

CITATION: *Police v Kurungaiyi* [2009] NTMC 067

PARTIES: DAVID STEVEN MOORE

v

JOHN SHELVEY KURUNGAIYI

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal Code (NT), Justices Act (NT)

FILE NO(s): 20831461

DELIVERED ON: 8 December 2009

DELIVERED AT: Darwin

HEARING DATE(s): 28, 30 July 2009, 13, 14 October 2009,  
24 November 2009

JUDGMENT OF: Jenny Blokland CM

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Informant: Mr Stoddart  
Defendant: Mr Smith/Ms Blundell

*Solicitors:*

Informant: NTLAC  
Defendant: ODPP

Judgment category classification: C  
Judgment ID number: [2009] NTMC 067  
Number of paragraphs: 30

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

No. 20831461

*[2009] NTMC 067*

BETWEEN:

**DAVID STEVEN MOORE**  
Informant

AND:

**JOHN SHELVEY KURUNGAIYI**  
Defendant

REASONS FOR DECISION

(Delivered 8 December 2009)

JENNY BLOKLAND CM:

**Introduction**

1. John Shelvey Kurungaiyi (“the defendant”) faces four counts of aggravated assault allegedly perpetrated on Ernestina Perdjert between 1 April 2007 and 30 August 2007 at Wadeye. It is alleged all assaults occurred on the same day, although as will be discussed below, the evidence is far from clear on when that was. All counts allege circumstances of aggravation that the assaults were perpetrated on a female and that she suffered harm. Counts 1 and 4 further allege Ms Perdjert was threatened with an offensive weapon, (a nulla-nulla).
2. Broadly, the prosecution alleges that at Wadeye, sometime between April and August 2007 Ms Perdjert was with her partner Peter Mullumbuk at her father’s home. They lived for some time in her father’s, (Ernest Perdjert’s) residence. Mr Perdjert also gave evidence in these proceedings. It is alleged the defendant came to Ernestina Perdjert’s residence at night,

knocked on the bedroom door, the door was opened and he entered holding a nulla-nulla; that he punched Ernestina Perdjert with his fist to the right side of her head, grabbed her hair and threw her to the ground; that he then swung the nulla-nulla at her striking her three times in the head. The second count alleges the defendant then dragged Ms Perdjert by her hair to a neighbouring residence in Top Camp, Wadeye. The third count alleges he took Ms Perdjert to Bartholomew Perdjert's home and threw her onto the floor causing her to hit her head on a metal pole; that he struck her with his fist, demanded to know where her family was and dragged her to another residence. She escaped from him. Count 4 alleges he threw a nulla-nulla at her causing an injury to her ankle.

3. The defendant pleaded not guilty to all counts. To succeed, the prosecution must prove the material facts beyond reasonable doubt.

### **Evidence before the Court**

#### **Ernestina Perdjert**

4. Ms Ernestina Perdjert gave evidence with the assistance of an interpreter. Ms Perdjert recalled she was staying at Ernest Perdjert's house at Top Camp; she was unable to say when it was but as a point of reference she confirmed her child was not yet born at that time. She knew the defendant. She is related to him. She agreed that "at night some years past", (as it was put to her), in the dry season, the defendant came in the back door of Mr Perdjert's house where she and her partner or husband were; there were men in the other room; she heard the defendant say "open the door"; she opened it and he assaulted her. She said he hit her with his fist "maybe around the ear", on the right side and grabbed her hair. He hit her with the nulla-nulla three times "on the head maybe". She said she was in the room "then onto Barty's house". She said it was a thick nulla-nulla. He threw her against a pole. She said her husband *took off* after the defendant had hit her. After her husband left, the defendant grabbed her shirt and took her to the pink

house; she ran away, she said she was scared. She said the defendant pulled her hair when he took her to Barty's house. She said he hit her and asked about her family. She said they weren't there, they were at Wumuirdim. She said the defendant was angry and that he hit her and threw her and her head hit the pole. He then took her to the pink house, she ran away and he threw a nulla-nulla and hit her foot on the ankle. She ran away from him to Bottom Camp, Manyallaluk Camp and to Ambrose's house. Ambrose took her to her father at Wumuirdim outstation. She said there were other people in the house when the defendant took her to Barty's, but she didn't know who. She said when the defendant came into the room there was no light in that room but there was light in the middle room. She said she first opened the door because "he was talking angrily". She said her injuries were that she hurt her head, "everywhere on the forehead". She said she went to the clinic the next day.

5. In cross-examination, Ms Perdjert said there were also some boys at her father's house who were relatives but she didn't know who they were. She said the defendant was wearing a black *man o' war* singlet and shorts. She didn't know what colour; he had bare feet. Her partner was present in the room with her when she was hit the first time; she said there were two other Cumaiyi boys in the room trying to stop the defendant. She said the defendant's partner (Cecilia) was outside. She said he hit her with the right fist, followed by three hits on the head with the nulla-nulla. She said the nulla nulla was thick and short; she indicated it was about 18 inches by four to six inches; he was holding it in his right hand; that he hit her hard with the nulla nulla and with his clenched fist. He also used his right hand to pull her hair; the two men in the room were saying "leave her alone" but her partner was quiet. He also hit her partner with his right hand to the chest and in the back of the neck. She said people (her partner, the Cumaiyi boys and others unknown) were following the defendant when he took her over to Berty's house; there were other people at the house but she wasn't sure who

they were. She said the defendant grabbed her by the “hair – head” and dragged her to Berty’s house. The Cumaiyi boys were “maybe” wearing black shirts. She said she only heard the defendant’s wife Cecilia, she didn’t see her.

6. She agreed it was September 2008 that she talked to police about this incident, although she then said she didn’t know the dates; she recalled speaking “last year” to a police officer named Kylie. She agreed when she spoke to police she had told them this happened not last year but in 2006; she agreed her mother and father were involved when she told the police and that her father now works for police. She said the defendant was her cousin; she said he did the wrong thing so she went to the police. She rejected the suggestion that her allegations were untrue or that Ambrose Jongmin told her to say it was the defendant who did it. She said she had big bumps on her head and she showed them to the clinic attendant the next day; she said she told them John Shelvey did it; she said she showed the bumps and bruises on her head to the nurse. She said she told the police the story the next day after it happened; she said she told Sergeant Shane Taylor.
7. Ms Perdjert denied that she had previously blamed Leslie Narjic for hitting her. She said Leslie Narjic’s house was the pink house and it was the house she ran away from.
8. Peter Mullumbuk gave evidence with the assistance of an interpreter confirming he is Ernestina Perdjert’s partner and that they stayed in Ernest Perdjert’s house at Top Camp. He said at that time they had a visitor, Kendric Melpi. He was sitting down with Kendric and that’s when the defendant came in. It was a Saturday night; Ernestina was in the middle room. He said the defendant, Jonathon Cumaiyi and Francis Mardinga came into the house and went into Ernestina’s room; they locked themselves in the room and “he” was shouting. He said they both opened the door and he hit her on the right shoulder with his fist and then on the ankle with a nulla-

nulla when she was on the floor. He grabbed her hair and dragged her and hit her with the nulla-nulla; he said the defendant hit him on the chest with a nulla-nulla and he (Mr Mullumbuk) did not do anything. The defendant then grabbed Ernestina, pulled her hair and dragged her out; he indicated the nulla-nulla was about one metre in length by four – six inches. He said Jonathon Cumaiyi was in the room trying to stop the defendant; Mr Mullumbuk said he ran away when his wife was dragged off and the other young men ran away; one of them was Keith Melpi. He said he ran away because the defendant was drunk and yelling. His wife was crying; he said when he saw her the next day she was stiff from her neck to her ankle. He said this happened in 2007.

9. In cross-examination Mr Mullumbuk agreed he made a statement to police saying it happened in November 2008. Initially he disagreed that he had told police it happened in 2005 but he agreed later in evidence that he had said this. He later said in evidence the incident occurred in 2005. He denied speaking to other witnesses in the case and denied that Ernest told him to tell the story. He said the defendant was wearing a black singlet and shorts. He said the defendant's partner Cecilia was with the defendant; Francis Mardigan and Jonathon Cumaiyi; he saw them after the defendant beat Ernestina Pedjert. He said it happened "little bit early part" of the night; he wasn't getting ready for bed with Ernestina at that time, but he was in the bedroom with her. He said Matthew and Jonathon came in to stop the defendant. He denied he had not told the truth.
10. Mr Kendric Melpi who also gave evidence with the assistance of an interpreter told the Court he stayed at Peter Mullumbuk and Ernestina Perdjert's house in 2007. He said the defendant came into the second room where Peter Mullumbuk and Ms Perdjert were – the door was open and he could see them; the stick was in the defendant's hand; he saw the defendant go into Peter Mullumbuk's room and he ran. He heard screaming and shouting; he said it was in the raining season in 2007; he said the defendant

worked for the police at the time. He said the defendant was wearing shorts and a “Crow’s” guernsey. He agreed all the people in that house hate the defendant. He disagreed the group want to tell the story to keep the defendant in goal. He said he went to the police when the screaming happened. He ran because he was scared.

11. Keith Mardigan stated in evidence he had lived at the Perdjert’s house; he was taken to an incident that occurred “some years ago”; he woke up and heard screaming and heard someone drunk; the defendant was drunk; he was sleeping on a mattress at the time. He said the defendant was threatening them with a nulla-nulla saying “I’ll hit you my boys”; he was speaking from the door; he didn’t see what happened after that but heard a scream from Ms Perdjert of maybe two to three minutes; he didn’t see anything happen; he saw his uncle Frances Mardigan and saw other people outside. He agreed he was related to the Perdjert family; he agreed his understanding was that the Perdjert family hated the defendant; he agreed with the proposition that everyone wanted to keep the defendant in gaol. He agreed he was telling his story to help keep the defendant in gaol, but that it was a real story. He said the defendant was wearing a black “*man o’ war*” shirt. He agreed he had been smoking cannabis at the house. After being warned, he answered no further questions on that topic. He said he wouldn’t get into trouble from Mr Perdjert who he agreed now worked for the police, but he could get into trouble from police. He disagreed this was a made up story.
12. Matthew Cumaiyi gave evidence that he lived at Top Camp. He was asleep one night and he remembered the defendant’s wife Cecilia waking him up; that she was frightened. He said he saw the defendant standing with a nulla-nulla stick in his hand; that he was chasing Ernestina and she was hiding behind his back – really scared. He said he was trying to get the nulla-nulla but the defendant was too strong and he was drunk. He saw the defendant hit Jonathon on the head. He said that Mr Mullumbuk was crying. Mr Cumaiyi was asked if he was still in the German Priest gang. He said he

didn't have anything to do with them any more. He was then asked about the German Punks but he said he wasn't in them anymore. He agreed the group were called the German Priest as they had become friendly with the Judas Priest group. He appeared to agree that when he first spoke to police they told him that he was in this with the defendant.

13. It was suggested to Mr Cumaiyi that his mob, the German Priest mob were all friends with the Jongmin mob. He said they "talk together". He disagreed he had joined in telling a story to keep the defendant in goal.
14. Mr Ernest Perdjert, Ernestina's father, a Community Liaison Officer for the police since February 2008 told the Court that in 2007 he was living at Wumuidim outstation in about June and July; that Ernestina was living at Wadeye. He said between June and July 2007 Ambrose Jongmin and his wife brought Ernestina to his outstation; Ernestina had a bruise on her forehead and he noticed her bruised ankle and that she was limping. He arranged for her to go to the clinic at Wadeye. He agreed at the time the defendant was doing the same job as he does now – Community Liaison Officer for police. He agreed they worked together for a time.
15. Mr Perdjert was asked in cross-examination about an earlier incident in 2007 between himself and the defendant about a Troop Carrier. It was suggested to him that he gave the Troopy to the defendant – he denied this suggestion, saying the car was taken without his permission when he was in Darwin. He said he knew the defendant had paid between \$8,000 and \$9,000 to fix the vehicle; it was half payment and the bill was still owed; he agreed he had the car now "but it's all wrecked". He didn't agree he gave the defendant the car; he didn't agree it was a dispute, he said it was his own private car. He said the defendant took the car from his son when he (Mr Perdjert) was in Darwin and that he didn't say the defendant could take the car to the workshop.



16. He was reluctant to categorise what happened as a “dispute” but agreed there was a problem with the car and the defendant proposed to sort it out at the Council Office. He disagreed this problem with the car arose not long before the assault allegations were made by his daughter. He agreed it ended up with the defendant being able to drive the Troopy around; he said the defendant wrecked the car.
17. He disagreed that Ambrose Jongmin was a “great enemy” of the defendant’s; he agreed Mr Jongmin was the main man with the Judas Priests. He agreed Ernestina wouldn’t tell police her story at the time. He disagreed he tried to get Ernestina or anybody else to blame the defendant. In re-examination, he was asked about whether the defendant was angry with him when he collected the Troop Carrier and he said he was.
18. The medical evidence tendered by consent was the statutory declaration of Dr Oliver Hosking who examined the clinic records of Ms Perdijert. Of relevance was the following paragraphs:

“4. There is an entry dated 7<sup>th</sup> February 2007: “Hit c (with) stick 2/7 (2 days) ago (Mon 5/2/07) by Lesley Narjic on L (Left) shoulder or upper arm c stick.

O/E (On Examination) Abrasions over L deltoid + L  
suprascapular area Swelling over superficial

X ray

Recurrent low back pain 18/12 (18 months) Recurrent UTI  
(Urinary Tract Infection) Text in brackets explains  
abbreviations – my interpretation)

I am not sure who has made this entry

There is a further entry dated 1<sup>st</sup> July 2007: “alleged assaulted on outstation BIB (brought in by) police She says she was hit “everywhere with a stick” O/E bruise and swelling across L ankle c small abrasion Says she has pain “everywhere” no abrasions, bruising or swelling found except for L ankle. Weight bearing without difficulty. Slow to answer questions.

Oriented to time place and person. No vomiting Says she was knocked out and (??) the assault happened yesterday. Given Panadol (??) bandage to ankle”

I am not sure who has made this entry, though it is annotated “RN”

5. She was further seen on 12<sup>th</sup> July and the ankle wound redressed
  6. I can find no other entries in the record indicating assault.
  7. There are no photographs available to me in the record.
  8. In my view the examination findings on 01/07/07 are not entirely consistent with the history of being hit all over, though it is possible that no injuries would be visible.
  9. From the patient’s history it is possible that she was unconscious after the assault of 01/07/07.
  10. From the records, in my view, it is unlikely that she would suffer long term disability and the injuries were not life threatening on either occasion”.
19. The defendant gave evidence with the assistance of an interpreter denying that he had ever assaulted Ernestina Kurungaiyi, “it wasn’t me, I never hit Ernestina”. At the time of the alleged offences (between April 2007 – August 2007) he was working with Sergeant Taylor as a Community Liaison Officer for police at Wadeye. He said before he did that job, Ernest Perdjert had done the same job and held the position again after he finished.
  20. He gave detailed evidence about Ernest Perdjert giving him a broken down vehicle – that his son brought it to him by driving it – he said everything was broken, even the head. He contacted bush mechanics who said it was a really bad truck and there could be an accident. He said he took it to a real mechanic at the Council workshop. He said they completed the work and he paid \$8,000. When the work was finished he went to the workshop and that Ernest Perdjert had already been there. There was a meeting at the Council to try and settle the matter and when it was said Ernest Perdjert would have

to pay the \$8,000, Ernest Perdjert told the defendant to take the vehicle which he did. The defendant said they had got on well until that time. The defendant said Ambrose Jongmin is a Judas Priest leader, whereas he and his family are Evil Warriors. He said they fight each other. He said both Ernest Perdjert, Matthew Cumaiya, Peter Mullumbuk and Keith Mardigan are members of the Judas Priests.

21. In cross-examination he maintained his denial concerning the alleged assaults. He said the dispute with the vehicle occurred sometime between April and December 2007. He disagreed with the proposition put to him that it was not possible to drive a car with a broken head. He said it makes a lot of noise, but can still be driven. He said it was mid 2007 when the dispute arose, although he wasn't sure about the month. He said Ernest had no issue when the car was in bad repair. He said he didn't get angry with Ernest. He denied any of this led him to go to Ernestina's house; he said he didn't go there and didn't touch her. He said he didn't drink at the time when he was working for police and could be breath tested. He said he left the position with police after some incidents he described when people he was dealing with had threatened and spat at him. He recounted one incident where he asked the person be charged for threatening him, but was told to shake hands instead. He denied he lost his position because of drinking and abusing members of the community. He denied the alleged incident with Ernestina was due to a form of payback as a result of the dispute with Ernest over the vehicle. He denied bossing people at the community and denied any physical contact with Peter Mullumbuck. He said he didn't know anything about Cecilia trying to stop him. When asked about his participation in the Evil Warriors gang, he agreed there were fights between gangs, but he was no longer involved.

## **Discussion of the Evidence**

22. The prosecution must prove the charges beyond reasonable doubt. In ascertaining whether the prosecution has done this, the contested evidence of apparently credible witnesses such as Ms Perdjert must be scrutinised. The evidence as a whole must be assessed and scrutinised, including the evidence of the defendant who, although he is not obliged to, has given evidence and has been cross-examined.
23. There are a number of issues of concern that arise on the evidence that diminishes the reliability of the prosecution witnesses. First, there is completely contradictory evidence on when these alleged assaults took place. This is not of course usually fatal in itself to the prosecution case, especially giving all allowance to the fact that the primary witnesses are from a remote community, giving evidence through interpreters within a world view to that does not require adherence to or noting specific times and dates. Considerable latitude must be given to Aboriginal person's testimony in these circumstances. The problem here however is more significant than usual and tends to cast a cloud over the reliability of the testimony of certain individuals and the case as a whole.
24. The allegation is that these incidents occurred between 1 April 2007 and 30 August 2007, so the case was heard in a context allowing some flexibility with dates. What has never been explained in the evidence, despite some indications that it would be, (Transcript 32) is why charges were not laid until December 2008 when the evidence indicates police were notified – the day after the alleged assault. The officer to whom a complaint was said to have been made was not called to give evidence. This matter did not come before the Court until January 2009. Given the alleged assaults were said to have occurred in 2007 and when there is essentially only oral evidence, sourced in recollections that have proved to be inconsistent and given the delay has not been explained, the prosecution of this case suffers accordingly from weaknesses inherent in delay. The delay in laying the

charges is not explained in the evidence or in any submissions. That of itself does not adversely affect the probative value of the evidence, but coupled with the fact that the evidence is completely confused about when this incident occurred and whether recollections about it may have merged with another incident (the possible complaint of assault by Dennis Narjic), the prosecution evidence loses significant probative force.

25. Ms Perdjert said she spoke to police in September 2008, although other evidence would indicate she spoke to police in July 2007. When she spoke to police, she told them it happened in 2006. Her father said she was brought to him with the injury around June or July 2007. Peter Mullumbuk gave dates of November 2008 and 2005. Kendric Melpi said it was 2007 in the raining season. There is an entry in the medical records noting a history given by Ernestina Narjic of an assault by Dennis Narjic with a stick on 7 February 2007. Ms Perdjert denies any such complaint in evidence. The medical history of 1 July 2007 does not name the defendant, although Ms Perdjert said she told the clinic about him. The medical report itself notes the findings are “not entirely consistent with the history of being hit all over”. While it is proper to give significant latitude in cases such as this with variance over dates and times, without significant detriment to the probative value of evidence, in this case the dates around when any incident *may* have occurred adversely reflect on the reliability of the evidence as a whole. It is difficult to rule out the possibility that there has been a merging of the description of events that relate to the defendant with an earlier matter concerning Dennis Narjic.
26. Of course had the evidence settled on these events occurring during a particular time frame that differed from the dates alleged in the information, the Court could have amended the information. It is not that the dates are material, but when potentially connected to other incidents ambiguity about the dates assumes greater significance. As noted the Defendant denied the allegations – no evidence that might be in the nature of an alibi was given

on his behalf – that is hardly surprising as the evidence simply did not settle on any time frame save that the events in question could have been anytime from 2005 to the end of 2008.

27. That of itself may not be fatal to every count of assault alleged. On top of no firm evidence about *when* this incident occurred there are the significant discrepancies between descriptions of the incidents. Once again, accepting that this is part and parcel of different people observing or participating in the same event, here at the outset Ms Perdjert says she was punched to the head three times, dragged by her hair then her husband was hit and he ran away. Her husband says nothing about her being hit on the head but rather struck on her shoulder and then her ankle. Ms Perdjert mentions nothing about her ankle until the very end when she says the Defendant threw the nulla nulla at her when she was fleeing. I found the injury to the ankle to be the strongest supportive evidence of any of the counts however the evidence is completely contradictory on how that occurred. Matthew Cumaiyi is the only witness who said he gave assistance and that Mr Mullumbuk was crying for Ms Perdjert. A number of witnesses give confused accounts of whether anything occurred beyond the screaming and shouting.
28. I was surprised to find the medical evidence, save for possibly some evidence in relation to the ankle is largely unsupportive of Ms Perdjert's testimony. As noted above, the history speaks of the assault occurring at an "outstation" and the conclusion is that the findings are not entirely consistent with the history given. It is also difficult to accept that if Ms Perdjert were hit by the Defendant with the nulla nulla three times there would be no bruises as noted in the medical report. Mr Perdjert says however that he saw bruises on his daughter.
29. There is acknowledged evidence, not only from the defendant but also from Mr Ernest Perdjert about the fraught ownership situation of the troopee. That evidence along with gang membership evidence was largely introduced

by the defendant. It is difficult to make positive findings about the troupee problem between them, save to say that given this is a criminal case I am obliged to accept the Defendant's version if it cannot be negated beyond reasonable doubt. The Defendant gave coherent, measured evidence on this point from which he was not shaken. There is no reason to reject his testimony. Similarly, the family allegiances to different gangs is largely uncontested. These surrounding factors are a double edged sword for the Defendant as they provide not only a motive for some of the prosecution witnesses to construct their testimony accordingly but also provide a reason on why the Defendant may have had a motive to attack Ernestina Perdjert. I am also mindful that neither Cecilia, Johnathon Cumaiyi, Francis Mardigan nor Ambrose Jongmin were called without explanation. No police were called. I can only conclude they would not have been of assistance to the prosecution case. Given the state of the evidence, although the evidence as a whole makes me highly suspicious of the Defendant, I cannot conclude the charges have been proven beyond reasonable doubt as is required for proof in the criminal setting.

30. Orders will be made dismissing the charges.

Dated this 8th day of December 2009.

---

**JENNY BLOKLAND**  
**CHIEF MAGISTRATE**