

CITATION: *Police v Kerinauia* [2010] NTMC 033

PARTIES: SCOTT RUSSELL

v

BRENDAN JOHN PETER KERINAUIA

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 21003259

DELIVERED ON: 11 May 2010

DELIVERED AT: Darwin

HEARING DATE(s): 21 April 2010

JUDGMENT OF: Ms Fong Lim SM

CATCHWORDS:

Criminal law – Aggravated assault – child victim – uncorroborated evidence- oath on oath

REPRESENTATION:

Counsel:

Plaintiff: Mr Tierney
Defendant: Ms Nincovic

Solicitors:

Plaintiff: Director of Public Prosecution
Defendant: NAAJA

Judgment category classification: C
Judgment ID number: [2010] NTMC 033
Number of paragraphs: 39

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

No. 21003259

BETWEEN:

SCOTT RUSSELL
Plaintiff

AND:

BRENDAN JOHN PETER KERINAUIA
Defendant

REASONS FOR JUDGMENT

(Delivered 11 May 2010)

Ms FONG LIM SM:

1. Mr Kerinauia was charged with one count of aggravated assault upon his 8 year old son, two counts of breach Domestic Violence Orders one breach in relation to his partner Ms Kantilla and one in relation to his son Brendan Junior, and one count of obstruct another person taking action to prevent further injury to a third party, in this instance the child Brendan Junior.
2. Both Mr Kerinauia and his son have the same name so throughout this decision I will refer to Mr Kerinauia as Kerinauia and the son as Brendan.
3. It is agreed that Brendan suffered an injury from a knife and that injury became severely infected which resulted in Brendan being flown to Darwin for admission into Royal Darwin Hospital for treatment. It is also agreed that there was a current Domestic Violence Order in place where Kerinauia was restrained from:

“1. Harassing , threatening, or verbally abusing Sharon Kantilla, Brendalia Kerinauia, Asumpta Kerinauia, Brendan Kerinauia and Brando Kerinauia and in particularly harassing for money;

2. Assaulting or threatening to assault Sharon Kantilla, Brendalia Kerinauia, Asumpta Kerinauia, Brendan Kerinauia and Brando Kerinauia; and

3. Damaging or threatening to damage the property of Sharon Kantilla, Brendalia Kerinauia, Asumpta Kerinauia, Brendan Kerinauia and Brando Kerinauia.”

4. The breaches of the Domestic Violence Order were particularised as a throwing of a knife at Brendan and threatening Kantilla. Both charges 2 & 3 were dismissed. Charge 3 was dismissed and Kerinauia was found not guilty because there was no evidence produced to support that charge. Charge 2 was dismissed as duplicitous with Charge 1.
5. There was no dispute in relation to the circumstances of aggravation as pleaded except the alleged threat with a dangerous weapon, namely a kitchen knife.
6. The Court heard evidence from Sharon Kantilla partner of Kerinauia and mother of Brendan, Mel Fernando Brendan’s grandmother, Janis Perry the nurse at the clinic and Kerinauia. Brendan did not give evidence nor was a recorded interview tendered.
7. **Did Kerinauia throw the knife?** Kantilla gives evidence of being inside the house with Kerinauia and the children playing outside when Brendan started crying for his dad. It was then Kantilla says Kerinauia took the knife from the kitchen and threw it at Brendan, Brendan went to run away but came back when his father called him. Brendan had a wound on the right forearm which was bleeding.
8. Kerinauia says he was inside lying down with Kantilla when Brendan started crying. He went outside to see what the problem was and spoke to the children about why they wouldn’t let Brendan play the game. He then went back inside got the knife and a fish from the fridge and started cleaning the fish. When he was finished he says the knife was on the table and Brendan

ran by and was somehow injured by the knife. Kerinauia says it was not a deep cut but it was bleeding and he applied some pressure to the wound and then no further treatment was required. Brendan then went to his aunt's for the night and came back with a bandage on the arm.

9. Both Kantilla and Kerinauia agree there was then a period of time before Brendan was taken to get some medical attention and when he was taken to the clinic he had developed a serious infection which required him to be medivaced out to Darwin.
10. I heard evidence of Janis Perry, the nurse who attended Brendan at the clinic, she gave evidence of a 2 -3 cm longitudinal wound which was severely infected and required further medical attention. She also gave evidence of the changing story someone had relayed to her about what had happened. She could not remember who told her what but the story changed from to the knife having been thrown at the child to the child being deliberately stabbed. She reported the incident to the Police.
11. The significant evidence given by Ms Perry is that she physically indicated the wound was on the inside of the left forearm even though her oral evidence was that it was on the right forearm. The evidence given by Ms Fernando, the child's grandmother, is that she had observed a wound on the inside of the child's right forearm. Ms Kantilla also indicated a wound on the inside of the forearm. Mr Kerinauia is the only witness who indicated the wound to be on the outside of the right forearm. Ms Perry was cross-examined on the site of the wound and referred to the clinic notes which indicated the wound to be on the left arm and she agreed that must have been the case.
12. Ms Perry originally gave evidence that the wound was "8 cm long" but when asked to clarify indicated a distance between her fingers of about 2 - 3 cm. She says the wound was longitudinal and when defence counsel asked her the "direction" the wound was in defence counsel drew on the outside of her

own forearm a mark lengthways to which Ms Perry agreed was the direction of the wound.

13. All witnesses besides Kerinauia indicated a wound on the inside of the forearm (whether it was on the left or the right). The clinic notes were not tendered by the prosecution so the Court can only rely on the oral evidence of the witnesses. Defence counsel submitted that Ms Perry had agreed with her that the wound was on the outside of the left arm as she had indicated by drawing on her own arm. I do not accept Defence counsel's submission on this point. The question in relation to that drawing on the Defence counsel's arm was specifically in relation to the direction of the wound not the site. I cannot infer from the answer that Ms Perry was changing from her previous evidence that the wound was on the inside of the forearm.
14. The fact that Kantilla and Fernando indicated the wound was on the right arm whereas the nurse confirmed her notes indicated the left is not of great significance. It would be easy for those witnesses to be mistaken as whether it was the left or right arm given the length of time expired since the incident.
15. The site of the wound is clearly significant because if the wound was on the outside of the child's arm (whichever arm) it is possible he might have received the wound in the manner Kerinauia states however if it was on the inside of the arm then it is hard to imagine how, by running past a table he could have received the wound on the inside of his arm and in my view highly improbable that it happened in that manner.
16. Some criticism was made of the prosecution for not calling the victim to give evidence. I note that the victim is a child eight years of age and at that young age is less likely to be a reliable historian nor understand the serious consequences of telling the truth in a court situation. The fact that he has not been called should not in these circumstances give rise to an inference against the prosecution.

17. The only evidence the Court has from the prosecution of how the child was wounded is Kantilla's evidence. In these circumstances it is important to approach Kantilla's evidence with caution and to carefully scrutinise that evidence. I must also consider the evidence of Kerinauia and decide if he has raised a reasonable alternative possible explanation for the wound and if so whether the prosecution evidence is strong enough to negate that alternative beyond a reasonable doubt.
18. Criticism was made of the evidence of the Kantilla. She became confused in cross examination about where she was when the incident happened and how the knife came to be outside. She agrees that she and Kerinauia were inside when Brendan started calling out, in examination in chief she says Kerinauia got the knife from the kitchen drawer and went outside and threw it the child. In cross examination she was referred to her statement made to police in which she apparently said the knife was on the table outside, at first she didn't accept that's what she said to the police but later did say she had made a mistake and accepted the knife was outside on the table. Then later she confirmed her earlier evidence that her partner had taken the knife outside.
19. Kantilla clearly also became very confused in cross examination in relation to where she was at the time of the incident whether she was inside or outside or whether she had followed Kerinauia outside. She was adamant she was inside the house and then qualified her answer to say she was on the verandah.
20. When allowed to narrate instead of answering questions as to where she was she said she and her partner were inside and then moved outside on the verandah and her partner had taken the knife outside and then thrown it at the child. This is in part corroborated by Kerinauia's evidence that after dealing with the children he went back inside got the fish and knife and started cleaning the fish.

21. In cross-examination Kantilla did not accept that Kerinauia was gutting the fish on the verandah. She did not accept Brendan getting stabbed was an accident she reiterated that she and “her partner” were inside and when the son called out they both went outside and the “father” got the knife and threw it at the “son”.
22. The evidence of Ms Perry is that the story she was given by she “thinks it was mum” was changing from the knife had been thrown at the child ending up with the knife being deliberately into the child. Defence counsel has asked me to infer the changing story was coming from Kantilla and not the child and if I make that inference I should further infer that Kantilla’s evidence must be unreliable. I cannot make that inference it could be the story was coming from both Kantilla and the child. In any event there was no suggestion in either version of the story that Ms Perry was given that the wound came about as an accident and Ms Perry was concerned enough to report the matter to authorities.
23. Defence counsel submitted that Kantilla was motivated by jealousy to lie about Kerinauia’s involvement in this incident and Kantilla was also trying to show she was not a bad mother because of an investigation by Families and Children’s services. Kantilla accepted that she knew that Kerinauia had another woman in Darwin but claims she was not jealous of that woman. Significantly Kerinauia did not give any evidence of Kantilla’s alleged jealousy.
24. There was no evidence of a continuing investigation or the status of the original investigation by Family and Children Services and neither Kantilla nor Kerinauia referred to it in their evidence. When cross-examined about her motivation to lie Kantilla denied she was trying to paint herself in a better light because of Family and Children Services.
25. Kerinauia had significant inconsistency in his evidence. In evidence in chief he first states he threw down the knife onto the table and because the table

was unstable the knife slid to the edge and finished half off the table just at that very moment Brendan ran by and cut himself. To the contrary he also stated in both examinations in chief and cross-examination that he put the knife down with the blade half off the table then Brendan ran by and cut himself on the knife.

26. Kerinauia also gave evidence of apologising to his son, an unusual response to his son running past and cutting himself on the knife. His apology suggests taking responsibility for the injury which was not as a result of an accident.
27. Kerinauia was also at pains to tell the court that he checked the wound everyday once in the morning and once at night and as far as he was concerned it was healing well. Yet he also stated that he had told Kantilla to take the child to the clinic. If he was content the wound was healing properly why then would he have told Kantilla to take the child to the clinic? He stated he was not surprised when Brendan needed to be flown out to Darwin for treatment. There is a clear inconsistency in the proposition that he thought the wound was healing and not being surprised that Brendan was seriously ill enough to require him to be sent into town. It is more likely that he was not surprised because he knew the wound was becoming infected even though he told the court he thought the wound was healing well.
28. I find that the inconsistencies in Kantilla's evidence can be explained by her understanding of the English language, while she had seemed to have a good command of the English language when questions were put to her in ambiguous terms she clearly became confused but despite that confusion she was adamant that she had seen the knife being deliberately thrown by Kerinauia. The highly emotional situation where she has observed her partner throw a knife at her 8 year old child is also a possible explanation why she is could be confused about minor details.

29. Kerinauia on the other hand had a good command of the English language and displayed no such confusion when cross examined or in his evidence in chief. I find he embellished his concern about the wound by first giving evidence that he checked it every day and then later stated twice a day. He gave no evidence of such concern for the child that he took time off work to take him to the clinic but deflected that responsibility to Kantilla. It was Kantilla not Kerinauia who eventually took the child to the clinic. I find he was being untruthful about his concern for the child.
30. Further the version of events given by Kerinauia was so unlikely given the site of the wound (on the inside of the forearm) that his evidence of how the child became injured must be disregarded.
31. Given all of the above I am satisfied beyond a reasonable doubt that Kerinauia was called out to attend to his son and for some reason threw a knife in the direction of his son. The knife hit the child on the inside of the left forearm giving him a wound between 1-3 cm long which bled enough to require Kerinauia to use his shirt to staunch the bleeding.
32. By throwing the knife Kerinauia applied direct force to the child and ought to have foreseen the result of the knife actually hitting the child causing him injury. Kerinauia must be found guilty of assault and the circumstances of aggravation as pleaded.
33. **Did Kerinauia obstruct Kantilla from taking Brendan for necessary medical attention?**
34. Both Kerinauia and Kantilla claim it was the other's responsibility to take the child to the health clinic both claiming they were busy at work. I find both parents did not take responsibility for the child's health and it was only when he fell really ill that Kantilla decided it was time to take him to the clinic.

35. Kantilla's immediate response to why she did not take the child was that she was too busy at work and maintained that stance until later in her evidence she says she had been stopped by Kerinauia from taking the child to get medical attention by him "growling" at her. However even after giving that evidence she was cross examined and did not mention the growling again. She emphasised she was busy working and Kerinauia had more time to take the child. Kerinauia says that it was he who was busy at work and it was the mother's responsibility to take the child for medical attention. He specifically denies stopping Kantilla from taking the child to the clinic.
36. Although I have disregarded Kerinauia's evidence about how the child became injured that does not mean I should disregard all of his evidence. Neither he nor Kantilla could confirm their hours of work with independent evidence, (which would have been easy to obtain).
37. Both parents were deflecting blame for a clear case of neglect of the child and neither can be found to be reliable in their evidence on this issue.
38. I am faced with an oath on oath situation and given I have some doubts about the voracity of Kantilla's evidence about this issue I cannot be satisfied beyond a reasonable doubt that Kerinauia did obstruct Kantilla from seeking help for the child and therefore he must be found not guilty of that charge.
39. I will hear the parties on sentencing.

Dated this 11th day of May 2010

Tanya Fong Lim
STIPENDIARY MAGISTRATE