CITATION: *Chambers v Kerr* [2007] NTMC 055

PARTIES:	KIM TREVENAN CHAMBERS
	v
	STANLEY KERR
TITLE OF COURT:	Alyangula Court of Summary Jurisdiction
JURISDICTION:	Criminal Code; Justices Act
FILE NO(s):	20706475
DELIVERED ON:	21 August 2007
DELIVERED AT:	Alyangula
HEARING DATE(s):	18 July 2007
JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

CRIMINAL DEFENCES – DEFENCE OF ANOTHER – EVIDENCE – PROBLEM OF AVOIDANCE RELATIONSHIPS

Criminal Code – s 188(2)(b); s 29
Domestic Violence Act - s 10
"Little Children Are Sacred" NT. Reports 2007
Northern Territory National Emergency Bill (CW) 2007

Ashley v Marinov [2007] NTCA 01
Zeceivic (1987) 25 A Crim R 25

REPRESENTATION:

Counsel:

Informant:	Ms Boahm
Defendant:	Mr Noud

Solicitors:

Informant:	ODPP
Defendant:	NAAJA

Judgment category classification:	C
Judgment ID number:	[2007] NTMC 055
Number of paragraphs:	12

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

No. 20706475

[2007] NTMC 055

BETWEEN:

KIM TREVENAN CHAMBERS
Informant/Complainant

AND:

STANLEY KERR
Defendant

REASONS FOR DECISION

(Delivered 21 August 2007)

Ms BLOKLAND CM:

Introduction

1. The defendant pleaded not guilty to one count of aggravated assault, the circumstance of aggravation was that the alleged victim was a female and the defendant a male contrary to s 188(2)(b) of the *Criminal Code*. He also pleaded guilty to one count of failing to comply with a Domestic Violence Restraining Order contrary to s 10 *Domestic Violence Act*.

Summary of Evidence

2. A number of young women from Numbulwar gave evidence about the incident including the alleged victim Leonie Ngalmi. The incident was alleged to have occurred on 20 February 2007 at Angurugu. The general thrust of the evidence of all witnesses is that Leonie Ngalmi and the defendant were previously in a relationship but broke up in 2006. The defendant became involved with Ms Jean Anne Lalara. In her evidence about the incident leading to the charges Ms Ngalmi was very straight

forward that she had been looking for Jean Anne Lalara as she knew the defendant was going to meet her. When she saw Ms Lalara she threw a lighter at her that hit Ms Lalara in the face. She then pulled Ms Lalara's hair and they started fighting; at first they were standing up and then were on the ground. Her evidence was that the defendant then punched her and kicked her twice, the punch being around her stomach area and the kicks in the back. She then stopped fighting Ms Lalara. She said she had no injuries from the defendant's actions. She walked home after the episode. She agreed that she had called out to Jean Anne Lalara and her friends that she wanted to fight Jean Anne and that she knew that Jean Anne was the defendant's new girlfriend. She agreed Ms Lalara meeting the defendant on that occasion made her feel angry. She agreed she punched Jean Anne Lalara to the face, pulled her to the ground and started hitting her. She agreed that the defendant could see what was happening. She agreed that she and Jean Anne Lalara were rolling around on the ground and they were both hitting each other. She agreed that she wanted to give Jean Anne Lalara "a good flogging". She agreed that the defendant had yelled out to stop fighting and then she felt two hits to her back. She was very straight forward about her initiation of the incident and from her demeanour she seemed to be taking some pride in telling the Court that she had picked a fight with Jean Anne Lalara.

3. Ms Marissa Wurramarra gave evidence in similar terms. There was some difference in the evidence on where the lighter hit. Ms Wurramarra said it hit Ms Lalara on the shoulder. Her evidence was the defendant hit Ms Ngalmi twice on the left side with his fist and kicked her once in the back. She said that was when the fight stopped. Although Ms Ngalmi's evidence was that she was on top of Jean Anne Lalara at the time of the fight, Ms Wurramarra disagreed and said they were both rolling around and pulling each others hair. Melanie McKenzie also gave evidence and described herself as Marissa Ngalmi's friend and the "cousin brother – Aboriginal

way" of the defendant and that Jean Anne Lalara was her "mother – Aboriginal way". Her evidence was she didn't see the defendant assault Ms Ngalmi as alleged although she said she saw the whole incident. She said the defendant was just trying to take hold of the young womens' hands and just trying to stop them. At the conclusion of her evidence the interpreter, (Ms Rhoda Lalara), was anxious to inform the Court that Ms McKenzie could not give evidence as there was an avoidance relationship between herself and the defendant. It did appear that she was somewhat uncomfortable in speaking about the defendant. I will make some comments about that particular part of the evidence in due course.

4. Jean Anne Lalara gave evidence largely consistent with Ms Ngalmi although she seemed to be saying that the defendant hit Ms Ngalmi because Melanie McKenzie was present. She said the defendant punched Ms Ngalmi twice on the body. She said that she was on top of Ms Ngalmi at some stages throughout the incident.

Defensive Conduct

5. The defendant did not give evidence but as it has been raised fairly on the prosecution case, the prosecution must negative the justification of defensive conduct: (s 29 *Criminal Code*). The prosecution must negative beyond reasonable doubt the reasonable hypothesis that the defendant believed the conduct was "*necessary*", in this instance, to defend "*another person*": (s 29(2)(a)(1) *Criminal Code*). Ms Boahm for the prosecution submitted that the Court should regard the incident as a consensual fight between the two young women and therefore reject any notion that the defendant believed his conduct was a "necessary" and "reasonable response in the circumstances as [he] reasonably perceived them": (s 29(2)(b) *Criminal Code*). I also note that the defendant is a much stockier build than Ms Ngalmi and would easily overpower her. In the circumstances however although I am prepared to find that the defendant punched and kicked Ms

Ngalmi, I cannot rule out beyond reasonable doubt that he believed his conduct was necessary and a reasonable response in the circumstances in the defence of Ms Lalara. There is no doubt at the outset that Ms Ngalmi was the aggressor, with commencing the fight and with throwing the lighter. Her evidence was very clear that she was out to give Jean Anne Lalara "a good flogging". There is evidence indicating she had the upper hand and evidence indicating the defendant tried to stop her by calling out. The test for the question of "defence of another" and whether any response was proportional must be answered in a similar way to defence of oneself.

6. The Report of the Law Reform Committee (NT), "Self Defence and Provocation", (October 2000), that led to the current provision does not focus on the content of defence of another. In the Law Reform Committee's report, in the context of a discussion on *Zecevic* (1987) 25 A Crim R 163, it is assumed that the same underlying principles apply to defence of another as they do to self defence. My researches reveal no more about the limits of defence of another, save for limitations that have fallen into disuse. (For example, an earlier common law prohibition on raising defence of a stranger, as in a non family member).

7. For defensive conduct to succeed, the conduct must be a reasonable response in the circumstances as the person reasonably perceives them to be: (s 29(2)(b) Criminal Code). The reasonableness or otherwise of his conduct must be assessed according to his reasonable perceptions. As noted above, there is evidence supportive of the hypothesis that Ms Ngalmi was the aggressor, she appeared to have the upper hand. The two women appeared to be around the same size. I can't exclude beyond reasonable doubt that the defendant thought it was necessary to take the action he did to stop Ms Ngalmi.

8. In *Zecevic* (1987) 25 A Crim R 163, at 174 the majority referred to the need to consider proportionality or reasonableness in the context of the whole

circumstances of which the degree of force is only one factor. The majority also refer to the need to approach [this] task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection. It appears the Law Reform Committee (NT) was significantly influenced by *Zecevic* in the approach taken to this provision. It would be an error for me to assess these circumstances from a position of detachment without remembering the defendant is to a degree caught up in the drama of the moment.

9. When I assess the situation from the point of view of the position of the defendant as I am required to do, I am not satisfied that *defensive conduct* has been negatived beyond reasonable doubt.

10. In relation to the fail to comply with a Restraining Order, the Restraining Order did not prohibit contact between the parties but rather prohibited "assault or threaten to assault"; "cause or threaten to cause damage"; and "not act in a provocative or offensive manner". This is the usual form of these orders. Given there is nothing additional to the assault that is alleged, given the authority in *Ashley v Marinov* [2007] NTCA 01, the Charge must be dismissed on the basis of s 18 *Criminal Code* (NT). This would appear to be the position even though the offence of breach of a Domestic Violence Order is a regulatory offence for which the justification of self defence cannot apply. It is a curious situation that a person can be acquitted on the basis of self defence on the charge on information and by virtue of that acquittal, be acquitted also of a regulatory offence that does not allow self defence to be utilised. In any event, very similar considerations apply in the specific defence under s 10(3)(a) *Domestic Violence Act*, namely that the contravention can be characterised on balance as the result of an emergency if an ordinary person similarly circumstanced would have acted in the same or similar way. On either approach, the defendant is acquitted on count two.

The Avoidance Relationship Issue

11. As indicated above, the witness Ms McKenzie (who told the Court she was fifteen years of age), appeared to be influenced giving her evidence by the fact that her relationship with the defendant requires avoidance. Although it is occasionally suspected that there may be a Kinship or avoidance relationship issue when witnesses do not testify in a way that was anticipated, it is rare that the Court is advised so clearly on this by an interpreter of the stature of Ms Lalara. I should say all the witnesses appeared to be well supported by the Witness Assistance Service but it was clear that no-one in the Court realised the relationship was a problem until advised by Ms Lalara. In this case the Court simply doesn't know whether Ms McKenzie's evidence would have made a difference to the prosecution case or would have assisted the defence. It is simply impossible to know and I cannot draw any conclusions from her evidence. This is an issue that needs significant attention from all relevant arms of the justice system after meaningful discussions with Indigenous communities where the Court sits. It is unlikely to be a matter that can be dealt with simply by the usual vulnerable witness procedures, (where they are available), but it will remain a problem of some significance where the avoidance relationships of varying degrees are important to witnesses, defendants or other parties before the Court. In my view there needs to be an investigation of procedures that can be supported by legislation that will allow witnesses to be able to give evidence when they are subject to cultural constraints. Despite significant energy and expertise being devoted to Indigenous People in the Criminal Justice System in both the "Little Children are Sacred" report (2007) and a legislative response in the *Northern Territory National Emergency Response Bill 2007* (CW), no strategy has been developed as far as I am aware to solving or mitigating this problem. The inability of witnesses to give evidence because of cultural constraints serves neither party nor the community well. I request the legal organisations with an interest in this area to investigate protocols for witnesses under these difficulties.

12. I authorise my colleague Mr Greg Cavanagh SM to publish these reasons and announce the orders of dismissal on both counts at Alyangula on 21 August 2007.

Dated this 21st day of August 2007.

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Jenny Blokland
CHIEF MAGISTRATE