CITATION: *Mark Nash v Maxwell Gregory Lansen* [2005] NTMC 003

PARTIES:	Mark Nash
	v
	Maxwell Gregory Lansen
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Katherine
FILE NO(s):	20422872
DELIVERED ON:	27 January 2005
DELIVERED AT:	KATHERINE
HEARING DATE(s):	6 December 2004
DECISION OF:	D LOADMAN, SM
CATCHWORDS:	"Assault a female" – finding of guilt 1/11/04 on same facts, "fail to comply with a restraining order" – plea not guilty – 6/12/04, no case to answer submission – court finding that 1/11/04 decision constitutes a defence in terms of Section 18(b) of the Criminal Code.

REPRESENTATION:

Counsel:

Informant:	Mr Mark Nash
Defendant:	Mr Peter O'Brian

Judgment category classification:	B
Judgment ID number:	[2005] NTMC 003
Number of paragraphs:	33

IN THE
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20422872

BETWEEN:

Mark NASH
Police

AND:

Maxwell LANSEN
Defendant

DECISION

(Delivered 27 January 2005)

Mr David LOADMAN SM:

THE CHARGES

1. To the charge on complaint, being an alleged breach of the *Domestic Violence Act*, the Defendant pleaded not guilty and the matter was fixed for Hearing in Katherine, the circuit commencing 6 December 2004.

2. The Defendant in this matter is charged:

(a)

"COMPLAINT

The Complaint of Mark **NASH** Sergeant of Police of KATHERINE taken this 7th October 2004, before the undersigned, a Justice of the Peace for the Northern Territory of Australia, who, upon oath or affirmation states that

Maxwell Gregory LANSEN, (Male, 23/08/1983) of HOUSE 29, KALANO COMMUNITY, KATHERINE, NT, 0850.

On the 6th October 2004

at Katherine East in the Northern Territory of Australia.

2. being a person against whom a restraining order issued in accordance with the Domestic Violence Act was in force, and having been served with a copy of that order, you failed to comply with the terms of that order;

Contrary to Section 10 of the Domestic Violence Act."

and (b)

"INFORMATION FOR AN INDICTABLE OFFENCE

The information of **Mark NASH** Sergeant of Police of KATHERINE taken this 7th October 2004, before the undersigned, a Justice of the Peace for the Northern Territory of Australia who, upon oath or affirmation states that

Maxwell Gregory LANSEN, (Male, 23/08/1983) of HOUSE 29, KALANO COMMUNITY, KATHERINE, NT, 0850

On the 6th October 2004

at Katherine East in the Northern Territory of Australia

1. unlawfully assaulted Lavina Woodroffe.

AND THAT the said unlawful assault involved the following circumstance of aggravation:

(i) That the said Lavina Woodroofe was a female and the said Maxwell Lansen was a male.

Contrary to Section 188 (2) (b) of the Criminal Code."

3. To the charge on information, the Defendant pleaded guilty on 1 November 2004 in Katherine.

4. He was duly found guilty as charged on that charge.

5. The basis, upon which the finding of guilt was based, is set out in a specified passage from the transcript, being P2 in these proceedings and comprising the agreed facts.

6. The Agreed Facts (Transcript P4,5):-

> "MR NASH: Yes, your Worship. On 6 March 2003, a s 4 domestic violence retraining order, case 20303500 was issued in the Katherine Court of Summary Jurisdiction, the applicant being Lovina Woodroffe and defendant being Maxwell Lansen.
>
> The order and said conditions took effect on 6 March 2003, remain in force until 6 March 2005. On 6 September 2004 and by consent and without admissions, amendments were made to that restraining order in Katherine and the conditions now, the defendant: (1) not assault or threaten to assault directly or indirectly Lovina Woodroffe; (2) not damage or threaten to damage property in the possession of Lovina Woodroffe; and (3) not behave in an offensive or provocative manner towards Lovina Woodroffe.
>
> HIS WORSHIP: Yes.
>
> MR NASH: During the afternoon and early evening of Wednesday 6 October 2004, the defendant was drinking alcohol with friends. At approximately 8 pm the defendant was present in the front yard of 39 Acacia Drive in Katherine East, accompanied by his de facto wife Lovina Woodroffe, the victim in this matter.
>
> At about this time, the defendant became agitated and began to argue with his wife. Shortly after this the defendant became enraged and delivered a full blown kick with his right foot which impacted into the left side rib area of the victim. The force of the unexpected blow caused the victim to stagger and fall against a nearby fence. She then fell to the ground.
>
> HIS WORSHIP: Fell against what?
>
> MR NASH: She fell – she - - -
>
> HIS WORSHIP: Against a what? I just didn't hear what you said. She fell against something.
>
> MR NASH: - - - and fall against a nearby fence, then she ended up on the ground.

HIS WORSHIP: Yes.

MR NASH: The defendant then demanded that the victim get up and walk with him to his mother's flat along Acacia Drive. Fearing for her safety, the victim complied. Whilst the defendant was temporarily distracted, speaking with his mother, the victim managed to run further along Acacia Drive and into the rear of the Katherine Police Station where she reported the matter.

At approximately 2355 hours the defendant was walking along Katherine Terrace when he was apprehended by police and conveyed to the police station. On the morning of 7 October, the defendant was again informed of the allegations. He was invited to participate in a record of interview, however declined to make any comments.

He was then charged and appeared in court. At the time of the offence the defendant did not have permission to threaten or assault Lovina Woodroffe in any way, form or manner. As a result of the actions of the defendant, the victim sustained bruising to the left side ribs. She was conveyed to the Katherine Hospital for a medical assessment.

Those are the facts in that matter, your Worship."

7. In relation to the charge of breaching the *Domestic Violence Act* on 6 December 2004, the Prosecution led no evidence, but tendered the Defendant's antecedents, the agreed facts relating to the assault charge, the domestic violence order of 6 March 2003 (P2 in the proceedings) and the varied domestic violence order of 6 September 2004 (P3 in the proceedings).

8. There is no purpose in the Court's perception in setting out the initial domestic violence order. As at the date of the alleged breach of the extant order, it is common ground that the order having application was in the following terms:-

"The COURT hereby orders :

BY CONSENT AND WITHOUT ADMISSIONS

The defendant be restrained and

1. not assault or threaten to assault, directly or indirectly Lavina Woodroffe.

2. not damage or threaten to damage property in the possession of Lavina Woodroofe.

3. not behave in an offensive or provocative manner towards Lavina Woodroffe.

("the relevant order")

9. The Prosecution then closed its case. The Defendant made a no case submission, but in any event did not call any evidence. Probably as a matter of pedantry, a correct analysis of the Defendant's position at this time was that he could have been found not guilty, but for the purposes of this decision, since the Prosecution face its lowest hurdle on a no case submission basis, the Court will treat the matter as asked, and consider a submission that there was no case for the Defendant to answer in relation to the domestic violence charge.

10. The basis for the no case submission is what, at Common Law, was a defence of autrefois convict.

11. The Common Law defence is enshrined in the *Criminal Code Act* where it is set out in Division 5-Effect of Previous Finding of Guilt or Acquittal.

12. Included under that heading is Section 21 of the *Criminal Code Act* which with other relevant sections is set out hereunder:-

"**17. Definitions**

In this Division –

"similar offence" means an offence in which the conduct therein impugned is substantially the same or includes the conduct impugned in the offence to which it is said to be similar.

18. Defence of previous finding of guilt or acquittal

Subject to sections 19 and 20, it is a defence to a charge of any offence to show that the accused person has already been found guilty or acquitted of –

(a) the same offence;

(b) a similar offence;

(c) an offence of which he might be found guilty upon the trial of the offence charged; or

(d) an offence upon the trial of which he could have been found guilty of the offence charged.

19. Limitation of defence in relation to certain crimes

Where the act or omission is such that it causes death or grievous harm to another, the accused person may be found guilty of the offence of which he is guilty by reason of such death or grievous harm notwithstanding that he has already been found guilty of some other offence constituted by the act or omission.

20. Finding of guilt or acquittal of regulatory offence no defence

Subject to section 21, a finding of guilt for or an acquittal of a regulatory offence shall not be a defence to a charge of a crime or a simple offence.

21. Stay of vexatious, &c., proceedings

Notwithstanding anything contained in this Division, a judge or a justice of the peace, in any proper case, may order that proceedings brought before him be stayed on the ground that they are vexatious or harassing and thereupon they shall be stayed."

13. It is to be observed that in the perception of this Court, there exists an anomaly created by the provisions of Section 20. The charge currently being ventilated before the Court is a regulatory offence. However, it is beyond contention that had the Defendant been charged and found guilty in relation to the alleged breach of the domestic violence order which is currently before the Court, a finding of guilt or conviction or both in relation to that charge would have precluded the application of Section 18 and the basis of being able to establish the defence of autrefois convict.

That seems to create a hugely artificial situation, even lending itself to abuse.

14. The offence with which the Defendant is charged is an offence created under the *Domestic Violence Act*. The terms of the order having relevance in relation to this matter are set out above.

15. The provisions of Section 10 of the *Domestic Violence Act* are set out below:-

> "**10. Breach of Order**
>
> (1) A person against whom a restraining order is in force who has been served with a copy of the order or the order as varied and who contravenes or fails to comply with the order is, subject to subsection (3), guilty of a regulatory offence.
>
> Penalty: For a first offence - $2,000 or imprisonment for 6 months.
>
> (1A) Despite the *Sentencing Act*, where a person is found guilty of a second or subsequent offence against subsection (1), the Court must sentence the person to imprisonment for not less than 7 days but not more than 6 months.
>
> (1B) Despite the *Sentencing Act*, the Court must not make any other order in respect of a person referred to in subsection (1A) if its effect would be to release the person from the requirement to actually serve the term of imprisonment imposed under that subsection.
>
> (1C) For the purposes of subsection (1), a person is to be taken to have contravened or failed to comply with a restraining order if the person breaches a perpetrators' program order in force at any time while the restraining order is in force.
>
> (2) For the purposes of subsection (1), a copy of an order or order as varied is or shall be deemed to have been served on a defendant to whom the order relates where –
>
> (aa) the defendant was before the Court at the time the order, or the variation of the order, was made and the Court has explained to the defendant the purpose and effect of the

order and the consequences that may follow if the defendant fails to comply with it;

(a) it is served personally on the defendant;

(b) in the case of an order under section 6(3) or 8A(2) – the magistrate making the order advises the defendant by telephone of the terms of the order;

(c) it is properly addressed and posted by AR Security Post to the defendant at the defendant's last known or most usual postal address or place of abode and the defendant has acknowledged receipt of the mail containing the order in accordance with postal procedures;

(d) its existence and terms are made know orally or in writing to the defendant by a member of the Police Force; or

(e) it is served in such other manner as the Court or a magistrate orders.

(3) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves, on the balance of probabilities, that –

(a) the contravention or failure was as the result of such an emergency that an ordinary person similarly circumstanced would have acted in the same or a similar way; or

(b) the act complained of was reasonable and no more than was necessary to enable the defendant to exercise a right or perform a duty specifically given to or imposed on the defendant by a court of the Commonwealth or the Territory or of a State or another Territory of the Commonwealth exercising Territory or Commonwealth jurisdiction.

(4) Without prejudice to any other mode of proof, an endorsement on the Court file signed by the Court or the Clerk by whom a restraining order in relation to a person was made or varied, specifying that –

(a) the person specified in the endorsement was before the Court or the Clerk at the time the order was made or varied; and

(b) that the Court or the Clerk explained to the person the matters referred to in subsection (2)(aa),

is prima facie proof of the matters specified."

16. As can be observed, subsection 10(1) creates a classification of the offence permitted by a party in breach as a "regulatory offence".

17. In this matter there is no issue in relation to the finding of the nature of the offence. Service is not an issue before the Court.

18. It ought be observed at the outset that the facts upon which the Court is to sentence, are precisely the same facts upon which the Court found the Defendant guilty of the assault charge on information and they are entirely and exclusively those set out in the transcript and exhibited.

19. The Prosecution argue that in this matter, a charge of breaching the *Domestic Violence Act* is a separate offence in relation to which the Defendant can be found guilty and convicted, even although, to proceed in that manner would necessitate doing so upon precisely the same facts as were the subject of the finding of guilt in relation to the assault charge.

20. Conversely, says Mr O'Brien, the provisions of Section 17 and 18 of the *Criminal Code Act* should result in a finding that the Defendant has a defence to the current charge, in that pursuant to the provisions of Section 18(b) of the *Criminal Code Act*, the Defendant has been found guilty of a similar offence. To that, the Prosecutor retorts, had he been aware that such a course of contention would be embraced by the Defendant, instead of proceeding as apparently is customary and charging the assault charge on information, first and proceeding on the breach of the domestic violence order second he would have reversed the order. In those circumstances, no similar defence would have had its genesis because of the fact the current charge is a regulatory offence. That may be. However, that smacks to this Court as no more than a prostitution of the prosecutorial ethic as was

attempted in the matter of the Police –v- Kundu [2001] NTMC 44, a decision of this Court. In that case, the device which the Prosecution sought to employ, was to charge the offence which would have engaged the mandatory sentencing provisions set out in the then Section 70(8)(A) of the *Sentencing Act*, so that the Defendant would have been subject to a mandatory year in jail. The second charge was such that objectively nothing within a bull's roar of such punishment would have been proper according to ordinary sentencing principles.

21. In this matter, on any construction of what occurred, upon the Defendant being found guilty, it could only have been on the basis of the kick to the victim's ribs and not to any other conduct set out in the precis.

22. At page 5 of the transcript, conduct sequential to that kick comprised "The Defendant then demanded get up and walk with him to his mother's flat along Acacia Drive. Fearing for her safety, the victim complied." It is perfectly obvious that the demand was not accompanied by any overt threat, oral, actual or pretended, which could justify any finding of same being an assault.

23. The Prosecution asserts a contention to the contrary, and submit that because the victim feared for her safety, this must be a necessary indication that there was some form of threat. That is rejected.

24. There is only one reality. That is, "(the Defendant) delivered a full blown kick with his right foot which impacted into the left side of rib area of the victim". It is without doubt that single kick which comprises the entirety of the Defendants criminal conduct. It is only that kick which could constitute a breach of paragraph 1 of the domestic violence order. The demand to accompany him cannot constitute a breach of either that paragraph of the order or the succeeding paragraphs 2 and 3.

25. Of course the situation here is unusual in that, where generally a full no contact order is in place, a kick such as is the subject of the finding of assault in this matter, would usually be accompanied by an approach to the premises, probably a forceful entry, a further direct approach in the immediate company of the Defendant, and an uttering of threats, all of which would of course intrinsically entail in each instance a separate and distinct breach of some paragraph of such an order.

26. In the event, the further aspect of this matter concern Section 21 of the Criminal Code. Whilst the defence submit their primary position, is that Section 18 entitles the Defendant to be found not guilty, pursuant to the provisions of Section 18 of the Criminal Code in the alternative, they submit, there ought be a stay on the grounds that the continued prosecution for the domestic violence breach is vexatious or harassing.

27. As the Court did not in Kundu, the Court has not either in this matter and perhaps from a pedantic view, the Court ought to have invited the Prosecution at the outset to make the current charge an alternative charge to the charge of assault and upon their refusal, consider an invocation of Section 21 of the *Criminal Code Act*. In the event, it is obviously a matter of record that that was not done.

28. Whilst it is academic, it is undoubtedly the case, that the Court possesses an implied power to prevent an abuse of its own process. Further, and in addition, a prospective judicial course of conduct exists, as referred to at paragraph 100 of Kundu and derived from his decision in Pearce –v- The Queen [1998] CLR page 610, where His Honour, in summary, propounded that in appropriate circumstances, where there had been conviction of an offence and same was also the basis for a prospective conviction on a second matter, the Court in proper circumstances (even where there had been a proper charge under two separate statutes) "could take the fact of conviction on the first into account when deciding whether a second conviction should

be recorded at all on the second and, if it is recorded, whether any additional punishment should be imposed."

29. Nothing better demonstrates the vice apparent in the proceeding against the Defendant than the manner in which the Prosecution has done and to highlight the fact, that given the circumstances now apparent, the Prosecution has announced if it had its choice again it would first charge and proceed against the Defendant in relation to current matter, which of course is a regulatory offence, and thus Section 19 of the Criminal Code would preclude the availability of a Section 18 defence to the Defendant. It was also that kind of machination which was central to matters in the decision of Kundu, as the Prosecution were seeking to proceed in a particular way which would invoke a term of imprisonment, not objectively appropriate, if the penalty was at large on either or any of the charges the Defendant faced in that matter.

30. Unusually, and perhaps pedantically inappropriately, this Court by virtue of the finding of guilt in relation to the assault charge is in possession of a record of the Defendant's antecedents. It is apparent that on 11 August 2004, the Defendant was found guilty and convicted of failing to comply with an order made under the *Domestic Violence Act*.

31. A finding of guilt in relation to the current matter exposes the Defendant in such circumstances to a mandated period of imprisonment of at least 7 days.

32. Crisply, the Courts decision in this matter is:-

    b. The finding of guilt on 1 November 2004 by this Court against the Defendant on a charge of contravening Section 188(2)(b) of the Criminal Code, the basis for which is the kick referred to on occasions in this decision, is a finding of guilt against the Defendant in relation to a similar offence to his current charge, which therefore entitles him to succeed and show that

such finding of guilt is a defence pursuant to the provisions of Section 18(b) of the Criminal Code.

c. Even if that finding of guilt was in law not correct, a continued prosecution of the charge against the Defendant for a breach of the *Domestic Violence Act* is a proper case in relation to which this Court would in any event have stayed further prosecution on the ground that to continue with the prosecution was vexatious or harassing in the circumstances.

33. Whether, as a matter of pedantry, there ought be an upholding of the submission of there being no case to answer and a subsequent finding of not guilty, or whether at first instance the Courts decision should simply be to find the Defendant not guilty, is to wallow in judicial theory. From an excess of caution though, the Court will and pronounces, it upholds the submission that there is no case to answer and it finds the Defendant not guilty for the reasons set out above.

Dated: 27 January 2005

DAVID LOADMAN
STIPENDIARY MAGISTRATE