CITATION:	*Mark Nash v William Edgar Reed* [2004] NTMC 086
PARTIES:	Mark Nash v William Edgar REED
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	KATHERINE
FILE NO(s):	20413228
DELIVERED ON:	9 December 2004
DELIVERED AT:	KATHERINE
HEARING DATE(s):	3 November 2004, 6 & 9 December 2004
DECISION OF:	D LOADMAN, SM

CATCHWORDS:

Assault – single blow delivered at antagonist – bystander struck in area of the eye – application of Section 31(2) Criminal Code Act – raising of Section 318 Criminal Code Act after all evidence for prosecution and in relation to which the prosecution did not open – ability to rely on such Section denied.

REPRESENTATION:

Counsel:

Informant:	Mark Nash (Sergeant)
Defendant:	S O'Connell

Judgment category classification:	B
Judgment ID number:	[2004] NTMC 086
Number of paragraphs:	32

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

No. 20313228

BETWEEN:

Mark NASH
Informant

AND:

William Edgar REED
Defendant

DECISION

(Delivered 9 December 2004)

Mr David LOADMAN SM:

PRELIMINARY

1. In the town of Katherine in the Northern Territory there is a den of iniquity posing as a nightclub and until recently bearing the name of Rio's. It is notorious for spawning, on a regular basis, drunken disturbances and intermittent violence.

2. Recently the owners, perhaps because of the reputation of Rio's, have changed its name. It is now known as The Base nightclub. Probably the architects of the name change are not aware of the fact that one of the meanings to be attributed to that word is, to quote from the Concise Oxford Dictionary, 6th edition:

> "Morally low; cowardly, selfish, mean, or despicable; menial."

3. In the event, in the antithetical sense to Shakespeare's rose in his sonnet, change of name or not it is still a den of iniquity.

4. On 6 June 2004, an incident took place at about 4.00 am in the morning, giving rise to charges being laid against William Edgar Reed, a male born 8 October 1985. Those charges in precise terms are as follows:

> **"INFORMATION FOR AN INDICTABLE OFFENCE**
>
> The Information of **Mark NASH** Sergeant of Police of KATHERINE taken this 7th June 2004, before the undersigned, a Justice of the Peace for the Northern Territory of Australia, who, upon oath or affirmation states that
>
> **William Edgar REED**, (Male, 08/10/1985) of 10 CASSIA CRT, KATHERINE, NT, 0850.
>
> On the 6th June 2004
>
> at Katherine in the Northern Territory of Australia.
>
> unlawfully caused bodily harm to Rosemarie Braun.
>
> Section 186 of the Criminal Code.
>
> Taken before me the day and year first above mentioned at Katherine, in the said Territory."

and

> **"COMPLAINT**
>
> The Complaint of **Mark NASH** Sergeant of Police of Katherine taken this 7th June 2004, before the undersigned, a Justice of the Peace for the Northern Territory of Australia, who, upon oath or affirmation states that
>
> **William Edgar REED**, (Male, 08/10/1985) of 10 CASSIA CRT, KATHERINE, NT, 0850.
>
> On the 6th June 2004
>
> at Katherine in the Northern Territory of Australia.
>
> did resist a member of the police force in the execution of his duty:
>
> Contrary to Section 158 of the Police Administration Act.

> Taken before me the day and year first above mentioned at Katherine, in the said Territory."

5. The incident took place at the, or one of the exits, to the south of the Crossways Hotel building in which exists, amongst other facilities, the last Chance Saloon and well it may be. This southern exit comprises a level area approximately 5 metres wide and 2 metres deep, the descent to the footpath comprising 4 discrete steps and the distance from the last step to the kerb of the main street being approximately 5 metres. At about 4.00am on 6 June 2004, a number of people having left the nightclub, were between the front door of same and the footpath in front of that door.

6. None of the witnesses volunteered how many people were congregated in this area, nor was there any revelation about the gender of those people. What is certain is that the defendant, William Reed, one Damien Hughes who had through the day been in company with Bradley Bronghur, the latter and Rosemarie Braun were there, amongst other people.

7. In the so called record of interview, to which there will be reference later, the Court believes that the defendant estimated the total number of people present in that area as 6 or 7 at the relevant time.

8. All the witnesses who observed the physical contest which took place between Bradley Bronghur and the defendant, more or less agreed those two were pushing, shoving and hitting one another, although there were divergent observations as to which one of the two commenced the contest. For the Court's purposes, resolution of that issue simply does not matter. It is inescapably the case that a blow from the defendant struck Rosemarie Braun in the area of her right eye and not her left as deposed by Damien Hughes. As a consequence of receiving this blow, she fell to the ground and was probably unconscious for a short time before she was taken to hospital and treated. All the witnesses and all the participants were, on their own admission, in an advanced stage of intoxication, with the exception of the

security guard, Alan Taylor. The evidence of those people clearly must be looked at in the light of the fact that they were intoxicated. Damien Hughes asserted that it was he who attempted to prevent the continuation of the contest between the defendant and Bronghur. It was his evidence that Bronghur was "in toe-to-toe" with the defendant; that he was standing behind him (Bronghur) and that Rosemarie Braun in turn was standing behind him (Damien Hughes). In relation to the blow, which undoubtedly caused the injury to Rosemarie Braun, his evidence was that Bronghur ducked out of the way, that he in turn ducked out of the way and although he didn't see the blow land, it clearly landed on the right eye area of Rosemarie Braun, who didn't duck out of the way.

9. There was no evidence from Bronghur as to the position of Rosemarie Braun at any time prior to her being felled by the blow previously referred to. Alan Taylor, the security guard, actually saw Rosemarie Braun receive the blow. Prior to the blow landing, she had been standing against the wall, the Court believes, on the eastern side of the steps referred to and his evidence was, that as the blow was travelling, she moved off the wall and directly into the path of the punch which was clearly aimed by the defendant at Bronghur. He said there was no verbal communication between the defendant and Rosemarie Braun that he observed. In cross examination, he agreed with Mr O'Connell, Counsel for the defendant, that the blow landing was "clearly an accident".

10. An off-duty police officer by the name of Kennon was present. This witness had started drinking Bundaberg Rum, presumably with a mixer of some sort, at about 7.30pm and thereafter had attended the nightclub. As is often the case with intoxicated people, he believes that his powers of observation were nevertheless not affected by his intoxication. It was he, and only he, prior to the blow in question landing which he testified was clearly aimed at Bronghur, who said that Rosemarie Braun was trying to break up the fight. In part of his evidence, he placed her between the defendant and Bronghur,

which on the evidence of everyone else cannot be correct. In cross examination he had Rosemarie Braun trying to pull, Damien Hughes, said to be wearing a green shirt, away from the contest between the defendant and Bronghur. His evidence was that the defendant clearly was trying to hit Bronghur when Rosemarie Braun was struck, bearing in mind that nobody else places Braun between the defendant and Bronghur in the fight and that he otherwise gave no evidence about where she was, his evidence must be suspect or his recollection impaired by alcohol.

11. It is remarkable that this version, which is in isolation and different to all other versions in relation at least to the position of Rosemarie Braun at material times, seems to have inspired not only the police but the prosecutor to pursue a finding of guilt against the defendant with alarming zealotry.

12. The evidence of Rosemarie Braun was admitted by consent, by way of a statutory declaration sworn the 6 June. She says that whilst the contest was continuing, she was on the stairs, which could have been of course on one of four steps, the next thing she knew someone hit her in the right eye. She recalls that Damien Hughes was with her. She does not say that she attempted to break up the fight, nor does she say that she was anywhere near the contest between Bronghur and the defendant, which one would have thought might have dissuaded those charged with the prosecution of the defendant, that to proceed on the evidence of the undoubtedly intoxicated Kennon was a most unwise course of action and one that was palpably unfair and uncalled for in the light of all of the evidence.

13. In relation to the second charge, Mr O'Connell conceded there was a case to answer and ventilation of the facts in respect of that charge is not consequently embarked upon.

14. Section 31 of the Criminal Code is the section which deals with the relevant mental element in respect of the charge of assault against the defendant and is in the following terms:

> **"31. Unwilled act, &c., and accident**
>
> (1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.
>
> (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission, or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.
>
> (3) This section does not apply to the offences defined by Division 2 of Part VI."

15. Crisply, it is the prosecution's contention that the Court must find that Rosemarie Braun was either between the defendant and Bronghur, or trying to pull Hughes away from the immediate area of the contest. Urging the Court to come to that finding the argument then continues, that failure on the defendant's part to acknowledge that he saw and was aware of the presence of Rosemarie Braun, is indicative of the fact that he is exhibiting wilful blindness and that as a consequence he must have foreseen, at the very least, that a blow aimed at Bronghur would connect with the person of Rosemarie Braun.

16. That argument is specious.

17. First of all the Court rejects the submission that it must find the position of Rosemarie Braun to accord with the evidence of the off duty police officer, Kennon and prefers the evidence of the security guard, Taylor, who was sober, as to her location immediately before she was struck.

18. Further, and in any event, merely because she was present, to assume the fiction for the purposes of the argument, does not necessarily create the need to make a finding that the landing of the blow was foreseen within the meaning of section 31 (1) of the Criminal Code. Further, and even it was,

and even if it should have been foreseen as a possible consequence of the defendant's conduct, in terms of section 31 (2) if an ordinary person similarly circumstanced would have proceeded with that conduct, he is excused from criminal responsibility. As the Court remarked to the prosecutor in an exchange, if any person was aiming blows at an ordinary person, he would most likely retaliate and/or defend himself and on the basis of section 31(2), the defendant would escape any finding of guilt. These arguments did not appeal to the prosecutor, who then subjected the Court to having to endure the playing of a so called record of interview conducted by one Jason Bradbury on Sunday 6 June 2004 in company of Julie-Ann Oakes.

19. In the event, Bradbury undoubtedly acting at least in his perception with the empowerment of section 137 (2) of the *Police Administration Act*, read section 140 of that Act, then interviewed the defendant who was accompanied by his mother.

20. The Court was obliged to suffer listening to the so called record of interview, but only of course in relation to the assault and the light of the concession made by defence counsel, not in relation to the charge on complaint, of resisting police.

21. In exercising a statutory power to do something which would otherwise be an infringement of civil liberties at the very least, requires that power be exercised professionally, ethically and within the bounds of commonsense. The relevant interview, or portion of it, endured for approximately an hour and firstly was pathetic in that the lack of control of the defendant's mother, who constantly indulged in outbursts was lamentable. Generally the atmosphere prevailing, was more indicative of a circus than anything else. That, however, is merely an exemplification of the ineptitude of Bradbury, whose ignorance of the law in relation to intention and section 31 was demonstrably profound.

22. That incompetence and lack of professionalism however, is not the evil to attach to this so called record of interview.

23. Like a dog with a bone, or like a dog returning to its own vomit, Bradbury returned more than 10 times to the repeated scenario, predicated on the fact that it was an unassailable truth, that Rosemarie Braun was either between the defendant and Bronghur, or in the immediate vicinity and tried to pull Hughes away. The defendant consistently and repeatedly denied that he was ever aware that Rosemarie Braun was there, and certainly denied that at any time he aimed a blow she was within his sight. Notwithstanding the denial on each occasion, Bradbury returned to the scene and endeavoured to unfairly pressure the defendant to making admissions or make concessions, which in Bradbury's ignorance he must have thought would suffice for the purposes of securing a finding of guilt. His inexorable persistence in so conducting himself on the multiplicity of occasions amounted, in this Courts view, to harassment and certainly to such conduct as to be objectively regarded as unprofessional, unfair, incompetent and uncalled for. Notwithstanding, the excesses and lack of propriety embarked upon by Bradbury, he extracted no concession from the defendant such as he was endeavouring to extract.

24. At the conclusion of the ventilation of the so called record of interview in respect of the assault mater, the Court again returned to section 31 of the Criminal Code and posed to the prosecutor, in respect of the no case contention, that the prosecution could not secure a finding of guilt in light of the state of the evidence and the state of the law. No doubt, and hopefully, instructed thereto, like the drowning man clutching at the straw, faced with the inevitable upholding of the no case submission for reason of a total lack of foreseeability reposing in the defendant as to the blow that struck Rosemarie Braun, the prosecutor reached for the straw said to be available to the prosecution as a consequence of section 318 of the Criminal Code.

25. That section of that legislation is in the following terms:

> **"318. Charge of offence against the person where section 31 or intoxication is a defence**.
>
> Upon an indictment charging a person with murder, manslaughter or any other offence against the person, if he is found not guilty of the crime charged or any other offence of which he might otherwise be found guilty upon that indictment by reason of the provisions of section 31 or intoxication, other than intoxication of such a nature that the provisions of section 43C apply, he may be found guilty alternatively of the offence defined by section 154 with or without any of the circumstances of aggravation therein set out."

26. The prosecution urged that if a finding of guilt was defeated by the provisions of section 31 of the Criminal Code, the Court ought to proceed to find the defendant guilty of an alternative charge of section 154, that section being in the following terms:-

> **"154. Dangerous acts or omissions**
>
> (1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years. (See back note 2).
>
> (2) If he thereby causes grievous harm to any person he is liable to imprisonment for 7 years.
>
> (3) If he thereby causes death to any person he is liable to imprisonment for 10 years.
>
> (4) If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.
>
> (5) Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section."

27. In aid of this submission, the prosecution sought to rely upon a decision in *Hale v Ah Fat*, file number 20319202, delivered 17 May 2004, being a decision of Ms Blokland SM. The argument proceeded further, that in any event further authority for the soundness of the proposition was to be found in the decision of Martin CJ in *Kells v Price* (the citation is obscured in the photocopy of the report handed up to the Court and the only readable portion is "…438 (FLR) Page 311").

28. Historically, in the Court of Summary Jurisdiction, there has not in the Court's experience been recourse to the provisions of section 318 of the Criminal Code, no doubt because the application of that section on the face of it, is related to a charge "upon an indictment charging a person …". In the event, it is not necessary for this Court to make a decision as to whether or not in the Court of Summary Jurisdiction, the Court is so empowered. The reason why the Court does not need to make that decision is because of, with respect, the unequivocally correct observations of her Worship, Ms Blokland, set out in paragraphs 23 – 25 of the said decision. Some of her comments, the Court chooses to set out in its decision, namely "…although in my view fairness dictates that the prosecution should open on dangerous act and make the particulars of the alleged dangerous act clear." That did not occur in this matter.

29. In this case, not only did the prosecution not open on dangerous act, it did not even mention it until the eleventh hour and in circumstances where the analogy of grasping for the straw by the drowning man is also the appropriate classification of such action. It is entirely inappropriate, and I rule unavailable, as course of action for reason that it would be unfair, was never notified and obviously was not even mentioned until the eleventh hour.

30. That however is not the end of the matter. Clearly what we are concerned with in this case is the blow by the defendant, a man of small stature and 19

years of age, apparently striking Rosemarie Braun in the area of her right eye. Even if section 154 could have been engaged by the prosecution in this matter, which I have ruled it cannot, the prosecution case would nevertheless inevitably fail. Section 154 is set out above in this decision. Clearly in subsection 1 the act must be one that "causes serious danger" but further that "an ordinary person … would have clearly foreseen such danger". It would be an exercise in verbal prodigality to explain why the aiming of a single blow in the circumstances such as these, could not possibly amount to the degree of danger which would invoke and justify the application of Section 154 of the Criminal Code. That of course is also made clear by the decision of *Sandby v R* cited by her Worship in paragraph 25 of her decision. The suggestion that it could in the remotest conception of objectivity be lawfully engaged for the purpose of finding the defendant guilty in this case, is beyond risible and the submission is utterly refuted.

31. It is this Courts unequivocal finding, not that there is an insufficiency of evidence upon which a jury properly instructed might convict, but that there is absolutely none and in the circumstances the Court upholds the submission that the defendant has no case to answer in relation to charge 1 and is consequently found not guilty.

32. Because of the existence of the convention in respect of prohibiting cost orders, once again this Court finds itself unable to express its opprobrium by making a costs order, which it would but for the convention have made, on a solicitor and own client basis or even de bonis propriis.

33. It is a matter of some sadness to the Court to have been involved in a matter which has so many unsatisfactory and unsavoury actions of the police force of the Northern Territory in the Prosecution of this case. It is an exemplification of the sort of the conduct that justifies the police Ombudsman being appointed to deal with matters of this kind.

34. It may be that the defendant in social terms can be described as a serial pest. He may be provocative and cheeky and a trouble causer. He is 19 years old. He is not Jack the Ripper.

Dated this 9th day of December 2004

DAVID LOADMAN
STIPENDIARY MAGISTRATE