

CITATION: *Peter William Hales v Mesfin Tamiru Bahiru* [2004] NTMC 039

PARTIES: Peter William Hales  
(Informant/Complainant)  
v

Mesfin Tamiru Bahiru  
(Defendant)

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal Code (NT)

FILE NO(s): 20322408

DELIVERED ON: 28 April 2004

DELIVERED AT: Darwin

HEARING DATE(s): 21 April 2004

DECISION OF: Jenny Blokland SM

**CATCHWORDS:**

CRIMINAL LAW – aggravated assault – direct application of force – force reasonably need for the common intercourse of life – s 1, s 187(e) *Criminal Code (NT)* ; *Davis v Bennett* [2003] NTCA 7; *Re Marion* (1991-92) 175 CLR 218; *Bouhey v The Queen* [1986] 60 ALJR 422

**REPRESENTATION:**

*Counsel:*

Prosecutor: Mr Carter  
Defendant: Mr Berkeley

*Solicitors:*

Prosecutor: ODPP  
Defendant: NTLAC

Judgment category classification: B  
Judgment ID number: [2004] NTMC 039  
Number of paragraphs: 23

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

No. 20322408

BETWEEN:

**PETER WILLIAM HALES**  
Informant/Complainant

AND:

**MESFIN TAMIRU BAHIRU**  
Defendant

REASONS FOR DECISION

(Delivered 28 April 2004)

Jenny Blokland SM:

**Introduction**

1. The defendant pleaded guilty to two counts of failure to comply with a domestic violence restraining order and not guilty to one count of enter an occupied dwelling with intent to commit a simple offence, namely to assault (contrary to *s 213 Criminal Code* ) and not guilty to one count of aggravated assault (contrary to *s 188(2) Criminal Code* ) , the relevant circumstance of aggravation being that the alleged victim, Eligayehu Fenta was a female and the defendant was a male. These reasons concern the contested charges.
2. It is common ground the alleged victim and the defendant were previously married and have two children who live with the mother (Ms Fenta) at 7 Tong Luck Street Millner. It is common ground that a restraining order was made on 21 August 2003 preventing the defendant from attending at the premises. The incident giving rise to these charges occurred on 3 September 2003.

### **Evidence Called on Behalf of the Prosecution**

3. The prosecution called Ms Fenta who gave evidence that she last lived with the defendant in 2001; that after the separation the defendant visited the children with her consent; that after taking out the domestic restraining order of 21 August 2003 the consent to visit the children was revoked. She gave evidence that on the evening before the incident she had locked the two external doors to the premises; that both doors had security doors and wooden doors.
4. Ms Fenta said that on the morning of the third of September 2003 her son woke her at 7.10 am; that she saw someone riding a push bike at the back of the house; that she called out *who's there?*; that she recognised the defendant; that she ran into her bedroom and locked the door; that the defendant came after her into the bedroom; that he got her on the shoulders in the bedroom; he grabbed her; he shook her; he had his arms and hands on her shoulder and he forced her to sit on the floor; that there was a lot of struggling; he started to pull her hand; he pulled her to the corridor; there was a lot of screaming and yelling; that her neighbour entered the house.
5. She also said the back security door was new and after the defendant had entered, the fly wire was pulled out or ripped apart; the lock on the bedroom door was broken – that she did not break the bedroom door; that he forced the bedroom door by kicking it – that he forced his way in.
6. In cross examination she agreed she had come to Australia with the defendant as her husband from Ethiopia; that her husband had come as a refugee; she said it was not fair to characterise her immigration status as dependant on her husband; when questioned about this she stated she became an Australian citizen in 1998. She said she obtained a divorce from her husband in 1998 and the defendant moved to Darwin after the divorce. She was asked whether she knew the defendant had attempted suicide – she stated she did not. When asked of an incident in 2001 she said she had

received a call from ICU and was told the defendant was seriously hurt after being bashed and she came to Darwin with the children and agreed to look after the defendant. She told the court they lived in the same house; she denied a sexual relationship recommenced. The house spoken of is the current home of Ms Fenta at 7 Tong Luck. Ms Fenta said at that time the defendant was on the lease and that the defendant moved out. She was asked about his relationship with another person and she said she was aware he had a girlfriend; that after the defendant moved out he would come and visit the children; that on one visit he had told her that her parents had died; she agreed she was upset; she agreed he was upset; that he did not tell her of the death of her parents in a culturally sensitive way; that he had hurt her physically and mentally; that it was after he hurt her in her heart that she took out the order against him; that she did not do this to stop him seeing the children; that she told him he could see the children by arranging it through the courts. She denied a constant suggestion that she was making the complaint to stop him seeing the children adding that if she had wanted to do that she would not have come to Darwin in the first place. She agreed when she saw him she screamed, with no words; she agreed the defendant did not say anything before the bedroom; she said at that point she was dialling 000. She agreed he said words to the effect of *please forgive me*. An inconsistency was put to her in relation to her evidence and her statement that her statement said that he had said *let me in, let me in*. She agreed she would prefer her statement on that point; she agreed it was made closer to the time of the event than was her evidence.

7. It was put to her she invented the story of him dragging her to the ground and that she alleged violence as a way to control access; she denied this saying she obtained the order for her own good. She agreed that he was asking forgiveness on his knees and holding her hand; that he may have been seeking forgiveness but he was very violent; that the words of forgiveness

were with the actions of violence. In re-examination she was asked about how the defendant held his fist towards her; she said it was close to her face.

8. The neighbour Ms Lillian Rahabariaoa gave evidence that she lived at 5 Tong Luck Street, a few metres from number 7; that she was living with her two sons; that she woke up to a loud bang coming from next door at about 7.00am; that children were screaming; that she went through the main entrance; the wooden door was open but the screen door was shut; she couldn't remember who opened the door; that she went inside and saw Ms Fenta in the living room by the door; kneeling on the floor in front of Ms Fenta was the defendant who was clinging to Ms Fenta; that when she walked in Ms Fenta pointed to the back door saying *look he broke the door*; that she saw the door and the security screen was ripped half the way down; that Mesfin (the defendant) was begging Ms Fenta to take her back; asking her for forgiveness; that he was holding onto her; that Ms Fenta was asking him to leave or she would call the police; that she herself asked the defendant to leave which he did; that she was trying to push the defendant away; that she thought the defendant looked drunk because of his eyes and she could smell alcohol.
9. In cross examination she agreed Ms Fenta was standing and yelling; that the defendant was crying; that they were both talking; it was suggested to her that he did not ask to be taken back – she said he did; that he possibly was crying when he left on his push bike; that she had taken Mesfin's arm and pulled him away and he didn't resist; she agreed he was distraught and he offered no violence.
10. Jahari Hobman was called who at that time lived with his mother in 5 Tong Luck Street. He also woke to the loud bang; he followed his mother to the front door; he called the police; that the defendant was on the floor clinging to Ms Fenta; that he was pleading to be able to come back. In cross examination he said he thought the defendant was squatting; he didn't see

his knees on the ground; he confirmed the defendant did say please let me back; he saw Ms Fenta attempting to get up and he didn't see her being pulled down.

11. Kadek Hobman, also from 5 Tong Luck St said he heard a bang; there was loud screaming; that it was from more than one person; that the screaming died down; that when he went next door he saw the defendant, Ms Fenta and their children; that the children were crying. He agreed in cross examination that the defendant asked for forgiveness and said please take me back; that the defendant rode away.
12. Constable Hancock gave evidence that she attended the house on that day at about 7.15; she observed Ms Fenta and two children; that the rear security door had the mesh pulled out of the frame; that the bedroom door looked as though it had been kicked - the lock was broken; that the lock was also broken on the back door; that she phoned the defendant who voluntarily attended the Peter McAuley Centre and participated in a record of conversation. That record of conversation was tendered without objection and is primarily directed to the question of the restraining orders and court records concerning them. There was little asked directly in relation to the alleged assault.
13. Mr Bahiru, the defendant gave evidence that he is 37 years of age and a graduate of Adis Abeba University in Ethiopia in 1988; that he came to Australia as a refugee with Ms Fenta who he first met in 1992; that they divorced in 1998; that after this time he had a psychological break down, tried to take his life, was lonely and frustrated and spent some time in St Vincent's hospital in Melbourne trying to recover. He said he and Ms Fenta got back together in 1999 in Darwin; that in 2001 he was bashed by someone with a didgeridoo; he was in hospital for a lengthy time; he had previously been a maths tutor at Kormilda but has been on a disability support pension since the assault. He maintained he still had a sexual relationship with the

alleged victim after the divorce, including when they were both living at Tong Luck Street.

14. Mr Bahiru said he moved to a residence in Bremer Street, Coconut Grove after a discussion or an argument with Ms Fenta about her wanting to bring her brother to Australia as her husband and that he (Mr Bahiru) would need to move out in case immigration came to check. He said he received news from his son that there was a new dad, a white man. He felt he had to go and see her and said words to the effect of I've done everything for you – your mum and dad have passed away. He said he kept this from her in the past few years. He said Ms Fenta couldn't believe this; he said that he did not break the news in a culturally appropriate way; that after that he was served with an interim order; that she was angry; that she didn't let him see the children after that. He said his only intention on the day of the offences was to ask for forgiveness because he thought he was losing his children for good. He said when he approached she ran away from him; that with the back door he was able to tear apart the screen, put his hand through and open the door. He said Ms Fenta was telling him to get out but he tried to tell her the only reason he was there was he was wanting to talk to her; he said he knelt down and put his hands on her thigh; he pushed the bedroom door open; that he held her hand and cried on her; that his son was in the room; he denied that he hit her or forced her to the ground; that culturally, in his culture you would hug someone if you wanted forgiveness; he admitted touching but said it was holding her hand and kneeling down. He said she was struggling and telling him to get out. He said she had slammed the door of the bedroom but he did not apply any force. He said Lillia, one of the witnesses took her by the arm and led her through the hall way; he said he apologised for breaking the news to her. He said his actions were all about being able to see the children. He said when she was in the bedroom he was pushing the door on one side and she was pushing from the other

side. He said he was walking on his knees and his knees were bleeding. He said Ms Fenta called the police.

15. In cross examination he was asked about the order and said he knew there was an order in force preventing him from going into the house; he agreed he had had some drinks; he agreed he knew Ms Fenta did not want to talk to him. It was put to him that he was prepared to use force to make her listen; he said he only forced the door because she had denied access; he agreed she told him to get out when she first saw him; he said there was no lock on the bedroom door; he said he didn't damage the bedroom door; that she may have damaged it when she slammed it; he agreed to tapping her only and to hold her because he said this was consistent with his culture; he denied using force; he denied raising his fist; he restated that this was all false allegations to stop him seeing the children.
16. I found Ms Fenta's evidence to be given in a coherent and logical way. Mr Berkely submits I should direct myself not to rely on her evidence unless it is confirmed by other evidence because of her bias towards the defendant. I have thought about that seriously however in my view Ms Fenta has approached the problems that have faced both of them as revealed in these proceedings in a fair way. For a number of years access was not a problem. She was even prepared to look after her ex-husband after he was injured badly with tragic consequences. She was clearly upset about the disclosure of the death of her parents – that was evident in her giving evidence. After vigorous cross examination she was not shaken and calmly gave her evidence. I don't consider at all that the circumstances involve a motivation on her part to allege violence to facilitate denial of access. She came across as honest and did not exaggerate her case, nor did she gratuitously attempt to undermine the defendant in her evidence. She was clearly in fear of the defendant at the time of this incident as her actions demonstrate. The neighbours confirm the defendant had hold of her outside of her bedroom and he was asking forgiveness and was asking to be able to come back. The

circumstances do not support a conclusion that she left the bedroom willingly with the defendant; it is clear she wanted him to leave her home and she had taken refuge in the bedroom.

17. The defendant's evidence is peppered with incredulity – an example being that he claimed his knees were bleeding because he'd been on the ground for so long. The mode of entry of the home; the evidence of alcohol consumption by the defendant; the mode of entry of the bedroom all point to someone who was acting quite irrationally. Even if he merely broke the screen of the back door and put his hand in and opened the door, he was highly motivated to get to Ms Fenta. Even if he pushed the bedroom door open rather than kicked it as alleged – it is evidence of someone highly emotionally charged. That is clear from all of the evidence. The neighbours who were called did not see any assaults, but they were not present when they were in the bedroom. One of them released the defendant's hold and persuaded him to go. The defendant also came up with the explanation about Ms Fenta wanting to bring her brother out to Australia as her husband. Although I don't draw an inference against him because of this, this was never put to Ms Fenta and is therefore impossible to assess. The defence case also involved putting to each witness that the defendant did not ask to be taken back – each of the neighbours who I regard as impartial rejected that suggestion. Although I cannot help but feel sympathetic towards the defendant's plight in the sense that he does appear to be someone who has been damaged by the events of life, his evidence does not detract from my conclusion that the prosecution has proven the assault allegations beyond reasonable doubt. I reject the defendant's denial of the assault.
18. The evidence of Ms Fenta persuades me beyond reasonable doubt that the assault occurred in the manner she described, namely, he grabbed her by the shoulders, shook her, forced her to the floor; physically forced her to go out of the bedroom. I also find beyond reasonable doubt that he raised his fist. He was intent, at least after she ran away from him, of using force to make

her listen to him when she clearly didn't want to. It was argued her evidence should be discounted also because she gave evidence that all doors were locked and yet clearly the neighbours entered through the front door. I consider that matter to be so far on the periphery that it can hardly be said to detract from her evidence. There is no doubt she believed all doors were locked the night before. It was also mentioned that neither of the children of Ms Fenta or Mr Bahiru were called to give evidence. In a case such as this where the parents are the main actors, and there is evidence of distress on the part of the children at the time of the incident, I would not be prepared to draw an adverse inference against the prosecution for not calling them.

19. At the prima facie case stage and at the conclusion of the evidence, defence counsel argued that the various acts such as placing his hands on her shoulder; holding her hand and various acts of touching could not amount to a direct application of force as provided in the Criminal Code. It was submitted there was no evidence of the element of causing injury or personal discomfort as required by s 1 Criminal Code, concerning the definition of application of force. Application of force is defined as include striking, touching, moving and the application of heat, light, noise, electrical or other energy, gas, odour or any other substance or thing if applied to such a degree as to cause injury or personal discomfort. With respect, this form of reasoning directly contravenes the authority of the Court of Appeal (NT) in *Davis v Bennett* [2003] NTCA 7 where for example His Honour Justice Mildren at para 16: The expression used in s 187(b) is the “attempted or threatened application of such force”. As to the respondent’s contention interpreting this to mean the attempted or threatened striking or touching “to such a degree as to cause injury or personal discomfort” I think that overlooks the words in the definition of “application of force”, “if applied to such degree”. In my view, those words must relate back to the words “the application of heat, light, noise, electrical or other energy, gas odour or other substance or thing”. It is difficult to see how in ordinary language a

striking could be “applied to such a degree as to cause injury or personal discomfort”. It is not so much that a striking may not cause injury or personal discomfort; the difficulty is that in ordinary language one does not speak of “striking” being “applied”. His Honour also relied on the High Court authority of *Re Marion* (1991-92) 175 CLR 218 as support for the proposition that the definition of assault in the Criminal Code NT supports the proposition that physical contact or threat of it was prima facie unlawful. His Honour Justice Riley added that the construction adopted by the Court of Appeal was consistent with the other Code States. The former Chief Justice agreed with both Justice Mildren and Justice Riley.

20. Further, it was argued that the acts complained of could be regarded as coming within the exception under s 187(e) Criminal Code, ...used for and is reasonably needed for the common intercourse of life. While I think it is possible to take a reasonably broad and inclusive view of how this might be applied, context is important. The High Court have said of equivalent Tasmanian section It excludes from an “assault” any “act” which is “reasonably necessary for the common intercourse of life if done only for the purpose of such intercourse, and which is not disproportionate to the occasion”. The effect of this provision is to exclude from “assault”, for the purposes of the Code, common place, intentional but non-hostile acts such as patting another on the shoulder to attract attention or pushing between others to alight from a crowded bus. Such acts are, if committed inoffensively, regarded by the common law as ordinary incidents of social intercourse which do not, without more, constitute batter: (*Boughey v The Queen* [1986] 60 ALJR 422 at 427
21. .The defendant would argue he was seeking forgiveness and culturally certain acts were acceptable within Ethiopian culture. Even on his version of events, in the context of the existence of a restraining order or the expressed view of the victim not to want the defendant on her premises at all, this was not conduct reasonably needed for the common intercourse of

life. There was nothing reasonable about the defendant's conduct on this occasion. It was an act executed offensively and could not possibly be contemplated as coming within the exception without seriously undermining the principles of protection of personal integrity at the core of the law of assault.

22. I cannot find beyond reasonable doubt the precise mode of entry by the defendant; hence I do accept that he may have removed the fly screen and opened the back door. I cannot find that he kicked the bedroom door open, but he definitely forced his way into the bedroom and damaged the door as observed by Ms Fenta and police. No-one saw what method he employed. I am not entirely sure at what point the defendant formed the intent to assault. It may have been at the time he entered the house or it may have been at the time he entered the bedroom. Even with the assistance of s 214 Criminal Code as an evidential aid I still have to be satisfied to the criminal standard that the intent was formed at the point of entry. Given much of the evidence from both the prosecution and the defence supports the notion that the defendant entered the home with intent to seek forgiveness I cannot be so satisfied that at the point of entry he possessed the intent to assault.
23. In conclusion, I find the charge of aggravated assault proven and make a finding of guilt. I dismiss the count of unlawful entry with intent to commit an assault.

Dated this 28<sup>th</sup> day of April 2004.

Jenny Blokland

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STIPENDIARY MAGISTRATE