

CITATION: *McGarvie v Seccin* [2006] NTMC 091

PARTIES: RENAE MOANA MCGARVIE

v

ZACHARI JAMES SECCIN

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20614976

DELIVERED ON: 24 November 2006

DELIVERED AT: Darwin

HEARING DATE(s): 5 September 2006, 12 October 2006

JUDGMENT OF: Ms Oliver SM

CATCHWORDS:

CRIMINAL LAW - ASSAULT

Mule v The Queen [2005] HCA 49

Van Den Hoek v The Queen (1986) 161 CLR 158

Zecevic (1987) 162 CLR 645 at 655

Criminal Code sections 29 and 34

Domestic Violence Act section 10

REPRESENTATION:

Counsel:

Prosecution: Ms Kemp

Defendant: Mr Noud

Solicitors:

Prosecution: ODPP

Defendant: NAAJA

Judgment category classification: B

Judgment ID number: [2006] NTMC 091

Number of paragraphs: 25

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

No. 20614976

BETWEEN:

RENAE MOANA MCGARVIE
Plaintiff

AND:

ZACHARI JAMES SECCIN
Defendant

REASONS FOR DECISION

(Delivered 24 November 2006)

Ms OLIVER SM:

1. The defendant pleaded not guilty to three offences, namely, aggravated assault, assault and a breach of a restraining order. The first offence is alleged to be an unlawful assault on Michelle McGowan with two circumstances of aggravation being first, that the defendant is a male and Michelle McGowan a female, and secondly that Michelle McGowan suffered bodily harm. The second alleged offence is an unlawful assault against Randall Quick and the third charge is alleged to be a breach of a restraining order under the terms of which the defendant is restrained from certain acts in respect of his partner Jodine Austral pursuant to the *Domestic Violence Act*.
2. All offences are alleged to have occurred on the same date over a short period of time in Cobham Court, Moulden.
3. At the outset of the hearing an application was made by the defendant to sever the third count, that is the alleged breach of the restraining order, on

the basis that there was insufficient nexus for it to be joined at hearing with counts one and two. It was submitted that the three offences did not constitute a course of action or series of offences within the terms of s309 of the *Criminal Code* because count three occurred at a different place, that is, at or outside different premises in the same street, and at a different point in time, that was fifteen minutes to half an hour after the alleged first assaults. The prosecution submitted that the time frame was not as generous as suggested by the defence, that it would be alleged that the time between the first offence and the last offence was in total a period of approximately ten minutes and that the charges were founded on the same facts and were part of a series of events. Similar witnesses were to be required on each charge. I ruled against the severance application and in my view the evidence as was ultimately presented to the court bore out the view that all of the alleged conduct was indeed part of the same series of offences of the same character or course of conduct to be properly heard together.

4. The prosecution called evidence from the two alleged victims of the assaults. Ms Michelle McGowan gave evidence that whilst sitting having drinks with a group of neighbours, including the defendant and the alleged victim Randal Quick, at Mr Quicks house, she saw amongst the large group of children who were playing in front of that house a boy attempt to pick up a pram, drop it, go straight over to a younger boy, jump on top of him and begin punching him. She described the older boy as punching the younger boy four or five times hard and that the younger boy was covering himself up and crying. She said she recognised the younger boy as Jodine Austral's son (the partner of the defendant and the person protected by the restraining order) but did not recognise the older boy. She said she looked at Zachari, that is the defendant, and Jodine and as both of them "were talking and stuff" she got up and went over to the boys and grabbed the older boy by the collar of his shirt, picked him up and escorted him a short distance away to the back of a trailer. She said she spun him around and said to him "who are

you and what the fuck do you think you are doing”. She described how when she was walking him to the trailer, holding him by the back of the collar, that he was trying to spin around and punch her and that he was very aggravated. As she spoke to him she heard from behind “Oi, oi that’s my son” and that within two or three seconds she got a punch in the back of her head behind her right ear. She then turned and saw the defendant standing behind her. She then received another punch to the back of the left side of her head but she didn’t see who did it and when she turned around again she saw the boy that she had pulled off the younger boy running away. She was adamant in cross-examination that when she was struck on the first occasion the young boy was in front of her and that she was looking directly at him. Mr Randal Quick, at whose place the gathering was held, also gave evidence of this incident. He described the defendant grabbing Ms McGowan spinning her around and punching her in the head. He described it as being at the side of the head and with a closed fist. He was uncertain about the side of the head although he thought it was the left side but was clear that it was on the back of her head.

5. Mr Robert Brand was another neighbour present at Mr Quick’s house. Mr Brand gave evidence via a video link from Queensland of the events of that evening. He said that the first trouble he noticed was when the defendant hit Michelle McGowan on the back of the head shortly after she had broken up a fight between a couple of kids on the front lawn. He described her being hit with a fist by the defendant to the back of the head. He described the first punch as landing just behind her right ear but didn’t know whether the second punch was on the left or right.
6. Ms McGowan said she was dazed after being hit and remembered setting off to go home but turning around some time short of that and still seeing everyone arguing out the front of Mr Quick’s house. She then saw her young son pushed over and retrieved him, she yelled abuse at the defendant and then she went home and called the police. Following that phone call she

returned to the driveway of her front gate where she saw down the road Jodine Austral standing with her youngest child in her arms. She then saw the defendant punch Jodine Austral with his right hand to the left side of her face. She described Ms Austral as standing there and taking it, she said “she was extremely upset she was angry of course and she was yelling at him and stuff”. In cross examination she said she observed this from a distance of about 75 metres but that the area was very well lit and that she could see everything that happened whether it was night or not.

7. Mr Quick also gave evidence of the alleged assault upon himself. He said that when he saw Ms McGowan punched he jumped up and grabbed the defendant and then embarked on pushing him out of the driveway which he described as “pushing him out”, “walking him out”, “getting him out”. He denied that there was any force involved. When they got to the front gates the defendant said “do you want to go?” and he said “No I don’t want nothing to do with it” but the defendant then stood back and took a swing at him which hit him on the side of the cheek hard enough to break the skin inside his mouth. He said that after the punch the defendant settled down and apologised and that he said “there is enough trouble here now you know just go away”. He said the defendant refused for a while then said he wanted to go up the road to another fellow’s place, so he escorted him up there but when the other fellow there didn’t want him they walked back down to the area of 6 Cobham Court. He said that on the way back his wife or girlfriend was standing with a pram and he grabbed hold of the pram and started yanking at it and then took a swipe at her. He said he didn’t see if it connected but it sounded like it did. He said it was aimed at the head region. In cross examination he said he was only about a metre away when this occurred and agreed Ms Austral was holding the baby.
8. Mr Brand’s evidence was that immediately on seeing the defendant hit Ms McGowan he and Mr Quick jumped up and started pushing the defendant out the front gate. He said he started getting “agro” again saying that he was

going to hit him (Mr Brand) and then he took a swing at Mr Quick. He didn't see whether it connected with Mr Quick because he was standing behind him but he saw the swing and saw Mr Quick go back. He said he thought "geez it's going to be on in a minute" and that is when he went inside and called the police.

9. It was not put to either Mr Quick or Mr Brand in cross-examination that the defendant had not punched Mr Quick. It was put to Ms McGowan in cross-examination that it was not the defendant who had hit her but that it was the child whom she had pulled off the younger child who had hit her. Ms McGowan denied this possibility at several points during her evidence saying that she was still watching the boy, that is the defendant's son, at the time that she was hit so that there was no possibility that the defendant's son hit her nor did she think that his son could have hit her that hard.
10. The prosecution also called Isabella Rhodes who described herself a relative of the defendant who was the person being welcomed into the neighbourhood with drinks at Mr Quick's house. She described herself as having had quite a bit to drink and being a bit intoxicated. She did not see anyone hit anyone else although she did see Ms McGowan pull the child Jermaine Austral off the younger child (his brother Ethan). Her evidence in that regard was largely consistent with what was described by the other witnesses, that is, that Ms McGowan grabbed Jermaine by the back of the collar although she described Jermaine being dragged with his knees bent whereas Ms McGowan had described herself as pushing the child along and out from her. In my view Ms Rhode's evidence is less reliable on this point than that given by the earlier witnesses as to the manner in which Jermaine was removed from the fight, both because on her own evidence she was intoxicated and apparently failed to observe any of the incidents involving Ms McGowan and Mr Quick noting that it was not contested that both Ms McGowan and Mr Quick were hit. The issue in relation to Ms McGowan was whether the blow or blows were struck by the defendant. There was no

challenge at all to Mr Quick's evidence that the defendant punched him. Ms Rhodes' evidence is that she saw none of these incidents and in my view this affects her credibility.

11. On the second day of the hearing the prosecution called Jodine Austral to give evidence. Ms Austral described herself as being the partner of the defendant who is the father of her five children aged from ten (Jermaine) to one. She said she was still living with the defendant. She described Ms McGowan grabbing Jermaine by the collar and dragging him towards the gate after the fight between him and Ethan got out of hand. She described it as walking and pulling him in a rough way. She said they were all intoxicated and Ms McGowan was also intoxicated. She said that the defendant said to Ms McGowan "don't touch my son; why are you doing this" but she didn't see what happened and that she didn't see anyone hit anyone. She denied being hit subsequently by the defendant. Like Ms Rhodes, although Ms Austral said she observed Jermaine being removed from Ethan by Ms McGowan, she apparently saw nothing that followed. It would ordinarily be expected that if she had seen an intoxicated woman roughly dragging her son away as she suggested, that she would, at the very least, pay particular attention as to what was happening next. Either due to her own intoxication or a reluctance to give evidence as to the events of that evening she was not able to say what happened next other than to say that she didn't see anyone hit and was not hit herself. I do not think her account is reliable and I do not accept her account of Ms McGowan's state of sobriety. Ms McGowan's evidence was that she had had 4 – 5 beers over the period and she was able to give a very clear and intelligible account of the events to the evening. I regard her and Mr Quick and Mr Brand as honest and reliable witnesses and prefer their evidence where it differs from that of the other witnesses.
12. In addition to the oral evidence called by the prosecution an electronic record of interview was tendered and played. In that interview the

defendant denied assaulting his wife Jodine Austral. When asked about the alleged assault on Ms McGowan he said that he saw her grab his eldest son by the collar and that he went up and growled at her and then she went off and went home. He then said that the bloke who had offered him a beer started having a go so that he growled at him also and then he, the defendant, went home. He denied touching Ms McGowan at all. At a point in the interview the defendant said that he knew Ms McGowan would go back and ring the police and in response to being asked why he would think that she would do that he said “Hang on I didn’t hit her my little son jumped up and hit her on the back of her head. He jumped up and hit her on the back of the ear. I remember now she probably thought I hit her”.

13. He said he didn’t recall hitting Randall Quick just pushing him back and he denied having any altercation with his wife.
14. The defendant did not give evidence himself however he did call his son Jermaine, who is now ten years old, to give evidence. Jermaine described play fighting with his brother but said that it became a real fight and that he threw a chair at his brother. He said Ms McGowan came and grabbed him by the collar and dragged him up. He said this made him feel bad that he was angry with her and that he punched her. He said that he punched her before his dad came over. In cross-examination he was asked about the argument between his father and Mr Quick out on the road. He agreed that it got a bit physical and that Mr Quick was angry at his dad but that he didn’t see anyone hit or pushed. In describing how Ms McGowan held him he said she had him by the collar had him far away fully out in front and that he was trying to reach around his body. When asked where he punched Ms McGowan he said in the face on the cheekbone and jaw and that he was standing to her left and punched her with his right fist two or three times. He said his father did not hit Ms McGowan and that his father did not hit his mother.

15. It was submitted by the defence that the evidence led by the prosecution in respect of the alleged assault on Ms McGowan was too inconsistent and lacked any thread of consistency for me to be satisfied beyond a reasonable doubt that an assault had occurred. In my view there is no merit in this submission. There is more than a “thread” of consistency; each of three witnesses (the alleged victim of this assault and Mr Quick and Mr Brand), persons unrelated to the defendant and with minimum prior contact with him, describe at least one punch to the back of Ms McGowan’s head. The punch or punches were directly observed by the witnesses Quick and Brand. The alleged victim also gave evidence of the punches. She said that it was the defendant who was directly behind her, that the first punch came within seconds of her hearing “Oi, oi that’s my son” and that there was no other person around other than Jermaine whom she had directly in her view at the time she was punched in the back of her head. It is not uncommon for there to be minor inconsistencies in relation to where the punches landed or the number of punches in cases of this nature given that witnesses do not observe events necessarily from the same physical position or at the same moment in time. The real inconsistency in the evidence given comes from the defence witness, that is, the defendant’s young son Jermaine. Jermaine’s evidence was that his father had not hit Ms McGowan at all but that he had himself hit her two or three times. His evidence is therefore entirely inconsistent with the evidence of the other three witnesses. He described his punches as occurring before his father came over to speak to Ms McGowan and that they landed on her jaw or cheek area. It may be that Jermaine either believes that he struck Ms McGowan in the course of her walking him away from his brother because as she said he was swinging punches and trying to hit her at that time or alternatively that he has tried to take the blame for the assault committed by his father. In my view, Jermaine was placed in a difficult situation in giving evidence and attempted to be truthful so far as his own involvement was concerned. I do not regard his evidence to be sufficiently reliable to cast any doubt on the version of events given by

Ms McGowan, Mr Quick and Mr Bland. In fact the fundamental inconsistency of where he says he hit Ms McGowan against the consistent evidence of the other three suggests that his evidence as a whole should not be regarded as reliable. This is no criticism of Jermaine, he is a very young boy placed in a difficult position. The evidence of Ms Rhodes and Ms Austral is at best neutral on the issue, their evidence being to the effect that that did not see anyone punching anyone, in other words it does not controvert the account given by Ms McGowan, Mr Quick and Mr Bland. I am therefore satisfied beyond a reasonable doubt that the defendant did punch Ms McGowan at least once in the back of her head.

16. It was then submitted that if I was satisfied beyond a reasonable doubt that the defendant **had** punched Ms McGowan, then two available defences needed to be considered; defensive conduct of another and provocation. Of course the evidence relied on by the defendant, in particular that of his son Jermaine, was that the defendant had not hit Ms McGowan at all supported by the exculpatory statements contained in the electronic record of interview that was tendered. The statements in the record of interview need not be given the same weight as other evidence but can be regarded as ‘a possible version of the facts’ *Mule v The Queen* [2005] HCA 49 and I accept it on that basis. The defendant bears the evidentiary burden of raising provocation as an issue and it is not necessary that the defendant himself give evidence of loss of self control *Van Den Hoek v The Queen* (1986) 161 CLR 158. Likewise once the evidence discloses the possibility that the act was defensive the burden falls on the prosecution to prove beyond a reasonable doubt that the act was not defensive *Zecevic* (1987) 162 CLR 645 at 655.
17. It was submitted that defensive conduct could be put on the basis that any parent would think that some conduct was necessary to defend his son from attack and that Ms McGowan’s conduct in removing the boys was more than

simply pulling him off and potentially constituted an assault by her on Jermaine.

18. I accept that defence of a child from attack is a matter within the realm of section 29 of the Criminal Code and evidence that Jermaine was being attacked would clearly be sufficient to raise defensive force as a justification for the assault. However in my view there is no evidence to support a view that Jermaine was actually being attacked or assaulted. Ms McGowan's evidence was that because neither the defendant nor Ms Austral appeared to be attending to the fight which had broken out between the two boys, she intervened to prevent the younger boy being hurt. In my view Ms McGowan acted perfectly responsibly and reasonably in the circumstances. She saw the potential for a young child, who she recognised as belonging to one of the members of the group, being hurt by an older boy. She did not know whether the older boy belonged to anyone else in the group. No-one else was intervening and it would not be reasonable for her to have stopped to make inquiries about whose son the older boy was whilst the younger boy continued to be punched. I find the evidence supports the view that she did nothing more than apply a reasonable amount of force to prevent the older boy from continuing to punch the younger boy and remove him from the immediate vicinity in order to disengage him from the attack. Once she had him at a safe distance she released him from her grip. Jermaine was not under physical restraint at the time she was hit and there is no evidence that at that time or even earlier as she was removing Jermaine that he was under any threat of bodily harm. As I have said, I do not accept the evidence of Ms Rhodes or Ms Austral that Jermaine was handled roughly and prefer the evidence of the other three prosecution witnesses in that regard. Indeed, Jermaine's own evidence supports the account of Ms McGowan that he was swinging punches at her as she attempted to move him away from his brother.

19. Even if on a view of the evidence most favourable to the defendant I were to accept that he believed that an unreasonable degree of force was being applied to Jermaine by taking him by the collar and removing him from the fight or that he feared that Jermaine was under some threat of force (although no direct evidence of such belief was led), I do not accept that the defendant's conduct was a reasonable response in the circumstances as he reasonably perceived them. I would be satisfied that the prosecution had discharged the onus beyond a reasonable doubt that it was not a reasonable response to punch Ms McGowan in the back of the head in order to defend his son.
20. It was also submitted that the defence had discharged the evidentiary burden in relation to provocation and that the prosecution had not negatived this beyond a reasonable doubt. I do not think that there is any substance in this submission. As I have said Ms McGowan's actions did not constitute an unlawful assault upon Jermaine, they were if anything defensive actions to prevent the younger boy Ethan from being harmed by the punches being thrown at him by Jermaine. Jermaine freely admitted in his evidence that he lost his temper and that the fight had turned from a play fight into a real one. It is fundamental to a defence of provocation pursuant to s34(1) of the *Criminal Code* that ordinary person similarly circumstanced could have acted in the same or similar way to the defendant. To my mind an ordinary person similarly circumstanced, that is a parent observing their child being removed from a situation where that child is punching their younger sibling, would not respond to that circumstance by punching the person, particularly a woman, who had broken up the fight. Further, as I do not consider Ms McGowan's conduct to have bear a wrongful act, s34(3) of the *Criminal Code* is not enlivened.
21. It was further submitted in relation to the assault on Randall Quick that if I found the assault on Michelle McGowan as being lawful by reason of provocation then the assault on Mr Quick could be excused because it was a

continuing act under the effects of provocation before the defendant had time for his passion to cool. Strictly speaking, a finding of provocation does not render conduct 'lawful' but excuses a defendant for what otherwise would amount to criminal responsibility for the act committed. As I have said I do not find that the evidence is sufficient to raise the issue of provocation and in any event I do not think that the evidence is consistent with the defendant having lost control and that loss of control continuing to the assault on Mr Quick. The evidence is consistent with him being angry but anger *per se* and loss of self control are not the same thing.

22. Consequently I am satisfied beyond a reasonable doubt that the defendant is guilty of the charge of aggravated assault on Ms McGowan, the circumstances of aggravation being that the defendant is a male and Ms McGowan is a female, factors which are clearly not in issue. I do not find that the further circumstances of aggravation, that is that bodily harm was occasioned, have been made out and the prosecution conceded as much.
23. I am also satisfied beyond a reasonable doubt that the defendant is guilty of the assault on Mr Quick. As I have said no issue was taken in cross-examination of either Mr Quick or Mr Brand as to their evidence of the defendant punching Mr Quick. The only contrary evidence to that was in the defendant's record of interview with the police in which he denied punching Mr Quick and of which I have said I do not give the same weight as the other evidence.
24. In relation to the charge of breach of a restraining order, the order pursuant to the *Domestic Violence Act* which at the relevant time restrained the defendant with respect to particular actions against Ms Jodine Austral, was tendered together with proof of service of the order. The order directs that the defendant:
 1. Must not assault, cause or threaten to cause personal injury to Jodine Rosemary Austral.

2. Must not cause or threaten to cause damage to property in the possession of Jodine Rosemary Austral.
3. Must not act in a provocative or offensive manner towards Jodine Rosemary Austral.

The order was made on 17 February 2006 as a variation of an earlier order of 7 October 2005. The order as varied was to continue in force to and including 7 October 2006. It was therefore in force on 2 June 2006 when the breach is alleged to have occurred. I therefore need to consider whether the evidence shows that order has been breached by the actions of the defendant. The evidence supporting a breach comes from two witnesses, Ms McGowan and Mr Quick, both of whom said they saw the defendant swing a punch at Ms Austral's head. Ms McGowan's evidence was that she saw the swing connect, although she was at a distance. Mr Quick's evidence was that he did not see the swing connect but by the sound of it that it had. He was only a metre away. Ms Austral's own evidence was to the contrary; that the defendant had not punched her. Jermaine said that he did not see his dad hit his mum.

I do not of course have to be satisfied that Ms Austral was actually physically struck provided that I am satisfied beyond a reasonable doubt that the defendant's actions constituted a breach of one of the conditions of the restraining order.

I am satisfied beyond a reasonable doubt that the defendant did swing a punch in the direction of Ms Austral's head. Ms Austral's denial of being punched by the defendant is not fatal to that finding. I am satisfied that a punch being swung at Ms Austral's head is sufficient to amount to a threat to cause personal injury to Ms Austral and is therefore a breach of the first condition of the restraining order. I therefore find the defendant guilty of this count.

25. I will hear counsel submissions on sentencing.

Dated this day of 2006.

Sue Oliver
STIPENDIARY MAGISTRATE