

CITATION: *Police v Houston* [2009] NTMC 013

PARTIES: STUART AXTELL DAVIS
v
EDWARD SURRIN HOUSTON

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20815254

DELIVERED ON: 6 May 2009

DELIVERED AT: Darwin

HEARING DATE(s): 5 February 2009 and 24 April 2009

JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

Criminal Law - Spontaneous admissions – recording of admissions – administering caution - ss 140,142 and 143 *Police Administration Act*

REPRESENTATION:

Counsel:

Plaintiff: Mr Dalrymple
Defendant: Mr McGorey

Solicitors:

Plaintiff: Director of Public Prosecutions
Defendant: North Australian Aboriginal Justice Agency

Judgment category classification: C
Judgment ID number: [2009] NTMC 013
Number of paragraphs: 45

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

No. 20851254

[2009] NTMC 013

BETWEEN:

STUART AXTELL DAVIS
Plaintiff

AND:

EDWARD SURRIN HOUSTON
Defendant

REASONS FOR JUDGMENT

(Delivered 6 May 2009)

Ms FONG LIM RSM:

1. The Defendant has been charged with two counts of assault police whilst in the execution of their duties contrary to section 189A of the Criminal Code and one count of resist police while in the execution of their duties contrary to section 158 of the *Police Administration Act*. These charges arose out of an incident on the night of 2 June 2008.
2. The assaults were particularised as the Defendant rapidly advanced upon the police officers with a pair of garden shears in his hands. The resist police charge was particularised as the Defendant struggling with the police officers as they tried to subdue him and arrest him.
3. It is agreed that the officers involved were on duty, night shift, when called out to attend a disturbance at 38 Wilmott Street, the Narrows, the Defendant's residence. Upon attending that residence the Defendant was out the back of the residence yelling to his partner who he believed was inside at the time. The police officers approached the backyard, identified

themselves and told the Defendant that they wanted to talk to him. The Defendant was upset by what was going on between him and his partner and told the police officers to “fuck off I don’t want to talk to the police”. The officers then gained entry into the backyard of the residence with the verbal assistance of the Defendant of how to open the gate.

4. What happened after the officers gained entry into the backyard of the premises is in dispute between the parties.
5. Constable Holmes and Burns were the officers attending and both gave evidence of their recollection of the events of that night. The Defendant also gave evidence of the events to that night.
6. Constable Holmes says that upon approaching the side fence of the residence leading toward the back yard, he identified himself as a police officer and told the Defendant that he wanted to talk to the Defendant. He remembers hearing angry shouting from the Defendant and what sounded like banging on a screen door as they approached the side fence, however couldn’t make out what was actually being said. The Defendant told him to “fuck off”. The officers then attempted to gain entry, however could not work out how to open the gate. He is then instructed by the Defendant how to open the gate. His memory is that when he was being instructed by the Defendant as to how to open the gate, the Defendant had become calm and he saw a hand over the top of the fence.
7. Once the officers gained entry, Constable Holmes says the Defendant was not visible nor could they hear him. Constable Holmes led the way down a dark corridor on the side of the house and when he rounded the corner of the house he could still not see the Defendant. Both officers had their torches on because it was so dark. The next Holmes says he saw of the Defendant is that he came out of some bushes and ran rapidly towards them with an object in his hands. Holmes thought that object to be a firearm and directed the Defendant to “drop the weapon”. Holmes also remembers that as the

Defendant was running towards him he was yelling “fuck you you’re gone”. When the Defendant did not comply with the command to drop the weapon, Holmes felt the need to draw his firearm as the Defendant was close enough to cause him harm with the object, which Holmes had by that stage identified as pruning shears. Holmes could not draw his firearm because it got stuck in his holster and he could not retreat because Officer Burns was behind him. It was at that stage that the Defendant seemed to stumble and drop the shears, when this happened Holmes ran towards the Defendant, struck him on the upper arm with his torch and then a struggle ensued.

8. During the struggle Holmes remembers being affected by capsicum spray and at one stage using his knee and being on top of the Defendant, he also remembers that the Defendant was face down when they handcuffed him and was later helped up and sat on a step.
9. Once the Defendant had been subdued Holmes remembers noticing the Defendant’s injury to the back of his head. It was then Holmes realised he had no access to his radio and that Burns went outside to call for back up and ambulance. Holmes remembers that it took about 10 -15 minutes for the other police unit and ambulance to arrive. During that time Holmes remembers having a conversation with the Defendant and while he doesn’t remember all the details, he remembers the Defendant making three statements as follows:
 - (a) “I’m sorry”
 - (b) “you should have finished me like I was going to finish you”
 - (c) “you didn’t know I had the shears while I was at the gate I could have stuck you then”
10. These statements were made to Holmes while he was alone with the Defendant and before any caution was administered pursuant to section 140 of the *Police Administration Act*.

11. Constable Burns' memory of events is similar to that of Constable Holmes, although there are some differences. He remembers the Defendant giving instructions on how to open the gate in a calm manner, he did not see any hand come over the fence. Burns remembers it being very dark and concerned about the sudden change in the Defendant's voice, at first yelling, upset and swearing and then very quickly calm. He remembers following Holmes down the alleyway almost tripping over a gas bottle then hearing Holmes yelling "drop the gun". When he looked up he saw the Defendant coming towards them with an object in his hand which he thought might have been a star picket not a gun and he also directed the Defendant to "drop the weapon". Burns' evidence is that he feared for his life as the Defendant advanced and remembers thinking that he may have to shoot the Defendant. He does not remember the Defendant saying anything like "you're gone" while he was running toward them. Burns' memory of the arrest and subsequent struggle was basically the same as that of Holmes and he confirms that the Defendant struggled quite violently until he was subdued once he was handcuffed.
12. Once the Defendant had been handcuffed Burns says he realised that the radio did not work in the backyard so he went to the van out the front to call for an ambulance and back – up. In the time between handcuffing the Defendant and the time he went to radio for back up, Burns says the Defendant did say something like " why didn't you shoot me I wanted you to kill me". He also remembers hearing the Defendant saying something about having the shears at the gate and "I was going to stick you" and that was said in a really cocky manner.
13. After the Defendant was assessed by the ambulance officers he was escorted to the police wagon and Constable Burns issued him with a taped caution pursuant to section 140 of the *Police Administration Act*. The tape of that caution was played on which the Defendant seemed calm, coherent and seemed to understand the caution as administered.

14. The Defendant's version of events is that earlier that day he had an argument with his partner and they were discussing their future together. He spent the afternoon and most of the evening with a friend he met at Casuarina Shopping Square. When that friend dropped him home, his partner would not let him into the house and told him to leave it is then started to lose his temper. He admits that he was very angry and upset and was banging on the screen door at the back of the house when the police arrived.
15. The Defendant admits to refusing to talk to the police and that he advised them how to open the gate. He then says he saw the garden shears leaning up against the wall of the laundry and he picked them up when he heard the police entering the property. He says he does not know why he picked up the shears. When asked in evidence in chief what he was thinking when he picked up the shears, he said he was "not rational and no logic. I was extremely upset".
16. The next thing he remembers is the police coming around the corner with their weapons drawn and demanding he "drop the weapon". The Defendant says he then put the shears down, knelt down with his hands behind his head and then he felt a blow to the bridge of his nose causing him to fall and someone fall with him. He says he felt a second blow to the head and then some OC spray being administered, after this he says he was feeling disoriented. Next thing he remembers is being handcuffed while still on the ground and the larger police officer washing out his eyes in the laundry. That is went the Defendant says he heard one of the police officers say something like "he ran at us" after which he was dragged into the laundry and hit on the head again.
17. The Defendant also remembers Burns leaving to go to the front of the house and then Holmes asking him why did he do it and answering something like "my girlfriend left me and I was upset". After that the Defendant's account is the same as the police officers regarding the administration of caution and

transport to the hospital. The Defendant does not admit to making the statements attributed to him by Holmes and Burns.

18. The injury received by the Defendant was a cut to the back of the head requiring four stitches, he did not report any other injury.
19. **Voir Dire** – Submissions were made about the admissibility of the alleged admissions made by the Defendant to the police officers prior to a caution being administered pursuant to section 140 of the *Police Administration Act* (“PAA”). For the purposes of the voir dire I will assume that the Defendant did make the admissions to Holmes and Burns as stated in their evidence. In particular, the statements that the police officers should have “finished him like he was going to finish them” is clearly an admission that he intended to assault the police officers and if admissible, goes a long way to proving the Defendant’s guilt.
20. On the evidence of Holmes, that statement was made after the Defendant had been handcuffed and placed under arrest and after Holmes had asked the Defendant “why”. The admission was not subsequently recorded pursuant to section 142 of the PAA.
21. Section 140 is clear in its intent and that is to protect a Defendant in custody from being questioned and making admissions against his interest before he has been warned of his right to silence and the opportunity to contact a friend or relative.
22. Holmes did not concede asking the Defendant “why” was “questioning” the Defendant and insisted in his evidence the admission was spontaneous. Under no circumstances can asking “why” not be “questioning” and for Holmes to expect the court to accept that explanation is disingenuous.
23. I find that the admissions made to Holmes were as a result of “questioning” and that questioning was in breach of section 140 of the PAA. In those circumstances, the admission should only be allowed in as evidence if the

court exercises its discretion under section 143 of the *PAA*. To exercise that discretion I must be satisfied:

“having regard to the nature and the reasons for non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice”.

24. The Defendant was in a highly emotional state before his arrest. He had an argument with his partner, they had broken up, he had been yelling and banging on the back door of his residence, he had, on the police evidence, charged at the police officers with garden shears, had a violent struggle with them before being sprayed with capsicum spray and arising out of that struggle, he suffered a cut to the head which required four stitches.
25. Given all of those circumstances, it would clearly be contrary to the interests of justice to allow any admissions in as evidence when the Defendant was in such a state and provided those admissions after he had been questioned in circumstances contrary to section 140 of *PAA*.
26. The admission of the statements made by the Defendant between his arrest and the time he was administered the section 140 caution is disallowed.
27. **Substantive issues:** I remind myself to find the Defendant guilty of the charges, I must be satisfied beyond a reasonable doubt of all of the elements of the offences as particularised.
28. The Defendant gave evidence of an extreme abuse of power by the police officers involved. He claims that they hit him with force on the head with their torches twice when he was handcuffed. He claims he was disoriented by the blows and was not struggling while they arrested him. The Defendant would have the court believe that the police officers charged at him with their torches after he had peacefully put down the shears and was on his knees with his hands behind his head. He says at the time of the attack on him he was calm and compliant.

29. If the Defendant's evidence is a true reflection of what happened on the night, then the behaviour of the police officers was reprehensible and if subject of a complaint by the Defendant, those serious allegations would be no doubt subject of a full investigation. There is no evidence that the Defendant made any such complaint or that there was an investigation in place. If the Defendant's evidence is a true reflection of what happened on the night, then the credibility of the police officers would have to be in doubt.

30. It is important to note that the police officers were cross-examined by Defence Counsel about a conversation apparently had in the presence of the Defendant. It was put to each of the police officers that once they had beat the Defendant with their torches, they had a conversation along the lines of "let's get our stories straight, he ran at us with the shears". The officers denied that conversation took place. The implication of that cross-examination was that the Defendant's evidence would be that that conversation took place and that implies that the police officers colluded about their evidence to protect themselves from criticism. The court is entitled to assume that such allegations in cross-examination are put under instructions, the Defendant was present when they were put to the police officers. The Defendant was also present in court when the police officers denied having that conversation. However, the Defendant did not make the allegation in his evidence, even though he was asked several times about any conversation he may have overheard. His evidence is that he only heard the words "he ran at us" and nothing more.

31. Given the seriousness of the allegation, it is unlikely that the Defendant had forgotten about that alleged conversation in the short time between the police officers evidence and his own. It is more likely that he had given those instructions to his solicitor and then decided not to make the allegations in the witness box. It is open for the court to view these actions

by the Defendant as deceitful and an attempt to unjustly smear the police officers' credibility.

32. Even if I am wrong about concluding that about the Defendant's motivation, there are other aspects of his evidence that shed serious doubt on the truthfulness of his evidence.
33. He claims he was hit with some force with a torch to the bridge of his nose, yet did not suffer any injury from that strike. He claims that he was hit three times about the head with a torch, again with force, yet he only suffers one cut on the back of his head. He claims that he was disoriented and upset because of his high emotional state at the time and the hits to the head, yet when given the section 140 caution, his voice was calm and coherent and he clearly understood the meaning of the caution. He claims that he was wrongly beaten by the police officers after his arrest, however when he had the opportunity to make complaint about it when given the section 140 caution on tape, he chose not to.
34. The Defendant also claims that he picked up the shears but didn't know why he did that because he was not thinking rationally because he was too upset, yet in the same breath claims he picked up the shears when he realised the police were coming into the property. That evidence shows he made the deliberate decision to pick up the shears. He then claims he has the ability to calm himself down really quickly when he has lost his temper. If he had calmed himself down at the time of the picking up of the shears, he cannot claim he also was too upset to really know what he was doing.
35. Counsel for the Defence submits I should accept the Defendant's evidence as a truthful account of what happened on the night, as it is clear from his lack of criminal history that he is of good character, never before having been in trouble for violent behaviour and he was honest about his yelling and swearing when the police arrived. Prosecution was granted leave to

cross-examine the defendant as to his character because of the allegations he made about the police.

36. Given all of the above, I find the Defendant reliable in his evidence leading up to the altercation with police, but unreliable in his evidence about the altercation. While he has been honest about his behaviour before the police officers entered the property, which could be because he knew evidence from the neighbours confirmed that behaviour. His physical injuries do not support his allegations of being hit three times with force by a torch and the inconsistency of his evidence of his emotional state cast doubt on the balance of his evidence.
37. Having discounted the Defendant's evidence, I must still be satisfied that the balance of the evidence is sufficient to prove beyond a reasonable doubt that all of the elements of the offences have been made out.
38. There was some criticism of the evidence of the police officers by the Defence Counsel. He submitted that their evidence was so similar in relation to what happened that there should be some doubt as to their evidence.
39. It is my view that Holmes' and Burns' evidence was credible and reliable in their description of the events of the night. There were some differences between the details of their accounts, however given human memory, it would be expected that the evidence would not be exactly the same. They were corroborative of each other regarding how far away the Defendant was from them when he came charging at them. Burns in particular was very clear in his fear of what was about to happen, that either he was about to be physically attacked by the Defendant or he, Burns, was going to have to use his firearm. Holmes also gives evidence of fearing he was going to be stabbed or hit by the shears and that fear caused him to attempt to draw his firearm.

40. Both Holmes and Burns were not completely clear on exactly what happened in the struggle with the Defendant. Given the level of emotion and adrenaline which must have been present because they had just been in a situation where they felt they had to draw their firearms, it is not unexpected that their memory of the moments after that was not clear.
41. I find that the Defendant in the height of anger and emotion, because of his argument with his partner, decided he did not want the interference of the police, he picked up the garden shears, waited until the police entered in the property and then vented his anger on them. He vented his anger by charging at them with the intention of physically harming them. In taking this action he has attempted or threatened the application of force against the police officers and has assaulted both officers. It is only by luck that the Defendant tripped and the police officers were not hurt out of the incident.
42. If I am wrong that the evidence supports a finding that the Defendant intended to assault the police officers, then I find that the evidence supports a finding beyond a reasonable doubt that the Defendant ought to have reasonably foreseen that a possible consequence of his actions of running at the officers with the shears in front of him would be harm to the police officers facing him. The Defendant must therefore be found guilty of both assault charges.
43. The evidence also supports the charge of resist police. I find beyond a reasonable doubt that the Defendant continued to struggle with the officers while they were trying to handcuff him. The Defendant's struggling was to such an extent that Burns made the decision to deploy capsicum spray to subdue the Defendant.
44. In conclusion, I am satisfied beyond a reasonable doubt that the Defendant assaulted both Constable Holmes and Constable Burns and in the process of his arrest, resisted the officers in the execution of their duties and therefore the Defendant must be found guilty of all charges.

45. I will hear the parties on sentence.

Dated this 6th day of May 2009.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE