

CITATION: *Police v Sok* [2010] NTMC 017

PARTIES: MARK MALAGORSKI

V

HAY SOK

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Justices Act; Criminal Code

FILE NO(s): 20824651

DELIVERED ON: 10 March 2010

DELIVERED AT: DARWIN

HEARING DATE(s): 10, 24 & 26 February 2010

JUDGMENT OF: JENNY BLOKLAND CM

**CATCHWORDS:**

Assault – threatened assault – intent – foresight

*Criminal Code* (NT) ss187:31

*R v Secretary* (1996) 107 NTR 1

**REPRESENTATION:**

*Counsel:*

Prosecutor: Mr Ledek  
Defendant: Mr G Maley

*Solicitors:*

Prosecutor: ODPP Summary Prosecutions  
Defendant: Maleys

Judgment category classification: C  
Judgment ID number: [2010] NTMC 017  
Number of paragraphs: 24

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

No. 20824651

BETWEEN:

**MARK MALAGORSKI**  
Informant

AND:

**HAY SOK**  
Defendant

REASONS FOR JUDGMENT

(Delivered 10 March 2010)

JENNY BLOKLAND CM:

**Introduction**

1. The Defendant, Hay Sok pleaded guilty to one count of aggravated unlawful damage on 9 September 2010 to the property of Kelly Maloney, in circumstances where the loss caused was greater than \$5,000.00, namely \$6,664.35. The subject of this hearing was a contested count of aggravated assault alleged to have occurred on the same date on Kelly Maloney, the circumstances of aggravation being that Kelly Maloney was a female and Hay Sok was a male and that Kelly Maloney was threatened with an offensive weapon, namely a Honda CBF Motorbike, contrary to s188(2) *Criminal Code* (NT). A further count of engage in conduct giving rise to danger of serious harm contrary to ss174D and 174G *Criminal Code* (NT) was stood aside.
2. The offences were alleged to have occurred on 9 September 2008. Evidence given by Ms Maloney was interpreted into Khmer by Dora Khiev via video-

link. Mr Khiev interpreted the evidence of three Khmer speaking witnesses into English. Another Khmer interpreter was engaged to interpret the Defendant's evidence from Khmer into English. I thank both the prosecution (ODPP) and the defence (I was advised by counsel the NTLAC were involved) for their cooperation in the provision of and the payment for the interpreters. Without the interpreters this matter that was already somewhat protracted could not have proceeded. The evidence raises issues of the application of s187 *Criminal Code* (NT), the attempted or threatened application of force and the mental element of the Defendant as governed by s31 *Criminal Code* (NT). To be successful the prosecution must prove each element of assault beyond reasonable doubt and negative any excuse or defence raised to the same standard.

### **Summary of the Evidence**

3. Ms Maloney gave largely undisputed evidence that she and the Defendant had been in a relationship for some six months prior to the incident. At the time of the incident their relationship had finished. She said they remained friends. Their relationship formed during a time they were fellow employee's at "Big W" in Casuarina. She described the relationship as a normal relationship, not very intense, saw it as boyfriend and girlfriend. She was 37 years of age at the time of giving evidence and said the Defendant was 23 at the time of their relationship. He had not previously had a significant relationship.
4. After around six months of being together Ms Maloney said it was her decision to end it. This upset the Defendant. It led to the Defendant engaging in conduct such as ringing her eldest daughter, abusing her and telling her it was all her fault. She described the end of the relationship as "a little bit heated, but not real messy at that time". She agreed with the proposition that the Defendant did not accept the end of the relationship. She knew this because the Defendant would persist in trying to persuade her

that they should still be together; he kept talking and arguing with her about it. He would utilise the phone or speak to her in person. She said this continued on for around three months.

5. On 9 September 2008, (the day of the offences), she received about 20 text messages from him. She said she communicated through her daughter (Jade) to the Defendant over the phone that she didn't want to speak to him; her daughter told her the Defendant had said he was coming to the house. He attended at her house. Ms Maloney said he was at the front door and she told him to "fuck off". She said there was no difficulty communicating in English with the Defendant during the relationship. She shut the main door but the Defendant stayed there for about ten minutes; she became angry and confronted him telling him he would have to leave; she told him she would go to his auntie's house to talk to her about it. She drove to his auntie's house in her new Toyota Yaris (the car is the property the subject of the criminal damages charge); the Defendant followed her on his motorbike. She spoke to the Defendant's aunty who she knew as Sue. (The Defendant's aunty gave evidence later in these proceedings; her full name is Sivhong Taing). Ms Maloney's reason for speaking to the Defendant's aunty was because of the auntie's influence; she wanted to tell Ms Taing to tell the Defendant to leave her alone. She said at the auntie's house the Defendant was speaking in Cambodian (sic) trying to "butt in"; she described it as a heated argument with voices raised. She said the Defendant was upset; she could tell this because he was raising his voice and by his body language. She told the Defendant and his aunty that she was leaving and the Defendant said "I am coming to your house now". She said she spoke to the Defendant's aunty and told her to tell the Defendant to stay away as she didn't want to have to call the police.
6. Ms Maloney said she reversed out of Ms Taing's driveway and the Defendant then got on his motorbike. At a point where she was more or less in the middle of the road the Defendant came out of the driveway and hit her

car with his motorbike after she had reversed out. The bike impacted the car; she said it was not very hard but enough to knock the number plate off the car. She said the Defendant was then lying on the bonnet of the car with his legs on the passenger's side and his head towards the windscreen. A male family member then appeared and passed her her number plate.

7. She said the Defendant's aunty was on the passenger's side of her vehicle and was upset. She said she was raising her voice and was speaking in Cambodian. She then saw the Defendant going to the end of the street on his motorbike and thought he was leaving the area. Rapid Creek Road was at the end of the street. At that point the Defendant turned his bike around and started riding it again towards Ms Maloney who was in her car. She said he was 10 or 15 houses away and rode towards her *pretty fast*, or as fast as he could pick up speed in that time. Ms Maloney said she tried to comprehend what was actually happening and when he got close enough to her she could see he was headed straight for the middle of her car and she realised she had to get out of the car. She opened the door and jumped out quickly. At that point he changed his direction towards her. She said as soon as she reached for the door and opened the door he swerved towards her while she was getting out of the car. The Defendant hit the driver's side door because she didn't get time to close the door. She thought he hit the door very hard and said it caused two windows to shatter and the door to shut. She was on the nature strip at the time of impact. She said she moved in a split second and was a few feet away. She said she was terrified because she thought he was going to hit her at speed. She said the Defendant then got off of the road, took his helmet off, jumped on the bonnet of her car and smashed the windscreen. She said he hit it about four times until it smashed. She agreed there were other people present at the time including the aunty and another male relative of the Defendant's and that she called the police.

8. Much of Ms Maloney's evidence was unchallenged. It was put to her that there were other people following her vehicle when it first reversed out of the driveway. Ms Maloney said the others appeared after the Defendant hit the car. She said they were in the front yard. She said she wasn't sure whether the swerve occurred less than a few feet from the front of the vehicle. It was suggested to her that the Defendant's aunty "Sue" was approaching from the left hand side of the vehicle at the same time that the Defendant swerved. Ms Maloney said she didn't know where the aunty was when the Defendant swerved; she saw the aunty after the car was hit. It was suggested to her that the aunty was on the left hand side of the vehicle walking towards the front waving her hands when the Defendant swerved. Ms Maloney said she didn't know as she was watching the Defendant and had no idea of the speed the Defendant was travelling; she said "it was fast but I don't know". She agreed she didn't know where the aunty was standing because she was watching the Defendant. It was suggested to her that there were two other people, a male and female, standing on the left side of the vehicle; she said "maybe" they were present after the impact but she didn't know if they were there at the time of the impact. It was suggested to her that the Defendant's intention was to hit the vehicle and not her. Ms Maloney said she didn't believe that. Ms Maloney said the Defendant acted by swerving at the time of her decision to open the door.
9. The prosecution called Sivhong Taing (the Defendant's aunty), Kim Lany Bahn (who described Ms Taing as his wife's aunty) and Vouch Hour Ngoun (niece of Ms Taing). Ms Taing gave the most detailed evidence and clearly the other witnesses were influenced by her both on the day and in their decision to come forward and give evidence. None of these witnesses had given statements to police however at least Ms Taing; (it is unclear with the others) was summonsed to give evidence. Ms Taing spoke of Ms Maloney and the Defendant arguing with each other that day and having "*grumpy faces*". She agreed Ms Maloney got into the car and the Defendant was on

his motorbike. Ms Taing said Ms Maloney was reversing very slowly, the Defendant was rushing to leave and he hit her car and the number plate fell off.

10. Ms Taing said she was calling the Defendant but she didn't think he could hear her. When the Defendant reached the corner of the street she thinks that is when he heard her and that that is when he came back. Ms Taing said she was calling out to the Defendant that she didn't want people hurt. She said her nephew and the nephew's partner were beside her on the left side of the car; the Defendant drove very close to her within two metres and then swerved. She says she turned to look at the car and saw the door being opened and the Defendant tried to get around the car. Ms Taing indicated that she was in front of the car. When the Defendant was driving towards her she thought it was at about 20 kilometres an hour but said it was not very fast. She said she wanted him to come home and was concerned that there not be any damage to any people; she said if the car door wasn't opened everything would have been okay. In answer to whether she felt frightened Ms Taing said again that if the car door wasn't opened it would have been okay and that no danger would have occurred as she was standing in front of the car. She spoke of both Ms Maloney and the Defendant arguing and swearing. She said when the Defendant turned his bike around at the end of the street it was stationary. She said she was half a metre away from the car. She said he wasn't going fast at all, he was slowing down; the motorbike was coming towards her but he curved the other way; he was swerving away from her because she was trying to grab his motorbike and he was moving away from other people as well. She said the Defendant would die for Ms Maloney.
11. Mr Bahn confirmed he was with his wife at one side of the car during the incident and his aunty was in front of the car. He thought the motorbike was going 20 to 30 kilometres per hour; he said it was slowing down and then hit the car on the door because it was already open. He said he saw the owner

coming out of the car. He said Ms Maloney was already on the grass when the bike hit the door. He also saw the Defendant hitting the windscreen of the vehicle. He was of the firm view that the Defendant swerved to get away from the aunty and that is why he hit the door of the car. He confirmed the motorbike had slowed down just before the point of impact when it hit the car door. Ms Ngoun did not add any further material of relevance.

12. The Defendant chose to give evidence. He stated that on the day in question he tried to apologise to Ms Maloney but she wouldn't accept his apology and told him to "fuck off"; he felt disappointed and sat in front of the door of her house; there was a further altercation involving swearing and he told Ms Maloney not to go to his aunty's house. Ms Maloney said she would tell his aunty because he didn't take notice of anyone except his aunty. He followed her to the aunty's and he said he told her not to say anything but she still spoke to his aunty.
13. He said when she got in to the car to drive off he followed her, he felt upset and hit the car and the number plate fell off. He said his leg was between the car and the motorbike and he couldn't get out and that is why he lay on the bonnet. He said his mind was mixed up and he wasn't sure what he was thinking but he wanted to kill himself; he said he didn't want to live. He said his cousin came and took him off the bonnet. He said he couldn't remember where he went as he wanted to die and drove to the corner of the street where it met Rapid Creek Road; he then turned back and said he went to hit the car and to die. He said he rode the motorbike directly to hit the car and then he saw his aunty trying to stop him so he applied the brakes of his motorbike, his mind was numb and he couldn't hear anything or think clearly. He said he was about 40 metres from the car when he first turned around and he didn't go very fast; riding back towards the car he intended to kill himself. He was about 25 metres away when he saw his aunty, then tried to slow and then changed direction and turned to the side of the car



because he didn't want to hurt his aunty. He said he didn't take any notice of the driver and didn't know where the driver was; he said he didn't notice or see anything about the driver. He said the motorbike hit very slightly on the side of the driver's car door, the motorbike fell down and he took his helmet off and smashed the windscreen and passenger side of the window. He said he would not have been going more than ten kilometres an hour when he hit the car. He said when riding towards the car he had no intention of hurting anybody.

14. He agreed he found the break up upsetting with Ms Maloney and he thought about it a lot. He agreed after the discussion with his aunty he saw Ms Maloney get into the car and get behind the wheel. He agreed he laid on the bonnet but said he didn't know if he saw her in the car at that stage. He hurt his knee in the first collision but could still drive. He agreed that "maybe" Kellie was on his mind at the time he drove. It was suggested to him that he could have gone in a number of directions had he wanted to kill himself, he could have gone to Rapid Creek Road or Stuart Highway; he said he was mixed up. He said he didn't think about Ms Maloney at that time. He said he tried to go fast but the distance was short and when he saw his aunty move he didn't know Ms Maloney was still in the car. He said someone opened the door of the car to hit him with the door. He said he didn't see Ms Maloney at all. When he got up he didn't see where Ms Maloney was, he took his helmet off and started to smash the windows because he was upset and angry about everything. He said if his aunty wasn't there he would have hit the car but he didn't know if Ms Maloney was inside. He agreed it was possible that someone could be hurt on the inside of the car.

### **Assessment of the Evidence**

15. In my view the evidence is compelling that the Defendant was upset and frustrated with Ms Maloney. It is possible that he was so distraught that he may have wanted to kill himself or harm himself. The prosecution cannot

negative beyond reasonable doubt that he wanted to kill himself or harm himself, however there is every indication that he intended to also frighten the victim by threatening her with his motorbike by driving it towards her car in a manner indicative of crashing into her car or charging her car. The preponderance of evidence indicates the Defendant rode towards the victim's vehicle in the knowledge that this would put her in fear or harm her. Clearly this is what happened. It is why Ms Maloney jumped out of the car. Similarly, the preponderance of evidence indicates the Defendant wanted to avoid the aunty and that is why he swerved at the last moment.

16. I reject the part of the Defendant's evidence when he says he wasn't thinking about Ms Maloney and didn't know she was in the car at the time when he was charging towards it. Clearly he had been obsessing about her and the relationship that had been. He had just seen her backing out of the driveway in the vehicle. Just saying now that he was mixed up at the time about his thoughts doesn't negate all the particularly strong evidence that points towards him wanting to crash into Ms Maloney's car in the knowledge she was in the car. He must have known his actions would be frightening and threatening to her, whether or not he also intended to self harm.
17. I accept Ms Maloney's evidence that she apprehended the Defendant would crash into her car and she would be hurt. She was forthright, logical and prepared to make reasonable concessions on the evidence, for example, she was not aware of the presence of the aunty at the point of the impact. I accept it appeared to her the motorbike was going fast – that would accord also with the Defendant's stated intention to crash into her car and kill himself. Given how quickly the incident occurred, I cannot rule out that the swerving was due to a decision to avoid the aunty.
18. Although I do not reject Ms Taing's evidence, it is given clearly in a way that is naturally protective of her nephew. I do not find it as convincing as

Ms Maloney's as Ms Taing views events very much from the prism of wanting to protect her nephew. I doubt her evidence that the motorbike was not going very fast. I reject her evidence that everything would have been okay if the door wasn't opened. She herself was frightened someone would get hurt.

19. Section 187 *Criminal Code* (NT) defines "assault" as follows:

- (a) the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of harm or by means of false and fraudulent representations as to the nature of the act or by personation; or
- (b) the attempted or threatened application of such force where the person attempting or threatening it has an actual or apparent present ability to effect his purpose and the purpose is evidenced by bodily movement or threatening words,  
  
other than the application of force.

20. The mental element is governed essentially by s31 *Criminal Code* (NT):

- (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 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.
- (3) This section does not apply to a crime defined by section 155.

21. In my view this is clearly a threatened application of force bearing in mind the context of the bike already once colliding with Ms Maloney's car and then being driven towards it again. The Defendant had the "apparent present ability" to effect the purpose by use of his motorbike. In *R v Secretary*

(1996) 107 NTR 1, Mildren J stated s 187(b), when it refers to “apparent present ability” must be construed by reference to the actual situation to which the words relate. His Honour stated:

“If the case is one of an attempted application of force, the apparent present ability to effect the purpose is to be evident at the time of the attempt; but if the case is one of threatened application of force, then it must be evident from the facts known at the time the threat is made that at that time when the threat is to be carried out the person making the threat will then have an apparent ability to carry out the threat”.

22. The actions of the Defendant by apparently being prepared to crash into Ms Maloney’s car for the second time, with the foresight as a possible consequence that she was in the vehicle lead me to the conclusion he had a present ability to effect his purpose through the threatened application of force. Clearly, driving a motorbike towards Ms Maloney’s car foreseeing she is in the car constitutes a threatened application of force.
23. As I have mentioned above, the Defendant must have foreseen as a possible consequence that Ms Maloney was in the vehicle. In other words he must have at least foreseen Ms Maloney would be threatened with assault by his actions, even if he also intended to self harm. The assault constitutes driving towards the vehicle with the apparent intention of hitting it, with the subjective foresight Ms Maloney was in the vehicle. The prosecution cannot disprove however the Defendant swerved to miss his aunty rather than target Ms Maloney. In my view it cannot be proved that the swerving actions on the part of the Defendant was intended to assault Ms Maloney. Further, given the evidence of the aunty, it cannot be proven the Defendant foresaw Ms Maloney to be opening the door at that moment of swerving. That part of his action does not constitute the assault. He had already assaulted Ms Maloney, that is clearly why she needed to jump out of the car.
24. I find the count of aggravated assault proven. I will hear submissions on sentence.

Dated this 10<sup>th</sup> day of March 2010

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**Jenny Blokland**  
CHIEF MAGISTRATE