

CITATION: *Davis v Mason [2010] NTMC 005*

PARTIES: STUART AXTELL DAVIS

v

ZACHARIAH RAY MASON

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20904169

DELIVERED ON: 15th January 2010

DELIVERED AT: Darwin

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JUDGMENT OF: Ms Fong Lim SM

CATCHWORDS:

Criminal law – Voluntariness – intoxication – intent – reasonable foreseeability – mental elements - sections 1, 7, 31(1), 31(2) and 32 Criminal Code NT
Pregili a Manison [1987] 88 FLR 346 - considered
DPP v WJI [2003] 219 CLR 43 - applied
Barnes v Westphal [2008] NTSC 41 - considered
R v O'Connor [1981] 146 CLR 64 - applied

REPRESENTATION:

Counsel:

Plaintiff: Mr Marrioto
Defendant: Mr Cassells

Solicitors:

Plaintiff: Director of Public Prosecutions
Defendant: Robert Welfare and Associates

Judgment category classification: C
Judgment ID number: [2010] NTMC 005
Number of paragraphs: 47

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

No. 20904169

[2010] NTMC 005

BETWEEN:

STUART AXTELL DAVIS
Plaintiff

AND:

ZACHARIAH RAY MASON
Defendant

REASONS FOR JUDGMENT

(Delivered 15th January 2010)

Ms FONG LIM SM:

1. Mr Mason has been charged with resisting police whilst in the execution of their duties (s 158 *Police Administration Act*) and assault police officer whilst in the execution of his duties (s 189A of the Criminal Code). Mr Mason had arrived back in Darwin from New Zealand and immediately went into socialising with his friends to celebrate his birthday. He consumed a large amount of alcohol at home before travelling to the city to continue drinking. Mr Mason remembers being at a particular establishment until about 10:00pm that night and the next thing he is aware of is waking up in the police cells being offered breakfast.
2. Evidence was heard from both police officers and the electronic record of interview was played. The defendant did not give evidence.
3. Both officers Gray–Spence and Lauder were honest and reliable witnesses, they gave their evidence to the best of their memory and there is no reason to disregard their accounts and certainly no evidence to the contrary.

4. It is clear from all of the evidence that Mr Mason was severely intoxicated so much so that he had passed out in a doorway on the nightclub strip of town. He was approached by the police who assessed him to be seriously intoxicated because of his lack of consciousness and his inability to talk coherently once woken. They decided to take him into protective custody under s 128 of the *Police Administration Act*. While he was being escorted to the van, he struggled with the officers and while restrained up against the van, Mr Mason kicked back with his foot striking Constable Lauder on the knee causing it to hyperextend backwards.
5. To find Mason guilty of the offences I have to be satisfied beyond a reasonable doubt as to all elements of each offence. In relation to Charge 2, I have to be satisfied that Mason's actions constituted resisting the police and the police were in the execution of their duty. In relation to charge 3, I have to be satisfied that Mason applied direct or indirect force to the officer in question without his consent and that application of force was intended or it was reasonably foreseeable that the victim would be kicked by the application of that force and the victim was a police officer in the execution of his duties.
6. I am satisfied beyond a reasonable doubt that Mason struggled against the police officers and that he kicked back when he was being taken into custody and that kick connected with Constable Lauder's knee as described by him. The evidence of the police officers was not challenged in relation to the struggle that took place and the kick which connected with Constable Lauder's knee. Their evidence was consistent in the main part of Mason's struggling after being told he was being taken to a place of safety and the kicking. It is clear from their evidence Mason was being uncooperative about being woken up and taken to the van.
7. The issues to be decided are:

- (a) Were the actions of Mason voluntary and if not can he rely on the defence of automatism to escape criminal responsibility? Do sections 1, 7 & 31(2) of the Criminal Code (NT) preclude the use of voluntary intoxication as an excuse for criminal responsibility?
- (b) What is the mental element required in relation to both offences and did Mason have the relevant mental element of each offence?. Does Mason have to be aware Gray-Spence and Lauder were police officers?
- (c) Was the taking of Mason into protective custody executed lawfully and were the police officers acting in the execution of their duties.

8. **Were Mason's actions voluntary and what is the effect of sections 1, 7, and 31(2) of the Criminal Code?** Mason submits that his actions in struggling with the police and kicking back at the police were not voluntary because of his level of intoxication. Mason submits that he does not remember doing those things so it cannot have been voluntary because of his intoxication. It is submitted that Mason's actions of struggling and kicking out were as a result of automatism arising out of his intoxication.
9. It is important to note that the Criminal Code (NT) is just as it is intended to be a Code and that the common law in relation to voluntariness can only assist regarding the cogency and admissibility of the evidence of voluntariness.
10. It is open to interpretation as to whether a defence of automatism exists under the Criminal Code (NT). Section 31 provides:

31 Unwilled act etc. and accident

(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

(2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance

of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

11. The prosecution submitted that automatism by way of voluntary intoxication is not available as a defence in the Northern Territory because of the definition of a “person similarly circumstanced” in section 1 of the Criminal Code (NT). That is a person similarly circumstanced does not include a person who is voluntarily intoxicated.
12. The use of the phrase “personally similarly circumstanced”, section 31(2) of the Criminal Code excludes a person, who did not intend the impugned act, event or omission and is voluntarily intoxicated, from claiming that anyone similarly intoxicated would have continued with the offending behaviour even if they foresaw the consequences.
13. It is clear that that definition is only relevant when considering the foresight of a person not the intent. When considering a person’s foresight, the operation of section 7 of the Criminal Code creates a presumption that a person voluntarily intoxicated is presumed to foresee the natural consequences of his actions and the defendant bears the evidential burden to rebut that presumption. Therefore the defence of automatism is more difficult to establish when voluntary intoxication and foresight are the issues.
14. It is arguable that the defence of automatism due to voluntary intoxication is available in relation to an intended act on the basis a person cannot have intention to do an act unless that act is voluntary.
15. The leading authority in the common law on voluntariness where intoxication was an issue is the High Court in O’Connor’s case [1981] 146 64 where the majority found that voluntary intoxication is a relevant consideration in the determination of the mental element of the crime. Barwick CJ discussed the need to ensure an appropriate instruction was

given to a jury. His Honour emphasised the need to direct the jury that if the evidence of the accused's sobriety did not raise a doubt as to the voluntariness or actual intent of the accused, then that evidence must be put out of their mind but if it is enough to raise a doubt then the jury should be told it is then for the Crown to negative that doubt. His Honour also suggested that it would be proper to direct the jury that the fact that a man does not remember his actions later does not necessarily mean that he didn't have the necessary intent at the time.

16. A magistrate in this court is the finder of fact and I have reminded myself of the relevance of the evidence of Mason's sobriety. It is clear Mason does not remember his interaction with the police officers on that morning and it is also without a doubt his memory has been affected by his severe intoxication that morning.
17. Mason submits that the fact he was incoherent supports the view that he was not acting voluntarily. While his incoherency is evidence of his intoxication, it is not evidence that Mason was so intoxicated at the relevant time that he could not have had the requisite state of mind to know what he was doing at the time. There is no evidence of the amount of alcohol consumed by Mason and what effect that would have on his free will, there is no evidence to raise a doubt as to the voluntariness or intent of Mason.
18. The evidence of Officers Gray-Spence and Lauder establish that Mason was deliberately moving his arms and legs to stop them from leading him into the police van and that he made a deliberate kick of his right leg. Those are not involuntary actions.
19. While I find that that Mason was severely intoxicated at the time of the incident and that he cannot remember the events of that night, I am satisfied beyond a reasonable doubt that his actions in struggling and kicking were not involuntary actions and therefore he cannot be excused from criminal responsibility on that basis.

20. **What are the mental elements required in the present case?** Section 31 of the Criminal Code requires a person to have the intention to do the impugned act, omission or event or foresee his conduct would result in that act omission or event for that person to be criminally responsible.
21. “Act” is defined in section 1 of the Criminal Code as “means the deed alleged to have been done by him. It is not limited to bodily movement and it includes the deed of another caused, induced or adopted by him or done pursuant to a common intention.”
22. “Event” is defined in section 1 of the Criminal code as “the result of an act or omission”.
23. The effect of section 31 has been considered by this court and higher courts in relation to different offences. The application of this section has proved to be problematic and the authorities show the courts to read the definition of “act” broadly in *Pregeli v Manison* [1987] 88 FLR 346 and more broadly in *Director of Public Prosecutions v WJI* [2003] 219 CLR 43. In WJI’s case the High Court considered a direction made by the trial judge relating to the offence of having sexual intercourse without the consent, the trial judge directed that the jury must be satisfied beyond a reasonable doubt that the defendant had intended to have sexual intercourse without the victim’s consent. The High Court affirmed the trial judge’s direction was correct in its application of section 31(1) as it characterised the “act” relating to that offence was the act of sexual intercourse without consent that is more than the bodily movement of having sexual intercourse.
24. In a more recent case the Supreme Court of the Northern Territory in *Barnes v Westphal* [2008] NTSC 41 in relation to the charge of intimidate a witness (section 103A of the Criminal code), Justice Mildren found that the prosecution must prove beyond a reasonable doubt that the defendant intended to “intimidate a witness” and that was the “event” for which the mental element was required.

25. The question in the present case is what is the “act” or “event” to which the mental element attaches in reference to both offences.
26. In relation to resist police in the execution of their duty it could be argued that the “act” is the physical pulling of his arms away from the police officers or the “event” is the resisting the police officer. In relation to assault police officer it could be argued the “act” is the physical application of force, the assault or the “event” is the “assault on a police officer”.
27. Given the broadness of the definition of “act” and the High Court’s application of section 31 in WJI’s case (supra), it is clear that without legislative indication to the contrary the mental element of intent or foreseeability must be applied to all of the intrinsic elements of the offence.
28. In my view the intrinsic elements of both offences require the defendant to intend or foresee that his actions would constitute resisting a police officer and assaulting a police officer. To have that intention or the foresight the defendant must have knowledge that he was dealing with police officers.
29. In relation to that element of the offences that the police officers were in the execution of their duty, it is my view that is not part of the “act” or “event” for which the criminal intent is required, it is part of the circumstances or “state of affairs” which must be proved. The court must be satisfied beyond a reasonable doubt the police officers were executing their duties lawfully. If the defendant made an honest and reasonable mistake about that state of affairs, he could be excused from criminal responsibility for those offences (section 32 of the Criminal Code).
30. If I cannot be satisfied that Mason had the necessary intent, I must also consider whether Mason ought to have reasonably foreseen his actions would have resulted in the event. When considering that issue I remind myself that section 7(1)(b) of the Criminal Code places an evidential burden

on a defendant who is voluntarily intoxicated to rebut the presumption that he foresaw the natural consequences of his actions.

31. **Did Mason know that he was struggling against police officers?** Gray-Spence's evidence is that when trying to rouse Mason he identified himself as a police officer, he also advised Mason that he was taking Mason to a safe place to sleep because "he was far too drunk to sleep on the streets". Gray-Spence was sure he advised Mason that he was being taken to the cells for his own safety.
32. Lauder remembers Gray-Spence trying to rouse Mason by rubbing his chest and calling "Police get up" and while escorting him to the police van saying "you need somewhere safe to sleep." He also remembers telling Mason that he was not under arrest.
33. There was no evidence that Mason understood he was in the custody of the police, the evidence is that he was incoherent and struggling. There is no evidence that Mason had heard Gray-Spence and Lauder advising him they were police nor is there evidence that the officers were in full uniform.
34. Without the evidence that the police officers were in uniform, I was asked by prosecution to take judicial notice of the fact that the officers were part of the city safe unit specifically tasked to ensure the safety in the inner city and as members of that unit they would have been in full uniform. I cannot take judicial notice of such an important matter. Police officers are not always in uniform and I am not aware that all officers of the city safe unit are always in uniform while on duty.
35. It is of note that the officers' mode of transport that night was a police van which was clearly marked as a police van.
36. Mason did not indicate at any stage he knew he was being taken into protective custody his responses to the police were incoherent rambling. There was no acknowledgement from him that he was aware of why the

officers were taking him into custody. The only indication that he was aware he was being taken into custody by police was the evidence of Gray-Spence that Mason, once roused, walked to the police vehicle unaided after being told he was being “taken somewhere safe to sleep”.

37. The circumstantial evidence is that, apart from his intoxication, Mason should have been aware he was being taken into custody by the police, he was told they were police, told he was being taken to a place of safety and led towards a police van. There is no other reasonable explanation consistent with innocence which would explain his struggling and kicking out in those circumstances.
38. I am therefore satisfied beyond a reasonable doubt that the defendant knew he was dealing with police officers and by his actions he was intending to resist being taken into custody.
39. In relation to the assault, while I cannot be satisfied beyond a reasonable doubt that Mason had an intention to assault Officer Lauder by kicking out, it is reasonably foreseeable that his action of kicking backwards, while police officers were in close proximity would result in an assault on one of those police officers.
40. The effect of section 31(2) and section 1 definition of “a person similarly circumstanced” is that the defendant cannot use his voluntary intoxication to categorise “ person similarly circumstanced” as a “person similarly intoxicated” to avoid criminal responsibility. A person of Mason’s age, education and circumstances, not voluntarily intoxicated, would have foreseen the possibility of committing an assault in those circumstances and would not have proceeded with his actions.
41. I find that Mason did know that he was dealing with police officers and that he had the necessary intent or it was foreseeable that his actions would constitute resisting a police officer and assaulting a police officer.

42. **Were the police officers lawfully in execution of their duties?** The clear evidence of both Gray–Spence and Lauder that they had approached Mason because they suspected he was drunk and had passed out in the doorway. It is also clear when they had managed to rouse Mason he was told he was being taken somewhere safe to sleep.
43. Counsel for Mason submitted what was said to Mason was not sufficient for him to understand the reason he was being taken into custody and therefore the police officers were not executing their duties lawfully.
44. The officers had made a clear assessment of Mason’s intoxication and his inability to keep himself safe (by sleeping or being unconscious in a doorway on the nightclub strip), they also had told Mason he was being taken somewhere safe to sleep and he knew they were police.
45. It is not necessary for the police officers to explicitly quote section 128 of the *Police Administration Act* or for them to state a person was being taken into “protective custody”, if there was, it is quite possible those not so literate members of the public would have no understanding of those terms. What is necessary is for the police to explain their actions in such a way that the person is aware of the reason they were being taken into custody and in my view, the explanations given by the two officers to Mason were sufficient in the circumstances.
46. I am satisfied beyond a reasonable doubt that the officers concerned were lawfully executing their duty pursuant to section 128 of the *Police Administration Act*.

47. **Orders:** I find the defendant guilty of both charges and will hear the parties on sentence.

Dated this 15th day of January 2010

Tanya Fong Lim
STIPENDIARY MAGISTRATE