

CITATION: *Polices v Peter Hayward Gorman* [2003] NTMC 023

PARTIES: Peter William Hales
(Informant)
v
Peter Hayward Gorman
(Defendant)

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20202183

DELIVERED ON: 15 April 2003

DELIVERED AT: Darwin

HEARING DATE(s): 23 January 2003, 28 March 2003, 11 April
2003

DECISION OF: Jenny Blokland SM

CATCHWORDS:

CRIMINAL LAW –PROVOCATION ORDINARY PERSON – *Mungatopi v The Queen* (1991) 2 NTLR 1; *Moffa v The Queen* (1977) 138 CLR 601; *Stingel v The Queen* (1990) 171 CLR 312.
Criminal Code (NT) ss 1, 34 , 188.

REPRESENTATION:

Counsel:

Informant: Mr Duguid
Defendant: Mr Cantrill

Solicitors:

Plaintiff: ODPP (Summary Prosecutions)
Defendant:

Judgment category classification: B
Judgment ID number: [2003] NTMC 023
Number of paragraphs: 21

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

No. 20202183

[2003] NTMC 023

BETWEEN:

PETER WILLIAM HALES
Informant

AND:

PETER HAYWARD GORMAN
Defendant

REASONS FOR DECISION

(Delivered 15 April 2003)

Jenny Blokland SM:

Introduction

1. The defendant, Mr Gorman has entered a plea of not guilty to a charge of one count of assault with a circumstance of aggravation, namely, that on 2 December 2001 he unlawfully assaulted Leslie Hunt and that the unlawful assault involved the following circumstance of aggravation: namely, that the said Leslie Hunt was threatened with a offensive weapon, namely a spirit level, contrary to *s 188(2) Criminal Code*. He also pleaded guilty to a charge of unlawful criminal damage on the same day. That charge relates to unlawfully damaging the side door of a Kombi van, to the value of \$700, the property of Leslie Hunt, contrary to *s 251(1) Criminal Code*.
2. The basis of the prosecution case is that at about 3.00 pm on that day, Mr Gorman went to the residence of Mr Leslie Hunt and his father who both reside at lot 3624 Fog Bay Road, Dundee Beach. Mr Gorman went to deliver a load of concrete to the property. There was alleged to be an altercation between the defendant and Leslie Hunt during which Mr Gorman assaulted

Leslie Hunt with a spirit level. He later drove his truck into Leslie Hunt's Kombi causing the damage alleged in the *Unlawful Criminal Damage* charge.

3. During the hearing it became obvious that the defendant was relying on provocation (an excuse) in the first instance and further or in the alternative self defence (a justification).

Outline of the prosecution evidence

4. Mr Leslie Hunt gave evidence that on the 2nd of December 2001 he was at home with his father Mervyn Hunt at their block at Dundee Beach. Amongst other matters Leslie Hunt said they were waiting for some concrete to be delivered. The defendant was to deliver the concrete. He is a concreter who owns *Dundee Concrete*. Leslie Hunt said he stayed inside. In his evidence in chief he alluded to the fact that he *knew there was going to be a problem* and referred to *past instances beforehand*. I found this tendency of Leslie Hunts to immediately attempt to discredit the defendant tended in turn to detract from his own evidence.
5. Leslie Hunt said the defendant was supposed to drop the concrete off and then leave, but that he stood there, washing out his truck and called out to Mr Hunt, words to the effect of *Get out here you lazy such and such...Come and give your old man a hand you effing stick picker*. Leslie Hunt said in evidence that he was inside and did not want to come out. The use of the word *stick picker* was pejorative. The court was told it was slang referring to someone in the trade who could only pick up stones and rocks and sticks for a work crew. Another term used to the same effect, the court was told was *emu picker*.
6. Leslie Hunt came out-side and saw the defendant by the concrete truck. Mr Hunt senior had the rake in his hand and Leslie Hunt asked Mr Gorman to leave. He says he was about 10-15 metres away from Mr Gorman at this

time. This all occurred fairly near a tank ring that the Hunts were building. Leslie Hunt says Mr Gorman had his hand on his truck's chute, leaning against it when he first went outside. Leslie Hunt says he went back inside and further abuse came from Mr Gorman. He came out-side a second time and asked Mr Gorman to leave. He said he stood between the already erected tank stand and the ring they were working on. He said at that point Mr Gorman came closer, about seven metres away. His father was stilling working on the concrete. He says the abuse continued to flow from Mr Gorman and he (Leslie Hunt) put his hands behind his back and walked up to Mr Gorman telling him to leave. He moved up *nose to nose* with Mr Gorman. He said he could smell alcohol on him. He said Mr Gorman was in the middle of an area between the concrete truck and the tank stand. His father was still raking the concrete. According to Mr Leslie Hunt, Mr Gorman started verbally abusing him again and then spat in his face. He says Mr Gorman then took two swings at him, one missed and one connected to the top of his shoulder. He says Mr Gorman ran to the passenger's side of the concrete truck, it was ten metres from the back of the truck and that he then ran to the driver's side. Mr Hunt followed him. He said Mr Hunt senior was still raking the concrete; Mr Gorman fell over near some reinforcement mesh; Mr Hunt went around to the back of the truck and saw Mr Gorman getting off the ground; Mr Gorman looked like he was getting into his truck; Mr Hunt picked up his tools so that he could help his father and started screeding; Mr Hunt then says he felt an almighty bang across the back – his middle back just below his neck; Mr Hunt says he was stunned at this and spun around; at that point he saw Mr Gorman taking another spin and he intercepted the next blow. He says Mr Gorman ended up on the ground. Mr Hunt was hit with a spirit level that was tendered into evidence: (*Exhibit P2*).

7. Mr Hunt then said he actually picked Mr Gorman up who was on the ground again and told him to *get up and fight like a man*. Mr Hunt said he then

shaped up at him as did Mr Gorman. Mr Hunt then punched him a couple of times, making contact about three times to the head region. Mr Gorman, he says, ran to his truck and took off again.

8. Mr Hunt said the defendant was very angry and agitated. Mr Hunt had a photo taken of his back about 15 minutes after the incident that has been received into evidence as exhibit P 3. It depicts a mark on the back.
9. In cross examination Mr Hunt agreed he had not been in full time employment as a concreter since 1996; he had worked in other positions such as a mini bus driver at the time of the alleged offence; it was put to Mr Hunt but denied that he had been receiving unemployment benefits when working for either Mr Gorman or H & K . He agreed in cross examination that when he left Mr Gorman's employment they weren't *very good friends*. He agreed he had asked for payment in cash, not cheques; he agreed that during May 2001 he was working for Mr Gorman but at the same time was receiving unemployment benefit; he disagreed that Mr Gorman had told him he was unhappy with his work; Mr Hunt agreed that he did not like Mr Gorman and that this commenced before the alleged assault; he says Mr Gorman spat in his face once before; he rejected suggestions that he had abused Mr Gorman; he agrees he smacked his hat off of his head. He rejected suggestions he said words to the effect of *You're a piece of shit* and *You're big, you're fat, your misses has got more guts than you*. He denied that he had taken opportunities to put Mr Gorman down to other people at Dundee. He denied telling Mr Gorman that he had said, *I'm going to get you*. He agreed he was 36 years old and weight 110 kilos. He agreed he was fit. He agreed he had briefly worked as a bouncer. He agreed essentially that there is and was a significant disparity between himself and Mr Gorman but he said that he was frightened of Mr Gorman. He said he'd been frightened of him since he threatened to shoot him. He then said he was being sarcastic when he gave that evidence. He agreed the motor of the truck and the

agitator were on at some stage but he heard them being turned off. He said his father Mr Merv Hunt saw everything on the day in question.

10. Inconsistencies were put to this witness concerning the statement he made to police about the level of abuse and about the number of times he came out of the house. He agreed it was police who suggested he attend to getting some medical treatment. He had previously been to the first aid clinic.
11. Overall I found Mr Hunt to be somewhat lacking in credibility. He laughed at some suggestions made to him rather than dealing with the issues. His description of the level of abuse and the issue of leaving the house was at odds with his statement to police. I don't consider this a fatal issue concerning credit because the way statements are taken are subject to a certain amount of assumption and interpretation by the person taking the statement. Combined with other matters I do, however, have some concerns. He took opportunities to gratuitously undermine the defendant. His comments about being frightened of the defendant are difficult to accept.
12. Mr Merv Hunt also gave evidence. He is an elderly gentleman and I think it is accepted he is not well at all. At Mr Gorman's arrival, he says he told Mr Gorman to *just pour the concrete in it and we'll spread it*. He says he was referring to his son. He said Mr Gorman essentially insisted on pouring it. He said his son walked out of the house on that occasion and *didn't say a word* and went back inside. He says Mr Gorman called his son a *stick picker*, and that his son walked back inside. He says Mr Gorman called his son a *wanker* and a *stick picker* and then his son came outside a second time and a third time. He says Mr Gorman was spreading the concrete at this stage. He said that Peter Gorman went around to his truck; that Leslie Hunt followed him and then came back saying "he spat – spat in me face" Next thing he says he saw the defendant come out with the spirit level and hit the complainant. He said the defendant went down and Leslie Hunt told him to *get up and fight like a fucking man*. He says that before Mr Gorman went

around to his truck, they *had a few words*. He said Mr Gorman went to the driver's side of the truck. He says he then couldn't see what happened. He says he saw his son follow him; he knew they were arguing but he didn't hear what was said. He saw his son come back with his arms folded. He didn't see any punching between the two. The initial part of Mr Hunt senior's testimony was in a general way consistent with that of his sons, however, as further detail was asked of him, it is clear he simply did not see or hear much of the events surrounding the alleged assault incident, alternatively, he was being evasive. His evidence did not turn out the way Mr Hunt junior had warned the court. He had not seen much at all.

13. The further part of the prosecution case is the Records of Conversation with the defendant. In the first record of interview of 5 December 2003 the defendant sets out a substantial amount of history about the relationship between himself and Leslie Hunt. He says he went to the Hunt's premises to deliver the concrete. He delivers it to Mr Hunt senior. He explains to police that Mr Hunt senior is old, that the concrete needed spreading before it dried and he asked Mr Hunt about the whereabouts of his son. He says Mr Hunt senior told him that "*he's got the shits, he went to Darwin and he got the dirty water off his shit- off his chest, he's got the shits or something.*" He then said Mr Hunt junior stuck his head out and called something out. The defendant decides to help Mr Hunt senior because his son hasn't come out. The defendant admits he called out "*What's the matter with you. Come and do it, what's wrong with you...oh, you're just a stick picker*". He says in his Record of Interview that Leslie Hunt came over to him, chested him, pushed him flattened him against the truck and *caved my head in*. He said the only way he could protect himself was to lie down on the ground and take it. He says he got up and said to Mr Hunt senior, "*Did you see that Merv? That's assault.* The reply was "*Oh no, I didn't see it.*"

14. The defendant then says he's had a gutful...

“I'm a little bloke, I can't fight with me fists, what do I do? I went to get into me truck, so I just grabbed the level, and I did, yes I whacked him so hard, I wish I'd hurt him more and that's the way I feel.. Because that's what he'd brought me to over three bloody months, this is how it got to this. So, OK he grabs the level, now, now I'm shitting myself, because he's three times my size, right? He's got the level, now, now, now, I'm shitting meself, because he's three times my size, right? He's got the level and I, I mean, I knew I'm in big trouble. So he knocks me down and punches me head in again, right next to his father, right? And his, his old man just stood there and watched and Merv, after he punches me a few times in the head and I'm on the ground and I'm cowering on the ground, because I'm a shit fighter and this blokes three times as big as me, what can I do? I can't fight. I'm defenceless”.

15. He then explains that earlier in the episode, he just had to walk backwards because of the way Mr Hunt started shoving him, saying “*you're just a weak little shit, and your wife's tougher*”. He goes onto explain that as soon as Mr Hunt mentioned his wife, that's when he spat at him. He says “*because that was a reaction. I can't fight him, I'll spit in his face, yes, I spit in his face. What else can I do?*”.

16. On grabbing and using the spirit level, he says

“Well there's one thing he forgot to tell you there, is that he pushed me all the way to the truck, he didn't stop bashing until I got, started to get into me truck, I've had enough, what am I going to do? My only.. is I'm going to get this bloke, like all I had was a level, so I grabbed the level”.

17. The defendant then goes on and gives a false account of the criminal damage matter that is the matter he pleaded guilty to today. On the 11 December 2001, the defendant went to the police station and corrected the statement concerning that incident. He went in without being requested to do so.
18. I have read a transcript of the defendant's evidence before the court including cross-examination. I was very impressed with the defendant. I thought he was honest and convincing, making appropriate corrections and

telling the court of his own volition that sometimes some of the language he used may have given a wrong impression. His evidence before the court does not differ in any matter of substance to his Record of Conversation. His evidence is much more detailed. He was cross examined very comprehensively and skilfully and I genuinely accept the need for the prosecution to properly test evidence of this kind, however, the more difficult the cross examination became, the more the defendant was able to answer in what appeared to me to be a very open and honest manner. He seemed to me to be someone who was prepared to have his actions scrutinised by the court. On the whole, where the evidence of the prosecution lay witnesses and that of the defendant conflict, I prefer, on the basis of credibility, the defendant's version.

Provocation

19. To successfully raise provocation under s 34 Criminal Code, the defendant bears the evidential burden on ensuring there is material, on the issue of provocation for the trier of fact to consider; the prosecution bears the legal onus to the criminal standard to negative: (*Moffa v The Queen (1977) 138 CLR 601*). The *Criminal Code (NT)* requires *evidence of a wrongful act or insult of such a nature as to be likely, that when done to the ordinary person or in the presence of an ordinary person, to deprive him of the power of self control.*
20. I agree with Mr Duguid that this part of provocation involves an ordinary person, in general, in a similar position to the defendant. It does not require the attribution of characteristics as with *Mungatopi v The Queen (1991) 2 NTLR1; Stingel v The Queen (1990) 171 CLR 312*. Here, in my view, there were provocative acts and insults on the part of Mr Hunt. There was the chesting, the comments about Mr Gorman's wife and the general abuse. In the circumstances, I do not think the defendant incited the provocation. In my view the evidence indicates he lost his self control. Mr Duguid has

submitted he acted in a meaningful and intentional way. I don't think so. I think it cannot be negated that the series of incidents led to a loss of self control. He doesn't need to mouth the precise words of the section. To me the defendant's explanation is classic provocation. I also think the defendant's later actions of ploughing into the Kombi provide a circumstantial basis to draw an inference that during the period beforehand, he had lost his self control. It cannot be negated that he acted on the sudden. An ordinary person, with the relevant attributes of this defendant would have acted in the same or similar way. He was reacting out of fear, anger and frustration. He had difficulties with Mr Hunt over a long period and in my view, an ordinary person would have acted in this way.

21. I therefore dismiss the charge. I take the view that the justification on the basis of self defence is not available to this defendant but do not intend to explore those matters.
22. I will hear counsel on the remaining charge

Dated this 15th day of April 2003.

**JENNY BLOKLAND
STIPENDIARY MAGISTRATE**