

CITATION: *Police v Frewen* [2008] NTMC 076

PARTIES: ERICA SIMMS

v

GAVIN FREWEN

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20815434

DELIVERED ON: 10 December 2008

DELIVERED AT: Darwin

HEARING DATE(s): 20 and 21 November 2008

JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

Domestic Violence – Credibility of witnesses – Child witnesses

REPRESENTATION:

Counsel:

Plaintiff: Mr Dalrymple

Defendant: Ms Keppert

Solicitors:

Plaintiff: Director of Public Prosecutions

Defendant: NT Legal Aid

Judgment category classification: C

Judgment ID number: [2008] NTMC 076

Number of paragraphs: 39

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

No. 20815434

[2008] NTMC 076

BETWEEN:

ERICA SIMMS
Plaintiff

AND:

GAVIN FREWEN
Defendant

REASONS FOR DECISION

(Delivered 10 December 2008)

Ms Fong Lim RSM:

1. The Defendant defends two charges: Charge 2 assault with circumstances of aggravation that he was male and the victim female, the victim was unable to defend herself and she suffered harm, and Charge 4 intimidation of witness. He pleads guilty to a breach of a Domestic Violence Order between him and the victim. In relation to Charge 4, it is not in dispute that at the time the Defendant was a Defendant in an earlier criminal matter which involved the Complainant as the Complainant and for which a hearing had not been completed at the time of this incident. It is disputed that the threat as particularised was made.
2. The allegation of the Complainant is that on 3 June 2008, she was the victim of an assault by the Defendant where he attempted to strangle her, punched her in the leg and also threatened to kill her and “gut her family”, should she go to Court for the earlier criminal matter.

3. The Court heard evidence from the Complainant, a neighbour of the property at which this assault apparently took place, the landlord of the property, various police officers and two of the Complainant's sons. The Defendant also chose to give evidence and called evidence from Mr Barritt, the Defendant's flatmate at the time.
4. The Complainant, Kerry Anne Kimber, gave evidence by way of video link as a vulnerable witness. She gave her evidence in chief in a flat and quiet manner and did not appear to be nervous at all. She gave evidence of the Defendant coming to her residence uninvited on Saturday 31 May 2008 and also on Sunday 1 June 2008 to spend some time with her and her children. He stayed over that night and then left her place early on the Monday morning. While there was a fight between two of her sons on the Sunday in which the Complainant had to intervene, with some assistance by the Defendant, there was no trouble between the Complainant and the Defendant on that day. The next day the Complainant says she was visited by the grandmother of one of her children who threatened to call Family and Children Services (FACS) because she had heard that the Defendant had stayed over night. This caused the Complainant some anxiety so she decided to go into town to see her lawyers. This is where the Complainant's evidence becomes confused.
5. The Complainant at first says that as she didn't have any credit on her phone, so when she got a call from the Defendant she asked him to call a taxi so that she could go into town. Throughout her evidence in chief and cross-examination, she stated she wanted to get out of her house because she was worried about FACS and because she was worried that the Defendant would come back to her place. She stated many times that she was intimidated by the Defendant and told the police that she caught a taxi because she didn't want the Defendant to come to Palmerston and find her standing at the bus stop. This is clearly contradictory to the claim that the Defendant was the one to call the taxi (that is supported by the objective

evidence of the taxi company's records) and therefore, would have known she was in a taxi, not at the bus stop, in any event.

6. The Complainant's further evidence is that she had a text conversation with the Defendant before he rang the taxi company. That is inconsistent with her earlier evidence that she had no credit on her phone. She could not have had a text conversation with the Defendant if she had no credit. However in his record of interview, the Defendant agrees that she had little or no credit left on her phone.
7. Early in her evidence in chief, she says she tells him by text that she had got out of the taxi at Kerry Holden and that the Defendant texted her saying he did not live far from there and he came and got her. Later in cross-examination, she states she got out of the taxi at Kerry's because she only had \$38.00 on her and that the Defendant saw her from across the road and that is when he came over and insisted she come back to his place. She says she went to the Defendant's place only because she felt intimidated by him. These inconsistencies will be discussed further.
8. However she came to be there, the Complainant and her children stayed with the Defendant for the night of 2 June through to the next day. It is on the evening of 3 June that the alleged assault took place and the threat was made.
9. There was evidence from a neighbour that on the night of 2 June 2008 there was arguing and yelling between a male and a female coming from the Defendant's address and that was the same female who had been shouting and yelling the night before for "Gus" to give her handbag back. This yelling and shouting apparently went on for about 30 minutes. Ms Eccleston gave evidence that she called the police at 1:15am on 3 June 2008, however the police records show a call from her at 1:16am on 2 June 2008. It is clear that Ms Eccleston is mistaken about the dates. There is no reason to doubt her evidence otherwise. Ms Eccleston also gave evidence of a further

argument emanating from the same property on 3 June at about 8:00pm which she believes was the same female voice and a male voice. This argument was a lot shorter. Neither the Complainant nor the Defendant gave evidence of a lengthy argument between them on the Sunday night.

10. The evidence of the landlady, Ms Williams, corroborates Ms Eccelston's evidence that she had complained twice in three days of disturbances from the property and I accept her evidence.
11. The Complainant's description of the assault is that on the night of 3 June an argument erupted between her and the Defendant which resulted in him holding her by the throat with enough strength that she couldn't breathe, he then pushed her and she fell and hit her head on the couch after which he punched her hard in the leg.
12. The objective evidence is not totally consistent with the Complainant's description of the assault. In particular, she says that the Defendant choked her with his hands for long enough and hard enough that she couldn't breathe, yet there was no evidence of bruising around her neck when the police attended. Photographs show bruising on the left wrist, bruising about the eyes and a bruise on the upper thigh.
13. The court also heard from two sons of the Complainant, Dylan who is 13 years old and Joel who is 16 years old. While Dylan's evidence confirmed there had been a fight between his brothers Damien and Joel and there had been an "assault" by Gus upon his mother, he did not place his mother in the kitchen when the fight occurred between his brothers. Dylan's description of the assault on his mother partly corroborates her description of the assault, that is, he says he saw Gus punch his mother and that is when he intervened, and he saw nothing of Gus with his hands around the Complainant's neck as described by her. While I have some reservation about his evidence because of Dylan's age and those inconsistencies, and the probable emotional response a young person of his age would have to violence, I found him to

be a witness who gave his evidence in a straightforward manner, the fact that he was not consistent with others regarding who was in the kitchen at the time of the altercation between his brothers and his description of the assault on his mother, indicates that there can be no suggestion of collusion with his mother about these issues.

14. The evidence of Joel in relation to the altercation between him and his brother I find to be credible and given he was a participant in the fight, he would be expected to have a more vivid memory of what he personally experienced. He was adamant his mother was not hit by Damien on that day and was certain because he was watching his brother closely to be prepared for his next move. His admission that Damien had been violent towards his mother in the past would also indicate that he would be aware of the possibility of his brother hitting his mum at that time. I find his evidence of that altercation to be reliable and I accept his evidence regarding that incident as truthful. His evidence corroborates his mother's memory of that fight.
15. Joel's evidence regarding the altercation at the Defendant's residence is not as useful. He confirms a verbal altercation between his mother and the Defendant, but he did not see any actual physical contact between the two. He only saw the Defendant lunge toward the Complainant and then he turned his attention toward his younger siblings. Any physical assault on the Complainant could have occurred after he turned away. He says he recalls an argument, but not the content of that argument, yet denies that the Defendant was asking his mother to leave. The denial must be considered unreliable if he is to be believed that he could not remember the content of the argument.
16. Neither son heard any threat issued to the Complainant by the Defendant.
17. Mr Barritt's evidence is that on the Sunday night he had met up with the Defendant and the Complainant at the Cavenagh Hotel and they all went

back to the flat. He says it was on that night that the Complainant had an argument with a neighbour and that argument had woken him up. In his words she “went a bit loopy”. He doesn’t place the Complainant and her children at the flat on the night of 3 June 2008.

18. Mr Barritt was questioned about his knowledge of the proceedings and how he came to know the court date when he had not been served with a summons. Both the Defendant and Mr Barritt state that it was through a mutual friend that Mr Barritt found out the hearing was on. They say that the Defendant had dinner with this friend, who is coincidentally called Gus, and they were discussing the case, it was that friend who relayed to Mr Barritt that he should be coming to court.
19. I do not accept any of Mr Barritt’s evidence as reliable, he answered many of the prosecutor’s questions with the obstructive response “you’re telling the story” and when pressed, gave the unhelpful answers in relation to timeframes and descriptions of any interaction between the parties. In addition, Mr Barritt stated that he had not seen the Defendant for ages, yet also stated in answer to one of the questions about how he came to know of the hearing date that “he got out of shower and I says you smell nice and he says he is supposed to get to court at 8:00 o’clock”. Mr Barritt confirmed that the person he said this to was the Defendant. Clearly that is in contradiction to the claim that he had not seen the Defendant for a while.
20. The Defendant’s evidence is that he had been in regular contact with the Complainant for about five weeks prior to the alleged assault at her instigation. He states he received a call from her regarding a fight her son Damien had with her ex partner and she spoke to him about the implications of that regarding FACS. Over the next five weeks the Defendant says he spoke with and saw the Complainant a couple of times and on 1 June was at her place when the fight between her sons occurred. His contention is that the injuries the prosecution are putting forward as arising from his assault

on her, actually came out of that altercation and the Complainant's intervention. When questioned about his observations, the Defendant says he saw Damien at one stage grab the Complainant's right wrist, but did not see her receive a blow to the leg, however states that the Complainant told him later that was how she got the bruise.

21. He points to her text message to him the next day complaining of being "so sore she could hardly walk". He also says she showed him the injuries the next day. The Defendant also claims he saw Damien grab the Complainant by the right wrist at one stage during that altercation. This is no doubt an attempt to explain the bruise on the Complainant's wrist as observed by the police and recorded in photos. Unfortunately for the Defendant, he had the wrong wrist. The bruising was on the left wrist.
22. The Defendant claimed in his evidence in chief that the Complainant went back to his place on the Sunday night and left at about 11:00-12:00pm after she became argumentative. He says he locked her out and put her bag out of the door and claims she had an argument with another tenant after he locked her out. There is nothing in his record of interview about this argument.
23. After that argument the Defendant says the Complainant returned home and contacted him the next day after having an argument with one of her children's grandmother. He arranged for a taxi to bring her and the children to his place and they went looking for accommodation which could not be found, so they ended up back at his flat. After a quiet night on the Monday, the Complainant and her children continued to stay with him until the Tuesday night when the Complainant started to become loud again so he asked her to leave. The Defendant says he did not hit the Complainant, he merely pushed her towards the door because she was refusing to leave.
24. In relation to the alleged threat, the Defendant obviously denies that threat and states that the Complainant was telling him that she would not be going to court against him. He also stated that his attitude to her comments about

that were casual and not caring. Given the serious consequences of that criminal proceeding, that is that he may go to jail, I do not accept that the Defendant did not care whether the Complainant turned up to the hearing or not.

25. This is a matter where the credibility of the witnesses, especially that of the Complainant and the Defendant, is a major issue.
26. I accept the Defence counsel's submission that the objective evidence of the telephone records is more consistent with the Defendant's explanation of what led up to the Complainant and her children being at the Defendant's flat on the night of 3 June 2008. That is they support the Defendant's evidence that it was at the Complainant's initiative that they were there and that the Complainant's evidence about that issue should not be considered reliable.
27. The Complainant was cross-examined on some text messages allegedly sent from her to the Defendant around the time between 28 May 2008 and 3 June 2008, at which time she became defensive and unresponsive in her answers. She stated she couldn't answer the questions because she didn't have her phone with her, however when pressed, stated that in relation to two particular messages, one signed "XOXO" and one referring to "gramps", that even if those messages were sent from her phone, they were not from her because she didn't use that language. The phone records of the Defendant and the Complainant were tendered and showed that over a period of time prior to 28 May 2008, particularly in 2006/07 there were several messages from the Complainant's phone to the Defendant's phone ending in "XOXO". Much was made of this fact by the defence counsel in relation to the Complainant's credibility, as it would seem inconsistent with her statement in re-examination that "I don't talk like that in text messages". There were also other messages with bad language in them from the

Complainant's phone to the Defendant's phone which do not support the Complainant's claim.

28. The Complainant sought to imply that anyone could have sent those messages on her phone, however given the time over which these messages have been sent, I cannot accept that implication.
29. The Complainant also claims that her children have never hit her, however the evidence of her two sons is that Damien had been violent towards his mother on at least a couple of occasions.
30. There are many internal inconsistencies in the Complainant's evidence which bring forth some doubt about the reliability of her evidence.
31. It is clear from her evidence that the Complainant is a confused person who is not totally reliable in her evidence. It is also clear from the evidence that the Complainant and the Defendant had a "terrible" relationship which featured arguments and violence between the parties, that conclusion is supported by the Defendant's evidence and the fact that a Domestic Violence Order had been issued between the parties.
32. It is also clear that the Complainant was not being truthful about the violence she has suffered at the hands of her older son Damien. The Complainant was also subject to the attention of FACS regarding the custody of her children and pressures from one of the children's grandmother about her continuing "relationship" with the Defendant. All of those factors and, if the Complainant can be believed, her fear of the Defendant would no doubt contribute to her confusion and perhaps give her motivation to sanitize the actions of herself and her children.
33. The Defendant also has credibility issues in that he was clearly prepared to lie to the landlady about knowing the Complainant to avoid trouble with the landlady, he is prepared to lie to the taxi company about his identity to avoid getting into trouble with the police, and he was also prepared to

breach an order of the court to continue contact with the Complainant. While his evidence was consistent with his record of interview and he was unshaken in cross-examination, his demeanour in the witness box was smug and his answers to questions were well rehearsed. He gave evidence that the relationship was “terrible”, yet was clearly willing to have the Complainant and her children with him which indicates he did not accept that the relationship was ended at the time. The Defendant’s attempt to explain away the Complainant’s injuries and his evidence that he didn’t care whether she went to court or not to give evidence on the other criminal charge is also unbelievable.

34. It is common in situations of relationships where violence is a common factor that the victim of that violence makes decisions which are not in their best interest. It is common in these situations that the victim becomes dependant on the aggressive dominant partner and continues contact with that person, despite the fact that may lead to violence. It is also common that these relationships are ended by either tragedy or the victim finally realising the destructiveness of the relationship and making the break.
35. It is clear to me from the evidence before me that this is what occurred between these two persons. The issue of the Domestic Violence Order by the court is evidence that this court was of the view that the relationship required the intervention of a court order to deter further violence upon the protected person, being the Complainant in this case.
36. I accept that the Complainant’s evidence was unreliable regarding her continuing contact between her and the Defendant and how she came to be at his flat on the night of 3 June. However, that does not mean that she must be found to be unreliable regarding the assault upon her and the threat made to her by the Defendant. Given the destructive nature of the relationship, the evidence of Dylan and Joel and the objective evidence of the obvious injuries to the Complainant. Most telling of her fear of the Defendant is that

shortly after this incident with the Defendant, the Complainant left Darwin for Adelaide leaving her two older sons behind.

37. Given the above, I am satisfied beyond a reasonable doubt that the Complainant suffered an assault at the hands of the Defendant on the night of 3 June 2008. I can be satisfied beyond a reasonable doubt that he punched her to the upper thigh and applied force to her to cause her to fall onto the couch. I cannot be satisfied beyond a reasonable doubt that the Defendant choked the Complainant in the manner in which she said he did.
38. In relation to the intimidate witness charge, charge 4, while I suspect that the Defendant has issued a threat to the Complainant given the history between the two, the fact she left her children behind to get away from the Defendant and the fact that the Defendant made an attempt to suggest he didn't care whether she turned up or not, I cannot be satisfied beyond a reasonable doubt that charge 4 is made out in all of its elements.
39. Accordingly, I find the Defendant guilty of Charges 1 and 2 and not guilty of charge 4. I will hear the parties on sentence.

Dated this 10th day of December 2008.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE