

CITATION: *Police v Espie* [2008] NTMC 046

PARTIES: POLICE
v
WAYNE ESPIE

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: Criminal

FILE NO(s): 20629568

DELIVERED ON: 3 July 2008

DELIVERED AT: Darwin

HEARING DATE(s): 25 February 2008 & 16 June 2008

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

Criminal Law – Assault Police – Execution of Duty, Power to Remove Child
Community Welfare Act, s 11

REPRESENTATION:

Counsel:

Informant: Mr Walsh/Ms Ganzer
Defendant: Mr Kaye

Solicitors:

Informant: ODPP
Defendant: NTLAC

Judgment category classification: B
Judgment ID number: [2008] NTMC 046
Number of paragraphs: 40

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

No. 20629568

[2008] NTMC 046

BETWEEN:

KERRY LEANNE RIGBY
Informant

AND:

WAYNE MICHAEL ESPIE
Defendant

REASONS FOR DECISION

(Delivered 3 July 2008)

Ms Sue Oliver SM:

1. Wayne Espie (“the defendant”) pleaded not guilty to a single count of assaulting a member of the Police force, namely Constable Sean Byrnes, whilst in the execution of his duty, contrary to s 189A of the Criminal Code. The events giving rise to the alleged assault occurred on 20 November 2006. The prosecution called evidence from two Ambulance Officers who had attended at the defendant’s home address in Hazell Court, Coconut Grove and from Police Officers, including Constable Sean Byrnes, who had either attended at that address or were present in the vicinity of the laneway adjacent to the Nightcliff Police Station at the Nightcliff Shops where the alleged assault was said to have occurred.
2. The background to the incident is that the defendant’s small daughter, a child of about four or five years of age, was reported to the Police by the defendant as having been assaulted by his partner. Police arrived first, followed by the Ambulance Officers, who were told that the child had been hit and who were requested to assess the child. The defendant was present

with his daughter, along with a friend, Ron, who subsequently gave evidence for the defence in the matter. The evidence of both Ambulance Officers was that they arrived at around 8.40/8.45 and that they observed a small swelling on the forehead region of the child and a small amount of bruising. The child was taken to the ambulance where they did a basic examination and although they could find no indication that there was anything wrong with the child, they wished to have her taken to the hospital for further assessment, to be certain that she had no further head injuries. The history that had been given to them was that the child had been struck on the head. Both of the Ambulance Officers described the defendant as being intoxicated or under the influence of alcohol. Both described him as using loud abusive language or being aggressive. Both were concerned that the father had indicated that he was going to start work driving a truck in the early hours of the morning and would take the child with him.

3. The defendant refused to go with the ambulance to the hospital with the child and both Officers gave evidence that he grabbed the child by the arm off the seat in the ambulance and walked off up the road with the other man.
4. Sergeant Shaun Furniss, who was the supervisor on the evening shift at Casuarina on that evening, gave evidence that he remembered the child's injury quite vividly because the lump on her head didn't look normal and she looked small for her age and was not responsive when being spoken to. He said that the defendant smelt strongly of liquor and appeared to be quite intoxicated. He also had a conversation with the defendant to the effect that the defendant was going to go to work after midnight or at midnight and take the child with him. He followed the defendant when he walked off down the road with the child to his unit and went inside. From outside he observed the defendant stumbling inside the unit. He asked the defendant's friend, Ron, to speak with the defendant to persuade him to take the child up to the hospital. When he saw the defendant walking back down the road in the direction of the ambulance, he thought that this was what was going to

occur and he left. Later, he heard a radio conversation that the defendant had not gone with the ambulance with the child to the hospital, but had gone off walking in the direction of Nightcliff, with his daughter and his friend. He said his concern was that the defendant was seriously affected by alcohol as to his demeanour and outbursts and appeared not to be wanting what was best for his child. He told Constable Beverley Hagston by radio that if the defendant was found to still be seriously intoxicated, then he should be taken into protective custody and the child should be seen to medically. He did not witness what occurred at Nightcliff, arriving to find that the defendant was handcuffed and sitting on the ground and that he had a bit of blood down his face.

5. Constable Alend had also been present at the initial scene and likewise, gave evidence that the defendant and his friend Ron were both intoxicated, slurring their words, bloodshot eyes and smelling of alcohol. Constable Alend was on duty with Constable Hagston. They were not able to persuade the defendant to take his daughter in the ambulance to the hospital and saw the defendant, in company with the friend Ron and his daughter, walking off towards the end of the street, going onto Dickward Drive towards the Nightcliff area.
6. The Ambulance Officers then left the scene, Ambulance Officer Alcibar, having advised Constable Alend that they were concerned and weren't happy to just leave the scene. Ambulance Officer Alcibar got Constable Alend to sign their case card, stating that they (Police) were taking over responsibility for the child because the Ambulance Officers felt they could not do anything further.
7. Police then organised to locate the defendant and the child. They were subsequently found in the laneway area, together with Ron, at around 9.40pm. Two patrols had been involved in the search, one with Constables Alend and Hagston and another with Constables Byrnes and Northey. All

four gave evidence as to what occurred at the scene. The Police Officers tried again to persuade the defendant to take his daughter to the hospital. I am satisfied on their evidence that this included an offer to drive the defendant, with his daughter to the hospital. The defendant remained opposed to that idea and on all accounts, responded aggressively to the Police requests. Each of those witnesses gave evidence as to the defendant's level of intoxication. Each considered him to be affected by alcohol, including that Constables Byrnes and Northey described him as being unsteady on his feet or staggering and that they could smell alcohol on him. At this point the child appears to have been standing next to the defendant and all Constables gave a consistent description of what happened next. Their accounts of the defendant's action in relation to the child were not questioned. The defendant spat on the ground and there was a short verbal exchange between him and Constable Northey regarding this action. The defendant then picked the child up and threw her over his shoulder and the child was screaming. Constable Northey described the child being approximately on her stomach over the defendant's shoulder, with her head facing the ground. All Officers expressed the same concern for the child's safety at this time, which Constable Northey summarised in his evidence as being that the defendant was intoxicated, he was holding the child as described, being a child who had earlier had a head injury and he was concerned that she might be dropped and land on her head on the concrete.

8. Once the child was thrown over his shoulder, the Officers surrounded the defendant and attempted to take physical custody of her. Constable Hagston was eventually successful in doing so and she immediately removed the child away from the scene, to comfort her and prevent her from seeing anything else that followed.
9. When the Constables surrounded the defendant he began swinging his arm out using his left arm initially with a raised clenched fist and making punching movements. Once Constable Hagston had removed the child, the

defendant began swinging both arms. These were described as being round house punches. Constable Alend removed Ron from the immediate vicinity, his evidence being that he was taking him into protective custody, leaving Constables Byrnes and Northey to deal with the defendant.

10. Constable Byrnes' evidence was that in the course of this struggle, the defendant pulled his head back and then lunged forward, head butting him and his head was thrown back by the force of the blow. Constable Byrnes responded immediately, punching the defendant to the left side of the face. Constable Northey described the head butt consistent with the account given by Constable Byrnes. Constable Northey then grabbed the defendant by the back and used a rear take down manoeuvre to put him on the ground and handcuffed him. Constable Northey said that he didn't see Constable Byrnes strike the defendant, but that Constable Byrnes did say later that he had struck him. Constable Alend observed these events from where he was placing Ron in the van, observation being "out of the corner of his eye". He saw the defendant lunge at Constable Byrnes with his head, a movement he described as "just like a head butting thing with the head, just lunged at him with his head". He said he couldn't say for certain that Constable Byrnes was hit. He did not observe Constable Byrnes strike the defendant. Constable Hagston saw none of this, as she had removed the child to a position where the child could not observe what was happening.
11. Constable Hagston described it taking a good two to three minutes to get the child from the defendant. She said that during this time, she was telling the defendant to let her go and that she just wanted to hold her.
12. The evidence of each Officer was consistent and I considered them to be reliable witnesses.
13. The defendant gave evidence in which he denies head butting Constable Byrnes. He described struggling with the three Constables and that one of them had punched him. He said he was smashed to the cement and

handcuffed. He did not think that he could have accidentally head butted Constable Byrnes in the struggle. He said that the Police said something about going to get locked up for intoxication and this was after the child was taken, but before he was taken to the ground. He disputed the level of intoxication that was described by the other witnesses, describing himself as still being able to walk and being only a “little bit drunk”. He said he was not concerned for his daughter because it was just a slap that she had received. He said he was going to take her to the hospital in the morning after he had finished his shift driving. He said that the reason he did not wish to take her that night was because it would take some hours at the hospital and he needed to sleep. The defendant said that the lump which had been described by the various witnesses on the child’s head was in fact one that she had had since birth, having been a very small pre-term baby. It was not suggested to any of the witnesses that the defendant had provided them with this information on the night in question.

14. The defendant’s evidence was to the effect that there was no real cause for concern because the child had only received a slap, he told them he would take the child himself in the morning and he was not starting work until well into the early hours. There is some disagreement as to what he may have said to the Police and Ambulance Officers in terms of the timing of starting work and taking the child to the hospital. He didn’t want to take the child to the hospital because of the long wait that would be required because he had to go to sleep to go to work. His actions were inconsistent with this expressed intent because he did not go home with the child but walked off with her to Nightcliff.
15. The defendant’s friend Ron Waldock (or Darby) gave evidence for the defendant regarding the assault on the child and said that when Police approached them at Nightcliff, that the defendant said he would take his daughter to the hospital in the morning. Mr Waldock thought that it was a welfare lady that grabbed the child. Constable Alend had given evidence

that both he and Constable Hagston, as would be expected, were in their Police uniforms whilst on duty that evening. Mr Waldock didn't see the head butt, nor did he see any Officer do anything to the defendant. Mr Waldock's evidence added little other than to confirm the defendant's account that he had only six beers. Given Mr Waldock's impression that an Officer in uniform was a "welfare lady", his account of the level of intoxication of himself and the defendant is not reliable.

16. Did the defendant head butt Constable Byrnes?

17. It was submitted that I should accept the defendant's evidence that he did not head butt Constable Byrnes either deliberately nor accidentally, and that the evidence of head butting was contrived by the three Officers who gave evidence of it in order to justify Constable Byrnes punching the defendant.
18. None of the other Officers said they saw Constable Byrnes punch the defendant but Constable Byrnes was frank in his admission and said that he had punched him to create distance between them after being head butted. Even though Constable Northey did not see the punch, he said that Byrnes told him afterwards that he had punched the defendant. Ron Waldock saw neither blows being struck.
19. There is nothing to support the contention that the story of the head butt was contrived. If the evidence was contrived by the three Officers who gave evidence of it, then it might be expected that they would all say that they saw it connect. Constable Alend saw the motion but not the blow. There would be no point in Constables Alend and Northey saying they didn't see the punch if they were contriving to justify it. There would be little point in Northey saying that he didn't see it, but that Byrnes told him about it. In my view, the difference in what each observed is consistent with general experience in violent rapid struggles. In those circumstances, not everyone sees everything that occurs.

20. The defendant was intoxicated. He was aggravated and aggressive in his language and attitude to Police. This was supported not just by those present at the incident but by those witnesses who had attended the Hazell Court address earlier that evening, including the two Ambulance Officers. This was not contested. He was swinging punches, first with one arm then with both. This evidence was not contested, rather the cross-examination on this point was aimed at whether the swings from him came before or after the Officers sought to restrain him, rather than any denial that this had occurred. The defendant did not, in his evidence, deny swinging punches. He did deny head butting Constable Byrnes.
21. I reject the submission that I should consider the evidence of the Officers as to the head butt as contrived. Their evidence taken as a whole is of a deliberate act to strike Constable Byrnes on the head with his head. The defendant himself rejected the idea that there could have been an accidental blow. I do not accept the defendant's evidence that he did not head butt Constable Byrnes. I am satisfied beyond a reasonable doubt that he did head butt Constable Byrnes in the way that was consistently described by each of the witnesses Byrnes, Northey and Alend and that it was a deliberate act.
22. In any event, even if I were to accept the defendant's version that he did not head butt Constable Byrnes, I would be satisfied that the swings that he was taking in the direction of Police who were attempting to restrain him were sufficient to amount in themselves to an intended application of force on the Officers. That would, in my view, have been sufficient to amount to an assault for the purpose of the charged offence.

Did the assault on Sean Byrnes occur whilst he was “in the execution of his duty”

23. Much was made in cross examination of the prosecution witnesses of the level of intoxication of the defendant in relation to the question of whether Police had justification for taking him into protective custody. The Police

witnesses described him variously as being “seriously affected”, “drunk”, “extremely intoxicated”, “intoxicated”. They each described various effects of the intoxication – “unsteady”, “slurring words” “blood shot eyes” “smelling of alcohol”. The Ambulance Officers gave similar descriptions “intoxicated”, “smell alcohol on breath” “speech slurred”, “red in face” “under the influence”, although Mr Winsley agreed in cross-examination that he was not “severely or seriously intoxicated”. Ms Alcibar agreed she could not say he was “seriously intoxicated”, but neither would she concede that he was not. The Ambulance Report was tendered [P1] and it notes that “Father appears intoxicated ·/c alcoholic beverages, when questioned father if he had been drinking alcoholic beverages father stated he had. Father is red to face, diaphoretic and smells of ETHOH” and later “Crew advised VKM as father is intoxicated he is in no state to take care and observe child this pm”.

24. The Ambulance Report also records “John Alend (VKM) at scene advised Father (Wayne Espie) that child requires to attend RDH to be assessed. Father refusing, then started rough handling the child, then walked off ·/c child and refused to speak ·/c crew” and further “Father became verbally abusive toward crew. Crew have asked and requested VKM to notify welfare of this incident this pm.” Both Officers also gave oral evidence of the defendant’s actions with his daughter, describing him grabbing her by the arm and dragging her from the vehicle (Alicibar) and grabbing her off the seat and walking up the road with the other bloke (Winseley). Each of these matters go to the issue of the effect that alcohol had on the defendant and as I will come to, the overall circumstances confronting the attending Police Officers.
25. The defendant in his evidence said he had drunk about 6 beers and was a little bit drunk but could still walk. Mr Waldock agreed with the defendant’s estimate of the number of beers that had been drunk. Mr

Waldock was said by prosecution witnesses to also be intoxicated. As I have said, I did not consider Mr Waldock reliable on this point.

26. It was submitted that the apprehension of the defendant was without power because he was not “seriously affected” by alcohol as is required by s 128 of the *Police Administration Act*. It is certainly the case that absent this qualification, power to apprehend would not exist and the Police Officers would not be acting “in the execution of their duty”. Certainly each of the Police witnesses gave evidence that protective custody was a course of action that they considered. Sergeant Furniss, the shift supervisor said that he told Constable Hagston that when they found him and the child, if he was still seriously intoxicated then they should take him into protective custody and have the child seen to medically.
27. However the evidence does not support a finding that there was an attempt to take him into protective custody, whatever might have been the advance thoughts of each of the constables on that score. The defendant’s own evidence supports this view because he said that it was after the child was taken that getting locked up for intoxication was mentioned.
28. The primary concern of each Officer was for the child’s safety and the need for further medical assessment. I find that the circumstances that presented themselves were, in summary, as follows:
 - A report had been received from the defendant that his daughter had been assaulted by being back handed by his partner.
 - The child had the appearance of injury consistent with the report– a lump to the head and bruising.
 - The Ambulance Officers assessed her as requiring further medical investigation at the hospital to exclude the possibility of any brain injury. Police were advised that this was required and that “welfare” should be contacted.

- The father was intoxicated and refused both Ambulance Officer and Police requests to take the child in the ambulance to the hospital. He was abusive and aggressive to both groups, both at the initial scene and then at Nightcliff.
 - He had roughly handled the child out of the ambulance, taken her first to his unit then left there with her, walking off in the direction of the Nightcliff shops in company with another male (Mr Waldock) also observed to be intoxicated.
 - The father had told Police that he intended to take her to work with him sometime in the early hours of the morning and that this work involved driving a garbage truck.
 - When the defendant, his daughter and Mr Waldock were found they were walking in the laneway adjacent to the Nightcliff Police Station. It is around 9.40pm. Police again tried to persuade him to let them take the defendant and his daughter to the hospital. The defendant again refused in an abusive and aggressive manner, including spitting on the ground and challenging Constable Northey when he remonstrated with him about it.
29. In view of these circumstances, the Police Officers were rightly concerned for the child's safety. What happened next in my view would have cemented their view that the time had arrived to intervene to remove the child for her own safety.
30. As previously noted, the uncontested evidence was that the defendant picked up his daughter who had been standing near him, threw her right across his shoulder so that her head was facing downwards over his back. The child was screaming. The defendant began swinging his other arm in round house punch movements towards the Officers and tried to leave with the child. At that point all four Officers moved in. Constable Hagston taking hold of the

child and eventually releasing her from the defendant's hold. The defendant then used his freed arm to continue swinging. As I have found, in the course of the struggle he head butted Constable Byrnes before being punched then was taken to the ground and handcuffed.

31. Section 11 of the *Community Welfare Act* (now repealed) was in the following terms:

(1) The Minister, an authorized person or a member of the Police Force may, where he or she believes on reasonable grounds that a child is in need of care and that no other action would ensure the adequate care of the child, take the child into custody.

(2) For the purposes of subsection (1), the Minister, an authorized person or member of the Police Force may, without warrant, enter a place where a child is or is reasonably believed to be located and, unless he or she is satisfied that adequate steps will be taken to ensure that the child will cease to be in need of care should the child remain at that place, remove the child, and may use such force as is reasonably necessary for those purposes.

(3) A person taking a child into custody under subsection (1) –

(a) subject to this Part, may have the child held in a place of safety for the period he or she considers appropriate; and

(b) must, not later than 48 hours after taking the child into custody, apply for a holding order under section 11A.

32. Mr Kaye submitted that the grounds for taking the child into care were not made out because they could be no reasonable belief that she was “in need of care” as that term is defined in s 4 of the Act. The relevant part of the definition relates to maltreatment and is as follows:

S4(2) For the purposes of this Act, a child is in need of care, where –

(a) ...;

(b) ...;

(c) he or she has suffered maltreatment;

(d) ...; or

(e)

(3) For the purposes of this Act, a child shall be taken to have suffered maltreatment where –

(a) he or she has suffered a physical injury causing temporary or permanent disfigurement or serious pain or has suffered impairment of a bodily function or the normal reserve or flexibility of a bodily function, inflicted or allowed to be inflicted by a parent, guardian or person having the custody of him or her or where there is substantial risk of his suffering such an injury or impairment;

(b) he or she has suffered serious emotional or intellectual impairment evidenced by severe psychological or social malfunctioning measured by the commonly accepted standards of the community to which he or she belongs, because of his or her physical surroundings, nutritional or other deprivation, or the emotional or social environment in which he or she is living or where there is a substantial risk that such surroundings, deprivation or environment will cause such emotional or intellectual impairment;

(c) he or she has suffered serious physical impairment evidenced by severe bodily malfunctioning, because of his or her physical surroundings, nutritional or other deprivation, or the emotional or social environment in which he or she is living or where there is substantial risk that such surroundings, deprivation or environment will cause such impairment;

(d) he or she has been sexually abused or exploited, or where there is substantial risk of such abuse or exploitation occurring, and his or her parents, guardians or persons having the custody of him or her are unable or unwilling to protect him or her from such abuse or exploitation; or

(e) being a female, she –

(i) has been subjected, or there is substantial risk that she will be subjected, to female genital mutilation, as defined in section 186A of the Criminal Code; or

(ii) has been taken, or there is a substantial risk that she will be taken, from the Territory with the intention of having female genital mutilation performed on her.

33. Mr Kaye suggests that because the child was assessed by the Ambulance Officers as only having a superficial injury, that s 4(3)(a) is not satisfied and the Officers therefore lacked power to take her into their custody in accordance with s 11. Without that power, Constable Byrnes' actions were not authorized and he could not be said to be acting in the "execution of his duty" which is a requisite element of the offence with which the defendant is charged.
34. In my view reasonable grounds for believing she had suffered maltreatment did exist. She had suffered a physical injury at the hand of the defendant's domestic partner. There were signs of temporary disfigurement (the lump and bruising) and the child indicated pain to the Ambulance Officer (recorded in the ambulance report). Without further assessment, a head injury could not be ruled out and the defendant was refusing that assessment. He was considered by the Ambulance Officers to not be in a

state to take care of and observe the child. He had treated her roughly earlier in the evening in removing her from the ambulance and then threw her over his back while she screamed. She was in a precarious position being held by an intoxicated person. Each of these matters in my view were grounds that would give rise to a reasonable belief that there was “substantial risk of his (sic) suffering such an injury” in accordance with the definition of maltreatment at s 4(3)(a).

35. Police did not use any more force than was reasonably necessary in the circumstances. It was the defendant who elevated the engagement with Police to a physical one by taking swings with his fist and trying to move away from them with the screaming child. It left them no option but to restrain him and physically remove the child.
36. I am satisfied beyond a reasonable doubt that Sean Byrnes was acting in the execution of his duty as a Police Officer pursuant to s 11 of the *Community Welfare Act* when he was head butted by the defendant.

Self defence or provocation

37. It was submitted that in the event that I was satisfied that Sean Byrnes was head butted whilst acting in the exercise of his duty as a Police Officer, I should find that either self defence or provocation had been raised on the evidence and not rebutted by the prosecution.
38. I do not think that the evidence raises the issue of self defence. It was not until the defendant stepped forward swinging his arm after throwing his daughter over his shoulder that Police stepped in to restrain him and take physical hold of the child. There is nothing to suggest that this was a defence of himself because no force had been used against him at that point. He cannot be said to have been defending his daughter because Police were entitled, as I have found, to use reasonable force to remove the child from

his custody. They did not exceed a reasonable degree of force in the circumstances.

39. At the time of this incident a defence of provocation pursuant to the then s 34 of the Criminal Code applied to excuse a person from criminal responsibility for the use of such force as was reasonably necessary to prevent the repetition of a wrongful act or insult as to be provocation for him. The use of force by the Police Officers, which I have found to have been “reasonable”, cannot be characterised as a “wrongful act” because as such, it was force authorised by s 11(2) of the *Community Welfare Act*. The issue of provocation does not arise on the evidence.
40. I am therefore satisfied beyond reasonable doubt as to the elements of the offence and find the defendant guilty of the charge of assaulting a member of the Police force in the execution of his duty.

Dated this 2nd day of July 2008.

Sue Oliver
STIPENDIARY MAGISTRATE