CITATION: *Police v Segeyara* [2008] NTMC 019

PARTIES:	TRAVIS JAMES WURST
	v
	NAZMI SEGEYARA
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act, Criminal Code
FILE NO(s):	20719736
DELIVERED ON:	18 March 2008
DELIVERED AT:	Darwin
HEARING DATE(s):	6 & 7 February 2008, 4 March 2008 (in Nhulunbuy)
JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

CRIMINAL LAW – CRIMINAL RESPONSIBILITY – ASSAULT CAUSING HARM – CONSENT – MENTAL ELEMENT

R v Mardday (1998) 7 NTLR 192
R v Raabe [1985] 1 Qd R 115
Largesner v Carroll (1990) 49 A Crim R 51
Carroll v Lergenser (1991) 2 Qd R 206
R v Minor (1991) 79 NTR 1
DPP (NT) v WJI (2004) 219 CLR
Zecevic v DPP (1987) 162 CLR
Sims v Robinson [2008] NTMC, Dr Lowndes SM, 23 January 2008
Daye v Pryce [2000] NTSC, 3 October 2000, Riley J

REPRESENTATION:

Counsel:

Informant:	Mr Walsh
Defendant:	Ms Kepert

Solicitors:

Informant:	ODPP
Defendant:	NTLAC

Judgment category classification:	C
Judgment ID number:	[2008] NTMC 019
Number of paragraphs:	19

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

No. 20719736

[2008] NTMC 019

BETWEEN:

TRAVIS JAMES WURST
Informant

AND:

NAZMI SEGEYARA
Defendant

REASONS FOR DECISION

(Delivered 18 March 2008)

JENNY BLOKLAND CM:

Introduction

1. Nazmi Segeyara ("the Defendant") pleaded not guilty to one count of aggravated assault, the circumstance of aggravation being that he caused Stuart Gunn ("the Complainant") harm. To succeed the prosecution must prove the elements of assault and negative any authorisation, justification or excuse beyond reasonable doubt. The prosecution must also prove the aggravated circumstance (harm) beyond reasonable doubt if that part of the charge is to be made out. In this matter I would readily find *harm* proven as the Complainant lost a tooth (obviously a significant injury) during the incident. The injury was the direct result of a blow from the Defendant. The primary issue is whether the prosecution can negative *consent* to the assault and/or *defensive conduct*.

Facts

2. The facts giving rise to the charge occurred on 30 June 2007 at a party at the "Cat Shed", Nhulunbuy. In general terms during the course of the evening a physical altercation occurred between the Defendant and Complainant resulting in harm to the Complainant. The prosecution witnesses are at odds with each other on some of the most crucial facts. This is no fault of investigators or the prosecutor who has energetically prosecuted the case. The witnesses accounts simply vary significantly, some supportive of the prosecution case, many supportive of the version given by the defendant. In common with many cases of this type, intoxication of varying degrees also undermines the credibility of a number of witnesses. Nine witnesses gave evidence for the prosecution and the Defendant gave evidence in his own case.

3. Mr Gunn's evidence was that he arrived at the party at about 9.00pm. The Defendant was familiar to him. He spoke to the Defendant who told him he had embarrassed him in front of another guest and the Defendant then punched him to the mouth. Mr Gunn did not agree that he had been aggressive towards the Defendant. Mr Gunn said he felt pain but went back to his friends. He said at one point he asked the Defendant to go outside because he wanted to talk to him. He said he took a cab home with a friend. As well as losing his tooth he experienced bruising around his eye and on his cheek; as well as blood contusion in one eye. His pain lasted two weeks and he received dental treatment. Aside from the evidence of Mr Nash, who I appreciate accompanied Mr Gunn, most of the witnesses for the prosecution contradict this seemingly straight forward account.

4. In his record of interview with police the Defendant speaks of some background facts concerning an incident when he says the Complainant gave him a can of drink that turned out to be some-one else's drink and an accusation that the Defendant "probably stole it".

5. He also spoke of an incident when the Complainant gave him a broom stick and said he'd given him a job to clean the whole Cat Shed. In very general terms he describes being hassled by the Complainant, the Complainant pulling his shirt, nudging his collarbone with his head and saying "if you're that angry about it lets take it outside". The Defendant stated that he said "I don't want to fight"; that the Complainant made another statement about "taking it outside" and "nudged [him] again in the head" and he (the Defendant) "cracked him in the face". He said the Complainant was stumbling, walked away with his mates but then came back towards the Defendant and he punched him in the face again. Police Officers asked the Defendant if at any time the Complainant had given permission to hit him and he replied "Um, I'd say yeah" and further "…cause he was asking for it…". "He was inviting me, like calling me out, like, he was saying "Lets go let's take this outside if you're that angry about it lets take it, take it outside"". He also stated the second punch was in self defence. In general terms, the tenor the Defendant's evidence before the Court was similar to the version he gave police.

6. Although the other witness accounts vary, there is evidence supportive of the Defendant's account from the witness Thomas Underhill who said the Complainant "kept harassing him" and using phrases like taking it or going outside to "sort it out like men". Both Mr Underhill and Kyle Goddard gave evidence of the complainant's aggression towards the Defendant, including physical aggression, grabbing the Defendant's shirt and rubbing his head against the Defendant's face. The witness Tammy Akapita confirmed the words "take it outside" was used a number of times by the complainant. The witness Steve Mallupo described aggressive behaviour by the complainant including the complainant grabbing the Defendant's shirt and pushing the Defendant. He also confirmed the use of the "take it outside" comments.

7. With such conflicting evidence, I cannot be satisfied beyond reasonable doubt of Mr Gunn's account even though it is substantially supported by Mr

Nash. The preponderance of evidence conflicts with their accounts. In those circumstances, I am obliged to accept the version of events most favourable to the Defendant, as detailed by the Defendant and supported in part by the majority of prosecution witnesses. I proceed on the basis the Defendant was harassed by the complainant in the manner that the defendant stated, both by words and actions such as pulling the Defendant's shirt, rubbing his head against the Defendant and seeking to "take it outside" and "sort this out" or "settle like men". I also accept that the Defendant initially at least attempted to evade a confrontation by saying such things as "back off"; "leave me alone" and turning or walking away. Curiously it is the Defendant who gives evidence of two blows. The Complainant gave evidence of only one blow. I find there were two blows as described by the Defendant and supported in the evidence of Kyle Goddard and Steve Mallipo.

Relevant Law

8. I hesitated to make an immediate decision at the completion of the case as although it is clear that an element of assault under the Northern Territory Criminal Code requires that there be no consent to the application of force, the severity of the injury demands close examination of the relevant principles and their application. Both counsel have provided helpful written submissions in the interim and I thank them both for their efforts.

9. The fact of a circumstance of aggravation is not by itself relevant to the determination of criminal responsibility for the assault. Intent or foresight does not need to be proven to establish a circumstance of aggravation: *R v Mardday* (1998) 7 NTLR 192. Issues affecting criminal responsibility are to be determined primarily by reference to the definition of assault. The circumstance of aggravation is relevant consequentially on proof of the assault. The threshold is firstly whether an assault has been proven. I would qualify that proportion slightly in the sense expressed by the

prosecution to the extent that the question of harm becomes relevant in this case on the question of what conduct is contemplated in the "consent" to the assault. The definition of assault is:

> 187 Definition
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> In this Code ***assault*** means –
>
> (a) the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of harm or by means of false and fraudulent representations as to the nature of the act or by personation; or
>
> (b) the attempted or threatened application of such force where the person attempting or threatening it has an actual or apparent present ability to effect his purpose and the purpose is evidenced by bodily movement or threatening words,
>
> other than the application of force –

10. Clearly "consent" is an element of assault. The prosecution has submitted detailed submissions based on a line of authority commencing with *R v Raabe* [1985] 1 Qd R 115 to the effect that consent to assault, in particular an assault that inflicts harm has limits. Attention was drawn to *Largesner v Carroll* (1990) 49 A Crim R 51, in particular the passage from Shepherdson J:

> "I think the true view is that in some cases of assault occasioning to actual bodily harm the prosecutor will, on the evidence, have to negative consent beyond a reasonable doubt, ie prove that the assault was unlawful. Each case must be looked at in the light of its own facts. I favour the view that in the case of assault occasioning bodily harm where consent to the assault is an issue and there is evidence capable of amounting to such consent the tribunal of fact in deciding whether the prosecution has proved beyond reasonable doubt that the assault was unlawful must decide whether the degree of violence to the person assaulted exceeded that to which consent was given".

11. In my view there is ample evidence that the Complainant consented, or conducted himself in such a way that the appearance of consent was given to the Defendant in the sense that he appeared to want to engage in a fight and at least, therefore that would involve blows being exchanged.

12. It is the wrong question to ask whether the complainant consented to "harm" of the type that actually eventuated, or conducted himself in a way that meant the Defendant believed he was consenting to the particular harm suffered. (See *Carroll v Lergenser* (1991) 2 Qd R 206). The focus must be on the type of activity that was consented to whether expressly or impliedly. So much is acknowledged in the learned prosecutor's submission at 15:

> "Consent can be implied by the conduct of the complainant (*Daye v Pryce*; *Lergesner v Carroll* Supra) and the circumstances surrounding the alleged consensual fight and the degree of violence offered (*Lergesner v Carroll* at 61-62). Further that the degree and level of consent is a matter for the tribunal of fact (*Lergesner v Carroll* at 58 and 65); see also the comments per Thomas J at 387 in *Raabe* supra:
>
> > It is for a jury to perceive the limits of any implied consent, and this must allow for different shades and degrees of violence. In some cases the consent will be limited to slaps or hair pulling, and in others to hard blows; in some cases to quite trivial assaults and in others to bodily harm… The point is that infinite graduations are possible in the scope of the consent from case to case.
>
> See also the decision of his Honour Justice Derrington at 389:
>
> > It is not reasonable to say that a person entering a fight gives his opponent carte blanche to administer such violence as to cause as much injury as he wishes within the bounds of bodily harm whilst the former continues to manifest a willingness to fight, no matter how inadequate he may be. Equally, it could not be said that a licence is given in such circumstances to use any means to inflict violence providing that the injury caused does not exceed bodily harm.
> >
> > The absence of consent is an element of the offence of assault, but the consent referred to is not of an abstract nature. More correctly, it might be said that the consent to the infliction of violence such as to cause bodily harm is not in the abstract. Whether expressed or, as is most unusual, implied, the consent contains a factor as to degree.

And finally, the judgment of his Honour Justice Cooper in *Lergesner v Carroll* at 65*:*

> In each case it is a question of fact for the jury to determine whether consent existed and if it did exist, the precise limits of the consent. No useful comment can be made as to where the limits, if any, of a consent lie. This is to be determined by the jury as a fact having regard to all the circumstances existing at the time the consent is expressly given or is to be inferred from the circumstances."

13. Consistent with that approach, in my view the complainant either consented, or gave the impression that he consented to a fight incorporating blows. I agree with submissions made on behalf of the Defendant that the limits of consent need to be explored.

> "A consent to fight does not mean a consent to any application of force. For example, a continued application of force where the other person no longer appears to be able to defend themselves, or the use of a weapon, may well be outside the consent given. However it must be bore (sic) in mind that the consent is to the nature or manner of the application of force, not consent to a particular injury. *Carroll v Lergenser* (1991) 2 Qd R 206."

14. It cannot be proven beyond reasonable doubt that the words inviting the Defendant "outside" were spoken after the first blow struck by the Defendant. Consistent with my view of the facts, the matter must proceed on the basis the words were said prior to the first punch being struck. In any event, there were other indicators aside the words that the complainant was wanting to fight. There is no evidence that the Defendant intended death or grievous harm which would preclude consideration of consent: s 26(3) *Criminal Code* and *R v Minor* (1991) 79 NTR 1.

15. A significant part of the submissions of both counsel are directed to the question of the mental element required to be proven particularly if it was found the complainant was not consenting but the Defendant possessed the belief that he was. Once again, despite valiant efforts by counsel for the prosecution to distinguish the line of authority culminating in *DPP (NT) v WJI* (2004) 219 CLR concerning the mental element relevant to consent in

cases of sexual assault in my view "assault" attracts the same full operation of principles of criminal responsibility including consideration of the Defendant's belief on consent. Although I accept there may be a contextual difference about the question of "consent" when it relates to sexual assault when compared with the facts of a case such as this one, the legal architecture provided by the Code is the same in both types of cases. Nothing in s 187 *Criminal Code* provides the mental element for assault. Recourse must be had to s 31 *Criminal Code*. The question is then whether an application of force without consent was intended or foreseen as a possible consequence of the conduct. The genuine belief that the force was consented to excuses the conduct via s 31 *Criminal Code*. Counsel for the Defendant has drawn my attention to *Sims v Robinson* [2008], Dr Lowndes SM, 23 January 2008 where on the same issue His Honour found that the prosecution must prove the defendant "knew that the victim was not consenting or knew that he or she may not be consenting and proceeded regardless". With respect, I agree His Honour.

16. Counsel for the prosecution argued *Daye v Pryce* [2000] NTSC was consistent with its position that "consent" in relation to assaults was distinguishable from *WJI*. I do not see anything with respect in *Daye v Pryce* to support that submission. In *Daye v Pryce* His Honour Riley J clarified that s 187(b) (attempted or threatened applications of force) contained the element of consent even though s 187(b) itself does not refer to "consent". I note also that in *WJI* Kirby J was well aware that the decision in *WJI* would be relevant to other areas of criminal law in the Northern Territory. At para 103 His Honour stated:

> "Considerations of legal policy: Considerations of legal policy also support this construction. Generally speaking, absent established error, the interpretation of a common provision of particular State or Territory law is the responsibility of the appellate court of that State or Territory [151]. Any decision made by this Court in the present case could not be confined to the crime of sexual intercourse without consent. It would impose an artificially narrow view, severally, of

"act" and "omission" and "event" for every offence where a mental element is not expressed in the NT Code [152]. It would do so, despite the pains of the drafters to use a composite phrase of wide ambit in which the words were obviously intended as cumulative and alternative (indicated by the word "or") [153]".

17. In any event, although most of the argument in this matter has concerned consent, I am not satisfied that the prosecution has negatived the operation of self defence. The relevant part of s 29 *Criminal Code (NT)* provides as follows:

> **29 Defensive conduct justified**
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> (1) Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.
>
> (2) A person engages in defensive conduct only if –
>
> (a) the person believes that the conduct is necessary –
>
> (i) to defend himself or herself or another person;
>
> and
>
> (b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.
>
> (3) A person does not engage in defensive conduct if the conduct involves the use of force intended to cause death or serious harm –
>
> (a) to protect property; or
>
> (b) to prevent trespass or remove a trespasser.
>
> (4) For the purposes of subsections (2) and (3), a person trespasses if he or she enters or remains on land or premises –
>
> (a) with intent to commit an offence; or
>
> (b) in circumstances where the entry on to or remaining on the land or premises constitutes an offence.

(5) A person does not engage in defensive conduct if –

(a) he or she is responding to the lawful conduct of another person; and

(b) he or she knows that the other person's conduct is lawful.

(6) Nothing in subsection (5) is to be taken to prevent a person from engaging in defensive conduct in circumstances where the other person's conduct is lawful merely because he or she would be excused from criminal responsibility for that conduct.

(7) Sections 31 and 32 do not apply in relation to defensive conduct.

18. I bear in mind it is important not to balance the competing considerations concerning defensive conduct on a knife edge (*Zecevic v DPP* (1987) 162 CLR) and accept that people make decisions about the use of force while being caught up in the drama of the occasion. It is open on the facts that the Defendant was acting to defend himself in relation to both blows – the first blow because of the complainant's aggression towards him and the second blow because of a continuation of that conduct as I have found it to be. The state of the evidence is such that the conclusion that the Defendant's conduct was a reasonable response to the circumstances as he reasonably perceived them (s 29(2)(b) *Criminal Code*) cannot be negatived beyond reasonable doubt. Although the first blow must have been a hard blow, it was not so disproportionate to exclude the operation of self defence.

19. I will make orders dismissing the charge.

Dated this 18th day of March 2008.

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Jenny Blokland
CHIEF MAGISTRATE