasonableness in the context of the *whole circumstances* of which the *degree of force* is only one factor. The majority also refer to the need to *approach [this] task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection*. It appears the *Law Reform Committee (NT)* was significantly influenced by *Zecevic* in the approach taken to this provision. It would be an error for me to assess this matter without being cognisant of the urgency or predicament of the defendant. Although I had some difficulty initially accepting that a kick in order to wind a person was a reasonable response to the situation, when I bear in mind the perspective

of the defendant as I am required to do, I am not satisfied that *defensive conduct* has been negated.

34. I therefore dismiss the charge.

Dated this 28th day of March 2003.

JENNY BLOKLAND
STIPENDIARY MAGISTRATE