CITATION: *Peter William Hales v Joseph John Ahfat* [2004] NTMC 037

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| PARTIES: | PETER WILLIAM HALES<br>Informant<br>v<br><br>JOSEPH JOHN AHFAT<br>Defendant |
| TITLE OF COURT: | Court of Summary Jurisdiction |
| JURISDICTION: | Criminal Code, Justices Act |
| FILE NO(s): | 20319202 |
| DELIVERED ON: | 17 May 2004 |
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| HEARING DATE(s): | 31 March 2004; 27 April 2004 and 11 May 2004 |
| DECISION OF: | Jenny Blokland |

**CATCHWORDS:**

CRIMINAL LAW – Aggravated Assault – intention and foresight – Dangerous Act – Alternative verdict – Summary Hearing. Ss 188(2); 154;318 Criminal Code; s17 *Interpretation Act* (NT) *Kelly v Price* (1997) 138 FLR 311; *Sanby v the Queen* (unreported) (NTCCA), 19 October 1993

**REPRESENTATION:**

*Counsel:*

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| Informant: | Mr J Duguid |
| Defendant : | Ms Robinson |

*Solicitors:*

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| Informant: | Office of the Director of Public Prosecutions |
| Defendant: | North Australian Aboriginal Legal Service |

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| Judgment category classification: | B |
| Judgment ID number: | [2004] NTMC 037 |
| Number of paragraphs: | 26 |

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

No.

BETWEEN:

**PETER WILLIAM HALES**
Informant

AND:

**JOSEPH JOHN AHFAT**
Defendant

REASONS FOR DECISION

(Delivered 17 May 2004)

JENNY BLOKLAND SM

**INTRODUCTION**

1. The Defendant is charged with one count of aggravated assault contrary to *s 188(2) Criminal Code (NT)* that on 22 September 2003 he assaulted his former or sometimes partner Evelyn May Yates. The circumstances of aggravation alleged are bodily harm, male on female assault, that at the time of the assault Evelyn Yates was unable to defend herself and being threatened with an offensive weapon, namely a knife. The primary issue emerging during the hearing concerned the question of whether the prosecution could prove the defendant intended or foresaw, (within the meaning of *s 31 Criminal code NT),* the application of force. The defendant has squarely raised accident or a non-intentional infliction of injury. For the prosecution to be successful it must negative that excuse beyond reasonable doubt, or put another way, prove intent or foresight beyond reasonable doubt. At the close of the prosecution case Mr Duguid submitted that if I did

not find the offence proven, I should move to consider whether, in the alternative, the Defendant has committed a *dangerous act* contrary to *s 154 Criminal Code*.

2. The prosecution allegations are that at about 2.30pm on Monday 22 September 2003 the defendant, Joseph John Ah Fat was at the alleged victim's home at 17 De Mestre Court, Moulden. Mr Ah Fat and the alleged victim Evelyn Yates were said to have a long standing relationship. They have many children between them including a nine- month- old baby, (Craig), who is mentioned later in evidence as the events of 22 September unfold. The prosecution alleged the defendant had been drinking, he went inside the house and Ms Yates asked him to leave but he did not leave. She went to the back door of the house and there was a verbal exchange. She called for a neighbour for help. She walked around the side of the house, the defendant followed her with a knife that he had been using in the kitchen. The knife is before the court in evidence. It is a long bladed kitchen knife with a fairly pointy end. The prosecution stated to the court that some facts were uncertain but, it may emerge that the defendant was holding the baby (Craig) when he followed Ms Yates around the side of the house. It is alleged Ms Yates went into the front yard and asked the defendant to give the baby to her, that she took baby Craig from the defendant and that the defendant stabbed her with the knife to the left shoulder causing a shallow wound, (of one to two centimetres) and further, another knife wound to the left chest wall. The victim didn't realise she was cut until she sees blood on the baby; that Ms Yates hands the baby to the defendant and asks him to hand over the knife which he does. It is alleged the defendant then left the premises.

3. It is alleged the Defendant then goes to a public phone box, rings 000, identifies himself and states that [*he's] stabbed his wife*. Police attend to Mr Ah Fat at the telephone box and he confirms that he has stabbed his wife. In a record of conversation taken later he essentially raises lack of intention,

that the wounds were inflicted when he was trying to take Craig from Evelyn. Ms Yates was taken to hospital, treated and sent home. The prosecutor told the court the wounds were not serious. Before the court also is a medical report.

**PROSECUTION EVIDENCE**

**EVELYN YATES**

4. Ms Yates told the court she lives at 17 De Mestre Court Moulden; that she has nine children, the youngest is Craig who is 15 months. She told the court she had been in a relationship with the defendant for many years: that he lived at The Narrows with his aunty: that the day in question he was in the kitchen when she first saw him; that he was very intoxicated; that in the kitchen he was trying to fix himself a feed; that she could see he was drunk and that she asked him to leave; that he asked what the matter was, what her problem was; she says she asked him to leave again otherwise she would get the police; that he got upset with her.

5. Ms Yates said she went out the back of the house and he followed her; that she went into the front yard and he stabbed her; that she saw blood on her baby's hand and she knew she'd been stabbed although she didn't feel the knife going in.

6. Ms Yates said that the defendant followed her into the front yard until he was standing next to her. She said their four year old and two year old children were in the house and Craig was with them in the front yard. She said that the defendant carried Craig out to the front yard; that she grabbed Craig and that (the defendant) Joseph, stabbed her; he took Craig again; that she asked Joseph to pass the knife to her and that Joseph was washing the baby under the tap. She said Joseph passed the knife to her and that the neighbour, (who she had called out to ), rang an ambulance; she said that she left the house out the back because she was scared Joseph might hit her;

that she had called out to a neighbour so that the police might attend and take Joseph back to his auntie's because she didn't want any trouble. She said she had first seen Joseph with the knife in the kitchen cutting up some meat but she didn't see him with the knife in the front yard; she explained that she was confused on whether she had been stabbed or whether she was stabbed by his arm coming down over the back of her shoulder when Joseph was standing next to her. She said she received three stitches but that the injuries did not cause her any pain.

7. In cross-examination she said she had been in a relationship with Joseph for 13 years, that seven of her nine children were Joseph's; she said Joseph stays at his aunties and comes back and forward between the two places. It was suggested to her that she and Joseph were in de-facto relationship and she has not told Centrelink that enables her to obtain a greater sum of money. She disagreed saying she lets him stay in the end room so he can see the kids; she said he comes and goes; she agreed he was living in the house three to four days a week.

8. She agreed he gave her access to his money and she had at times had access to his key card; she agreed that the front dor of the house was not used and the back door was the entrance to the house; she agreed that to enter and exit the house a person needed to access the gate and back door. She agreed that shortly after she told Joseph to leave she walked out of the back door. It was suggested to her that she had packed his bag but she was adamant he had no bag. It was suggested to her that she was aware Joseph had been given $40 by a cousin to go drinking; she said she didn't know about that but she told him he couldn't just turn up whenever he felt like it. She disagreed with the proposition that he had clothes at the house, reiterating that he doesn't live there, he just comes and goes. She agreed it was at the gate that she went for help and she knew that that was the only way Joseph could leave.

9. Ms Yates agreed that when she drank she liked to drink a lot and that she drinks in her back yard; she agreed there were star pickets in her back yard; she agreed she had been drunk in the back yard on many occasions and that Joseph has been there on those occasions,. She agreed that there have been times when she was drunker than Joseph; she agreed that sometimes he started arguments when she was drunk; she agreed that on occasions she had threatened Joseph with weapons including star pickets and knives. She did not agree that she swore at Joseph when she told him to get out; she denied swearing at Joseph except when she was drunk, she denied in particular that she swore at him on this particular occasion. She said that just before the stabbing incident she had just finished cleaning up and she was reading a magazine; she said that the children were with her and that they were playing. She denied the children were crying; she denied there was an argument about her being too tired to look after the children. She said she thought Joseph looked like he had been drinking for two days. She said she didn't see him the day before; she said she could tell he was drunk because of the way he was walking; she said he was staggering. She denied swearing and denied picking things up in the kitchen to demonstrate she was angry; she denied *ranting and raving*.

10. She stated again that Joseph was holding Craig; that Craig was at the back door and that Joseph picked him up from there and followed her into the front yard; she said she didn't think he was intending to leave the house. She agreed the other children were in the house; she said she thought they were in her bedroom watching TV; it was suggested to her that if she was correct about Joseph being intoxicated it seemed inconsistent to leave him there with a child; she said she knows Joseph wouldn't hurt the kids.

11. She told the court again during cross-examination that Joseph had Craig when he came out the front; she said she didn't see the knife at that time; she said she took Craig because she thought Joseph wouldn't touch her if she had Craig; she agreed there was a struggle between she and Joseph over

Craig, however she qualified that by saying it was when Joseph took Craig back; it was after there was blood on Craig, after Joseph handed her the knife. She said it was the first time she was holding Craig was when Joseph *whacked* her with the knife and then she saw the blood; then Joseph got the baby back and she asked for the knife and he gave it to her.

12. Ms Yates denied there was a *struggle* for the baby saying she grabbed the baby off of Joseph. She disagreed with the suggestion that she could have been cut when she grabbed the baby. She said she was stabbed *after* she got the baby from him. She disagreed that she could have been cut when Joseph was trying to get the baby back.

13. Ms Yates agreed that police advised her that in 2001 Joseph had a restraining order against her. She firmly restated that Joseph was intoxicated on this day and that she was sober. She agreed that in 1998 Joseph had to go to hospital and receive stitches because she cut him with a machete. She agreed that in 2003 she was admitted to CAAPS for alcohol problems but that she did not complete the program.

**CONSTABLE WAYNE TILLEY**

14. Constable Tilley produced a taped record of conversation that he conducted with the Defendant commencing 5.18pm on 22 September 2002 in company with Constable Malcolm Marshall. In that record of conversation, the defendant agreed that he had previously told police he had four schooners but was not under the effects of alcohol at the time of the record of conversation. The defendant agrees with the police suggestion that Ms Yates is his de-facto. He told police that on the day before the incident he brought a carton and one of Ms Yate's cousin's brother gave him $40; that Ms Yates went to the Casino. From there, he describes the background to the incident as follows:

> " Ah - Saturday – Saturday night, she came back, its Sunday morning – don't know what time it was, probably 4-5 o'clock in the morning.

And she ? well I got up early and had a shower and that. And she's still asleep and that and babies was crying, the kids you know and gave- made them breakfast and that. And she got up – start you know, and I reckon – we're taking it out on the kids and that you know, smacking them and that …".

15. The central part of the defendant's version of events appears as follows:

"And all of a sudden she's – ah- like- sling/ at things in the house – this kitchen you know. So I just got that packet of meat and walked up in my – and I tried to get that little boy off her so I went like that – see – for what – all about what happened – I forgot the knife in my hand – the knife. And she screaming and that : Oh you stabbing them boy – you stabbed him." So I let her go and I didn't stab the little boy, no cause she's threatened my (me?) a lot of times with knife."

And later in the exchange is as follows:

Tilley: "Yeah, were you angry at her?"

Ah Fat: "I (inaudible) angry. All I wanted to grab my little son off her and I had this bloody knife in me hand – that's all. I didn't meant to stab her and that. Cause she's yelling "Oh you stabbed him in the arm," and that, like and so on. Grab the little fellow off her and had a look – no. So I washed him down – turned the tap on and washed him down. (inaudible) Took his Kimbie off of her . – And the next door neighbour, then he comes swearing at me – run (inaudible) I do. I went and got towel and that and was stopping the bleeding. So I walked off went down public phone and youse came pick me up."

Tilley: Why did you go to the public phone and ring the police?

Ah Fat: Well I don't want to keep on going – you know – go hiding and that. Might as – you now – just get it over and done with it eh – all right – Cause I – I'm not like that hiding myself and that from coppers you know. Best to give yourself up you know. It's not good. Give – Ah get this (inaudible) out.

Tilley: So do you think it's the right thing or the wrong thing to do?

Ah Fat: What's that

Tilley: To – to stab her Evel – Evelyn ?

Ah Fat: Mate that is wrong what I done.

16. Officer Tilley also said in evidence that at about 5.00pm he attended at the phone box when he apprehended the defendant and asked the defendant if he had called police and why. The defendant answered that he had called because he had stabbed his wife. Officer Tilley said the defendant was calm and collected, he was not aggressive and not intoxicated. Officer Marshall said in evidence that the defendant was cooperative, he seemed *down* and Officer Marshall said he couldn't tell if the defendant was intoxicated.

**DONNA LISA VINTON**

17. Before the court also is Ex P7 statement of Auxiliary Donna Lisa Vinton who recorded the conversation when the defendant phoned police. The conversation took place at 1429 hours and the relevant part admitted into evidence is as follows:

I said: Police emergency

He said: Hello

I said: Police emergency

He said: Can I have police

I said: What's going on

He said: I just stabbed my missus, hey can you send.

I said: Where about's are you

He said: Uh, Tamarind Road, public phone

I said: Were you on De Mestre before

He said: Yer

I said: Yer

He said: That's right yer

I said: Just one moment and you just stabbed your wife.

He said: Yer

I said: Is she OK

He said: Yer she's all right

I said: And you are going to wait at the phone box

He said: Yer, I'm waiting here for the coppers to come and pick me up."

From there the defendant gave personal particulars when requested and did indeed wait at the phone box until police arrived.

**AMBULANCE OFFICERS**

18. By consent statements were also received from ambulance officers Waqanaceva and Warren who attended to Ms Yates at her home: (Exhibits P4 and P5). Both officers noted as follows:

> "Her wounds were treated and believed to be relatively minor; she was then conveyed to Royal Darwin Hospital."

**MEDICAL EVIDENCE**

19. Before the Court is a statutory declaration by Surgical Registrar Mark Zonta of Royal Darwin Hospital: (Exhibit P6). Dr Zonta noted Ms Yates

> "…..was stabbed to the left shoulder and left axilla (left chest wall). On examination she was fully conscious and there was no indication that she had been unconscious following the injury. She had two stab wounds, measuring approximately 1 to 1.5cm long and 1 to 2.5cm deep. There was nominal bruising and bleeding from the wounds. Chest examination was normal. There was no injury to her lung. This was confirmed on chest X-Ray. There is not likely to be any permanent physical disability to the patient due to these injuries".

20. I found a prima facie case and no evidence was called in the defence case.

## EVALUATION OF THE EVIDENCE

21. Broadly speaking, I accept the evidence of the complainant in terms of her description of the background of this incident and how it came to be that she was injured by the knife. She was sober on the day in question and she readily admitted to certain behaviours on her part that might put her in a bad light. Her honesty impressed me and I make it clear I do not hold it against her in relation to her description of this incident that she may have previously engaged in drunken violence towards the defendant. Her credibility was however shaken somewhat given she described the defendant as *staggering* drunk. It is clear the defendant had been drinking but one attending police officer did not think he was intoxicated and the other could not assess intoxication. I note that some time passed between the incident and the attendance of police. Although there is some disparity in this part of the evidence, I still think the complainant tried to be honest. It appears to me she feared the defendant on this occasion and that is why she told him to leave. Being afraid is a subjective state of mind and I accept she felt that fear as described. That fear may well be to do with her perception that the defendant was drunk but it is probably also to do with the dynamics of this relationship. The court on these occasions only generally hears a small part of what is obviously in this case, a complex and difficult long- term relationship. The other area of her evidence that lacks clarity is whether there was a *struggle* or not. Her expression changed a deal on how she described the event.

22. In most cases where the complainant's evidence is accepted, that would virtually be the end of the matter. However here, it is not at all clear. The complainant did not see the defendant stab her. She indicated at one stage that he raised his arm above her shoulder; however, she did not see him stab her and was not aware that she had been injured until she saw blood on the baby. It seems to me if someone intentionally stabbed, or even jabbed another person with that knife (which I have examined again in chambers

since the hearing), it would produce a significant injury. It is fortunate for everyone that however the injury occurred, it was not serious in the scale of knife injuries and I note again the ambulance officers' statements and the surgeon's statement in that regard. The fact that the defendant phoned the police saying he *stabbed* his wife made me suspicious, however, that is not enough to find it was intentional in these circumstances. In my view the usual use of the word *stabbing* does connote an intentional act but I cannot say that beyond reasonable doubt that was what was meant by this defendant when he used that word. The defendant's speech and use of language in the record of conversation is fairly basic. In his formal record of interview he clearly told police he didn't mean to inflict the injuries. The other evidence seems to indicate he was indeed cutting up meat in the kitchen and therefore had the knife in his possession for a legitimate use and that when the altercation over Craig occurred he still had the knife in his hand, although he had forgotten that he had it. The complainant states that she did not see the knife. Certain of the other evidence does supports the defendant's version of events which is a main reason that I cannot reject this account. This is not a case where he has come rushing at her to stab her. Having thought long and hard about the matter since the hearing, I cannot be satisfied beyond reasonable doubt that this was an intentional or foreseeable application of force. In the exchange between the two over baby Craig, with the knife in his hand, I can't rule out the scenario that the complainant may have been injured unintentionally.

**THE POSSIBLE APPLICATION OF S 154 *CRIMINAL CODE***

23. I have wondered for some time about whether *s 318 Criminal Code* applies to matters on information heard summarily. Mr Duguid raised this point for consideration at the end of the hearing. Section *318* is in that part of the *Criminal Code* dealing with alternative verdicts. It provides for an alternative verdict of *dangerous act* for murder, manslaughter or other offences against the person when the person is acquitted on the basis of *s 31*

or *intoxication*. Here the defendant has clearly been acquitted on the basis of s *31*. At first blush it would appear that *s 318* could not apply because it refers to *trial on indictment*. As pointed out to me by Mr Duguid, *s 17 Interpretation Act* defines *indictment* to *include information*. I note former Chief Justice Martin said in *Kelly v Pryce (1997) 138 FLR 311* states that the definition *…is subject to the definition yielding to the appearance of an intention to the contrary*. In that case His Honour was dealing with the question of whether a person charged with stealing could be convicted of receiving in the alternative, notwithstanding receiving had not been charged.

24. In his deliberations His Honour indicated that as an alternative to murder or manslaughter, dangerous act could be found proven without the necessity to lay a separate indictment. Because of the different elements involved as between stealing and receiving, His Honour decided in that case that receiving must be separately charged before it can be relied upon as an alternative to stealing whether the trial is in the Supreme Court or a summary matter. If this matter was proceeding in the Supreme Court as a trial on indictment, *s 154 dangerous act* would clearly be open as an alternative without being separately charged. There does not seem to be any reason why it should not apply in the summary jurisdiction in these circumstances, although in my view fairness dictates that the prosecution should open on *dangerous act* and make the particulars of the alleged *dangerous act* clear. In these circumstances the theoretical maximum penalty is less for *dangerous act simpliciter* than it is for *aggravated assault*, although the defendant is disadvantaged by the fact that the jurisdictional limit in penalty for *aggravated assault* is two years. There would be a major inconsistency in the application of the criminal law if *dangerous act* were only an alternative to aggravated assaults being dealt with in the Supreme Court and not in the summary jurisdiction where the vast majority of assaults are dealt with. One matter that goes against this conclusion is that if the defendant were intoxicated, he would be liable to a

much greater penalty by virtue of the circumstance of aggravation of being under the influence of an intoxicating substance. It is not the usual course of alternative verdicts that the alternative charge provide a greater penalty than the primary charge and it may in those circumstances be unfair to allow *dangerous act* to lie as an alternative to aggravated assault. In those circumstances the prosecution probably ought to charge *dangerous act* outright.

25. In my view the arguments at this stage, subject to fairness of trial considerations and considerations generally on whether the alternative is appropriate in a given case, favour the view that *s 154* can be relied on as an alternative to aggravated assault. In this case however, when applying the criteria of dangerous *act* to these circumstances, the prosecution case fails. Applying the case of *Sandby v R (unreported NTCCA, 19 October 1993)*, it is important to recognise that *dangerous act* requires proof of a *serious* danger. In this case, it must be remembered that it is accepted that the defendant had the knife for an innocent purpose. The impugned conduct must be beyond that which might attract a civil remedy. It must also be conduct where the *ordinary person clearly foresees the danger.* The *ordinary person* must effectively put themselves into the accused's position and see if they *clearly* foresee the danger. Here, the defendant forgot he had the knife with him. Would an *ordinary person* cutting up meat in a kitchen, leaving with a child in their arms, forgetting they had the knife and having an altercation *clearly* foresee the danger? I think there has to be some doubt about that. There would also be doubt about whether the act of carrying the knife while holding a baby and exchanging a baby would attract the level of serious criminal negligence that is essentially required by the section.

26. For those reasons I dismiss the charge. I note that this decision was made on 17 May 2004. I explained to the parties that my computer had frozen. The reasons for decision have been retrieved and forwarded on 18th May 2004 to both counsel.

Dated this 17th day of May 2004.

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JENNY BLOKLAND
**STIPENDIARY MAGISTRATE**