

CITATION: *Police v Raymond and Police v Lewin* [2010] NTMC 067

PARTIES: POLICE

v

GILBERT RAYMOND

POLICE

v

JONAS EVENESS RALPH LEWIN

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 21022795 & 21022680

DELIVERED ON: 30 November 2010

DELIVERED AT: Darwin

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JUDGMENT OF: Ms Fong Lim SM

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Knight v The Queen, Cassidy v The Queen [2010] NTCCA 15

McAuliffev R (1995) 130 ALR 26

Brennan v R (1936) 55 CLR 253

Stuart v R [1974] 134 CLR 426

R v Lowry [1972] VR 560

R v Mardday & Ors [1998] 7 NTR 192

Warren and Ireland v R [1985] 15 A Crim R 317

R v Sherrington [2001] QCA 105

REPRESENTATION:

Counsel:

Plaintiff: Mr Ledek

Defendant: Ms Lewar & Ms Dahlstrom

Solicitors:

Plaintiff:

Director of Public Prosecutions

Defendant:

NAAJA

Judgment category classification:

C

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[2010] NTMC 067

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51

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

No. 21022795 & 21022680

BETWEEN:

POLICE
Plaintiff

AND:

GILBERT RAYMOND AND JONAS EVENESS
RALPH LEWIN
Defendants

REASONS FOR JUDGMENT

(Delivered 30 November 2010)

Ms FONG LIM SM:

1. Gilbert Raymond and Jonas Lewin are jointly charged with others for the aggravated assault upon Walter Mamaku at Discovery Nightclub at about 3:00am on the 5 June 2010. A co – offender, Jason Davern–Raymond, started a fight with Mamaku which resulted in both Mamaku and Davern-Raymond tumbling down a staircase. At the bottom of those stairs Mamaku was subjected to several punches, kicks and stomps, from six offenders including the Gilbert Raymond and Jonas Lewin. Most of the blows were while Mamaku was on the ground unable to defend himself. At the end of the altercation Mamaku suffered multiple facial bruising and swelling, tenderness around the rib abdomen and rib area and haematoma over the right eye. He required two stiches under his right eye and was still suffering some ocular effects of the assault at the time of the hearing some 5 months after the incident
2. It was agreed the harm to Mamaku as alleged was as a result of the incident.

3. The Court was shown CCTV footage of the incident, heard evidence from the victim, and the electronic records of interviews of both Lewin and Raymond. Raymond chose not to give evidence. Lewin gave evidence.
4. The prosecution must satisfy me beyond a reasonable doubt each of the elements of the offence for each of the defendants. They must prove that the both Raymond and Lewin applied direct or indirect force upon Mamaku without his consent or that they were criminally responsible for the actions of others who assaulted Mamaku on that night. The prosecution relies upon sections 8 & 12 of the Criminal Code for the purposes of establishing Raymond's and Lewin's criminal responsibility for the actions of others and in particular the harm suffered to Mamaki.
5. Prosecution also has the burden to negate any positive defence raised by the defendant in the case of Gilbert Raymond defensive conduct and justified conduct. In the case of Jason Lewin defensive conduct is raised.
6. **Issues** – The prosecution freely admits it is impossible for them to prove which blow caused what harm to Mamaku and relies on the operation of section 8 and 12 of the Criminal Code to link the all of the harm to Mamaku to each of the offenders. The prosecution relied on “common purpose” and section 8 as the principle basis to prove each of the defendants responsible for the actions of the other assailants. The Prosecution also relies on section 12 alleging each of the defendants aided or abetted the others to assault Mamaku and through those actions can be held responsible for the consequences of those actions.
7. Defence counsel objected to the prosecution relying on section 12 because prosecution's case was always put on the basis the defendants had a common purpose in their assault on Mamaku. I ruled against defence on this point, the defendants are jointly charged and it has always been alleged that they are responsible as co – offenders for the harm done to Mamaku even if their own personal actions did not cause that harm. In those circumstances if the

evidence supports a finding under section 12 it is open to the court to make that finding. Recently the Court of Appeal of the Northern Territory considered the matter where two defendants were jointly charged. In their deliberations the Court of Appeal clearly considered a finding under section 8 and section 12 as alternatives when parties are jointly charged (see Knight v The Queen, Cassidy v The Queen [2010] NTCCA 15).

8. Both defendants deny any common purpose. They admit that they were present at the incident and some participation however deny they were part of a joint criminal enterprise and submit they cannot be found guilty of any circumstance of aggravation on the grounds of common purpose or aiding and abetting others in their offending.
9. The issues to be decided are:
 - (a) Was there a common purpose between Lewin, Raymond and others in the assault of Mamaku?
 - (b) If there was no common purpose were either Lewin or Raymond an accessory to the offending of other assailants and by doing so are they jointly responsible for the harm suffered by Mamaku?
 - (c) If the Lewin and Raymond cannot be found guilty on the grounds of section 8 or section 12 did each of them assault Mamaku and was Mamaku harmed by their individual assaults and unable to defend himself at the time of the assault?
 - (d) Was Raymond acting in self defence or justified in his conduct?
 - (e) Was Lewin acting in self defence?
10. **“Common purpose”** – Section 8 of the Criminal code (NT) deems a person liable for the commission of an offence by another if that person had formed a common intention another to prosecute an unlawful purpose and in the commission of that unlawful purpose an offence is committed. That person can be excused from liability for the offence if that person proves he did not

reasonably foresee the offence as a possible consequence of his prosecuting the unlawful purpose.

11. Defence counsel for both Raymond and Lewin submit that section 8 only applies when two or more people agree to undertake an unlawful purpose and a further offence is commissioned by one of them, in those circumstances those parties to the original agreement can be responsible for that offence as if they were the principal offender. A classic example is when parties agree to rob a bank and one of the offenders injures a security guard during that robbery, all of those involved would be responsible for that assault.
12. Defence counsel submits that section 8 does not include the situation where the unlawful purpose is in fact the offence that is committed and further argue there has to be some meeting of the minds of the offenders before there can be a finding of common purpose. I agree with Defence counsel in that analysis.
13. At common law a difficulty has developed with the phrase “common purpose” it has been used interchangeably with “joint criminal enterprise, common design and in concert” and confusion has been created by that use of the phrase. The phrase has been used to describe any situation where there are a number of offenders involved in a particular offence including the situations where each of the people involved have an independent purpose in mind. The common law position on common purpose is described by the High Court in *McAuliffe v R* (R1995) 130 ALR 26.
14. In the present case it is important to note that section 8 of the Criminal Code (NT) applies and that section should be given its ordinary meaning as part of a code, its inclusion shows an intention to replace the common law. The High Court in *Brennan v R* (1936) 55 CLR 253 in considering sections 7, 8 & 9 of the Criminal Code (Qld) held that those sections should be construed according to their own meaning without any presumption that the only

intention was to restate the existing law. Sections 7 & 8 of the Criminal Code (Qld) are almost identical to sections 12 & 8 of Criminal Code (NT) respectively.

15. Nonetheless later in Stuart v R [1974] 134 CLR 426 the High Court clarified the reasoning in Brennan v R (supra) to say it is sometimes necessary to refer to the common law to establish the meaning of a section if the meaning of the section is unclear and/ or there are references in that section to phrases which have a specialised legal meaning.
16. At common law a joint criminal enterprise is where there is an agreement implicit or explicit between co – offenders to commit a crime and all of those co – offenders participate in the commission of that crime. The agreement does not have to be longstanding and it can be inferred from the circumstances. If the prosecution can prove beyond a reasonable doubt that the agreement existed and the parties were present and participating in the offence then each of the co-offenders can be found guilty of the charge. The issue of common purpose arises where, as part of the joint criminal enterprise one of the offenders commissions another offence which was reasonably foreseeable by others then they are all responsible for that offence (see Rv Lowry [1972] VR 560).
17. Section 8 of the Criminal Code (NT) refers to the forming of a “common intention to commit an unlawful purpose” and further the commission of “an offence” while prosecuting that unlawful purpose. Section 8(2) goes on to further define when two or more persons form a common intention to prosecute an unlawful purpose as an agreement to engage or concur in engaging in any conduct which would involve “them or some or one of them in the commission of an offence or a tort”
18. Co – offenders can have a “common purpose” eg: to assault another person but unless another offence besides an assault has occurred then section 8 has no work to do.

19. Separate and apart from “common purpose” under section 8 of the Criminal Code (NT) parties can be found guilty of an offence if they come under the definition in section 12 of the Criminal Code (NT). A person can be found guilty of the offending of another person if they have either aided, procured or counselled to commit the offence.
20. There are no authorities in Northern Territory which analyse the meaning of section 8(1) or (2). However it is clear from the decisions of the Supreme Court of Queensland when considering section 8 of the Criminal Code (Qld), (the equivalent to section 8 of Criminal Code (NT)), that section 8 applies to situations where there has been an agreement by the co-offenders to prosecute on unlawful purpose and then another different offence is committed.
21. Section 8(2) Criminal Code (NT) makes it clear the unlawful purpose does not have to be an offence, it can be a tort. What is equally as clear from section 8(1) and (2) there must be an “agreement” to undertake that unlawful purpose.
22. For an agreement to be found there must be an unlawful purpose identified and while it is accepted that the agreement does not have to be explicit and can be inferred in the circumstances there must still be an agreement to undertake an unlawful purpose.
23. In the present matter the prosecution did not articulate the “common purpose” or agreement it wished to rely upon. The prosecution seemed to suggest that because all of the co-offenders were involved in an assault upon Mamaku then they had the common purpose of assaulting Mamaku and therefore should all be found guilty of the harm pursuant to section 8. However if the “common purpose” is to assault Mamaku and there is no other offence which has been commissioned during that assault. The harm caused is a circumstance of aggravation not a separate offence (see *R v Mardday & ors* [1998] 7 NTR 192).

24. Prosecution submits that Raymond's comments to Daly Raymond that his "cousin had got into a fight in the toilets" and in his comments in his record of interview that "them two fellas was arguing about woman" indicates some sort of fore knowledge about what was about to happen. I agree that those comments indicate some knowledge about why Davern-Raymond had got into the altercation at the bottom of the stairs however there is no other evidence to support a finding there was any arrangement between any of the co – offenders to gang up on Mamaku and beat him up prior to the initial punch from Davern – Raymond.
25. If there was any agreement Raymond, Davern-Raymond, Lewin and Daly Raymond that agreement can only be found to have occurred at the time of the assaults and implied from the circumstances, that is they were all of the same mind to assault Mamaku and that they were all going to assault him at the same time. The very strong implication from the circumstances and the actions of each of those individuals as shown in the footage is that each offender was intending to assault Mamaku and that each of them knew of the other's assault because of their proximity to one another. There was, by implication, a common intention to assault Mamaku. There can be no other reasonable explanation for the behaviour of the defendants.
26. I am satisfied beyond a reasonable doubt that there had been an implicit agreement to assault Mamaku however as there is no ancillary offence committed beside the actual assault therefore section 8 has no application in these circumstances.
27. **Accessories** – The second avenue by which all of the co-offenders could be found guilty for each other's unlawful actions is pursuant to section 12 of the Criminal Code (NT) as accessories.
28. It is clear from the CCTV footage, admissions in Raymond's and Lewin's records of interview and, in Lewin's case, his oral evidence that both Raymond and Lewin were present at the incident in which Mamaku was set

upon by several people. It is also clear from the evidence that both Raymond and Lewin participate in the incident. The question for this court is was their participation of a nature that they could be found criminally liable for the actions of other assailants on that night and in particular the harm suffered by Mamaku arising out of those actions.

29. Section 12 Criminal Code (NT) provides that a person who aids another in the commission of an offence can be charged as the principal offender. In Warren and Ireland v R [1985] 15 A Crim R 317 the Court of Criminal Appeal considered the effect section 7 Criminal Code (WA) which is almost identical in terms as Section 12 Criminal Code (NT). Their honours confirmed the distinction between offenders prosecuting a common intention to commit an unlawful purpose and each being responsible for any offence arising out of that prosecution of unlawful purpose and where two offenders may have different intentions but in acting on those intentions has aided the other in the execution of another offence knowing that person to be executing that offence. In that case Warren had been stopped for a traffic offence and Ireland was his pillion passenger at the time. Ireland attacked the police officer without warning and the Warren joined in. The Court found that even though Ireland's intention was to cause grievous harm and Warren's intention was to avoid arrest they could both be found guilty of the grievous harm because the facts supported a finding they were acting in concert in their assault of the police officer and section 7 operates to make them both responsible for the grievous harm even though it was impossible to say whose blows caused the grievous harm.
30. In R v Sherrington [2001] QCA 105 the Supreme Court of Queensland considered the application of section 7(1)(c) of the Criminal Code (Qld), and referred to the decision in Warren and Ireland Section 7(1)(c) provides "every person who aids another in committing the offence" can be charged with actually committing the offence. In that matter the court found for the purposes of that section is it necessary for the parties to have knowledge of

what was being done by the other and in the circumstances of that particular case there was no difficulty in finding that each person knew of the other's involvement.

31. In the present case Mamaku was clearly subjected to an attack by several people and Raymond and Lewin were present. It is clear from the footage that Lewin punches Mamaku twice the second time causing Mamaku to fall and hit his head on the toilet door frame. Lewin accepted in his evidence in chief that he hit Mamaku and stated that he, Lewin was concerned about the effect his punch had on Mamaku. Raymond did not give evidence however in his record of interview when asked about the kick he is clearly seen to execute in the footage he states he was trying to kick his cousin not Mamaku. Raymond also states that he thought he had grabbed his cousin and "booted him" (page 25 of the transcript of his record of interview) and "I kicked my cousin" (page 29 of the transcript) and further at "I honestly thought I hit my cousin" (page 33 of the transcript). Those comments made by Raymond indicate an acceptance that his kick had connected with someone but in his view it was his cousin. There is a further reference to the kick on page 35 of the transcript which the prosecution suggests Raymond admits to hitting Mamaku whereas the defence counsel suggests Raymond says he missed him. I have listened to that part of the tape several times and cannot ascertain what is said by Raymond at that point.
32. In relation to Lewin it is clear from the footage that the first punch connects with Mamaku from his reaction to it falling backwards. The second punch can also be seen to be connecting with Mamaku causing him to fall towards the toilet door. At the time of the first punch Mamaku can be seen to be in a fighting stance but is clearly unbalanced because Jason Davern-Raymond had a hold of his leg. Lewin's second punch came after another had kicked Mamaku causing him to fall towards Lewin, Mamaku is not in a fighting stance at the time of the second punch. After that Lewin is seen to desist and walk away but he returns very quickly and stands just a short distance away

from where the Mamaku is being set upon by others. He is only moved further away by others pushing him and security becoming involved. Before he is restrained by security he can be seen to be shouting something towards the area where Mamaku was being assaulted by others.

33. Lewin claims to have been pushed down the stairs by a swell of people rushing down the stairs, he likened it to being in a mosh pit at a concert. He says he jumped down the last steps because of the momentum. He also says that he first hit Mamaku because he had been hit from behind and thought he was in danger, he believed he was defending himself. Lewin also claims not to have recognised anyone around him at the time and claims not to have been acting in concert with anyone. He claims he was acting independently.
34. I find Lewin's evidence to be unreliable and untruthful. The footage does not corroborate his evidence of why he jumped down the stairs or that he had been hit before he punched Mamaku. His first explanation to the police in his record of interview is also inconsistent to what is shown in the footage. He first states that his memory of the incident has black spots here and there and he was heavily affected by alcohol. Yet he is certain he did not recognise anyone in the fight even though he accepted he knew, Jason Davern-Raymond, Daly Raymond and Gilbert Raymond. The area in which this incident occurred was not that large it was at the most 6 metres by 5 metres, at one stage Lewin can be seen standing right next to Gilbert Raymond, watching Jason Davern-Raymond punch Mamaku while he was on the ground and pulling Daly Raymond away from Mamaku once the security officers arrived. In those circumstances it is unbelievable he did not recognise those people or was not aware of what they were doing, particularly Daly Raymond's repeated kicks to Mamaku and Jason Davern-Raymond's repeated punches to Mamaku while Lewin was watching.
35. There is also the evidence of Mr Pavlovich, a security guard on duty that night, he confirmed he knows Lewin and Daly Raymond as cousins.

Pavlovich attends the incident after receiving a call from the duty manager. He says he restrained Lewin because he was trying to get back into the fight. Pavlovich distinctly remembers Lewin yelling “hit that cunt” while he was restraining him. After the fight was broken up Pavlovich remembers Lewin being fairly placid but struggling and managing to get away from him. Pavlovich was not shaken in cross examination about hearing Lewin yell those words and his certainty is understandable given he was very close to Lewin at the time.

36. I find Pavlovich to be a reliable witness and his account of what happened to be corroborated by the footage. Mr Lewin however cannot be believed he claims he did not say anything during the whole incident when he clearly did, he accepts he is an angry person, he accepts that he was “caught up in the mood” and it is clear from the footage that he jumped down the stairs to involve himself in the altercation between Mamaku and Davern-Raymond. In his evidence he was attempting to make up excuses for his actions as caught on the footage and in doing so was shown to be inventing circumstances which didn’t exist. There is no evidence of Lewin being struck on the footage.
37. I am satisfied beyond a reasonable doubt that Lewin punched Mamaku twice and both times Mamaku was hampered by Davern-Raymond holding onto his feet. I find Lewin’s second punch caused Mamaku to fall to the ground and hit his head on the doorway of the toilets. I am also satisfied beyond a reasonable doubt that Lewin did not act in defence of himself nor that he was unaware of the actions of those around him in assaulting Mamaku. I am satisfied beyond a reasonable doubt that Lewin’s actions aided others who continued to assault Mamaku by rendering him vulnerable to further attack and pursuant to section 12(c) Lewin should be found guilty of the assault of Mamaku and further guilty of the circumstance of aggravation that Mamaku was unable to defend himself and that he suffered harm.

38. If I am wrong about Lewin's actions aiding others in the continued assault of Mamaku I find I am satisfied beyond a reasonable doubt that his yelling encouragement to the others to "hit that cunt" he counselled the further assault of Mamaku and ought to be found guilty by operation of section 12(d).
39. In relation to Gilbert Raymond. It is clear from the footage and the record of interview that Raymond executed a kick at the very beginning of the altercation. That kick was executed after he had pulled Mamaku up from Davern-Raymond. In his record of interview Raymond claims his intention was to separate his cousin Jason Davern-Raymond from Mamaku. He intimated that he was trying to protect his cousin from Mamaku.
40. I do not find Raymond's evidence to be reliable. In his record of interview he claims he was very drunk on that night, given a scale of one to ten, he claims he was 10 out of 10 intoxicated. For that reason Raymond's memory of the incident must be considered with caution. Raymond's insistence that he was trying to kick his cousin to separate him from Mamaku is not corroborated by the footage. In relation to Raymond's actions the footage shows him to be running down the stairs (followed by Lewin) grabbing Mamaku from the ground where he and Davern – Raymond had landed, then kicking out at Mamaku in the upper body head region. The kick is no where near Davern- Raymond and it is clearly aimed at Mamaku. Davern – Raymond remained on the floor holding onto Mamaku's leg. After executing the kick Raymond can then be seen to standing watching Lewin and others in their assault of Mamaku. He can be seen to be casually leaning up against the stair railing watching the assault until the security officers arrive and it then he moves forward and guides Davern - Raymond away.
41. Objectively the actions of Raymond are not consistent with his stated goal and that is to separate his cousin and Mamaku. He made no attempt to separate them once he had kicked Mamaku he seemed content to sit back and

watch his cousin and others continue to assault Mamaku. He says he was concerned his cousin was acting strangely that night as if he had already been hit a couple of times about the head. Raymond intimated that he was concerned for his cousin's safety however was content to allow him to continue to be involved in violent behaviour.

42. In his record of interview Raymond also tried to distance himself from all of the people involved. He initially talks about "two blokes in a fight", he could not identify anyone on the footage until he says that his memory had been "refreshed" and then identifies himself and Jason Davern – Raymond. It is clear from the evidence that Raymond knows, Davern- Raymond, Lewin and Daly Raymond. They are related and family friends. He is familiar with those people. Considering the distances involved in this incident and the proximity of the co- offenders to each other it defies belief that Raymond did not realise who the co-offenders were and was not aware of what they were doing.
43. Defence counsel also relied on the evidence of Mamaku that he felt many blows and kicks while on the ground but did not recount any kick while he was standing. She submitted that because Mamaku did not remember any kick while he was standing then Raymond's kick must not have connected. However it is clear that Mamaku suffered either a loss of consciousness or at least was concussed during the altercation and therefore his memory of the incident is likely to be affected. It is Raymond's admission in his record of interview that he thought he had kicked his cousin which is telling. Raymond does not deny kicking someone that night but claims it was his cousin. He does not deny actually connecting with a person. The footage shows a reaction to the kick from Mamaku and he clearly loses balance. With that evidence I am satisfied beyond a reasonable doubt that Raymond's kick did connect with Mamaku as it was intended to do so.

44. The question must then be did Raymond assist the others who assaulted Mamaku. I am of the view that he did, his kick, while Mamaku was being held on the legs by Davern- Raymond, makes Mamaku lose balance and make him more vulnerable to the attack by others. Raymond's failure to intervene when Davern- Raymond was clearly punching a Mamaku while he was unconscious on the floor and while Daly Raymond was kicking him after assisting him at the early stages was in all the circumstances assisting in that assault. He clearly had some control or authority over his cousin Jason Davern - Raymond because Davern-Raymond responded to him when he pulled him away after the security guards attended. He could have exercised that control at an earlier stage but chose not to. I am therefore satisfied beyond a reasonable doubt that Raymond did assist in the co-offenders assault upon Mamaku and must therefore be found responsible for their actions as well as his own.
45. Once a person is found to have aided another in an assault it is not necessary to find who caused what harm was caused by whom to the victim they are all responsible for each other's assault on the victim including any harm that may arise from that assault.
46. **Individual assaults** –If I am wrong about finding Lewin and Raymond each aided in the assault of Mamaku by others on the evidence before me I am satisfied beyond a reasonable doubt that each of the Lewin and Raymond assaulted Mamaku in the manner as described earlier in this judgement. I also am satisfied beyond a reasonable doubt that Mamaku was unable to effectually defend himself at the time of both assaults by reason of Davern-Raymond having hold of his legs at the time.
47. In relation to each of the individual assaults I cannot be satisfied beyond a reasonable doubt in relation to what harm if any was caused by each defendant. In those circumstances both Lewin and Raymond would be found

guilty of assault Mamaku with the circumstance of aggravation that he was unable to defend himself.

48. **Defensive conduct** – In relation to Lewin I am satisfied beyond a reasonable doubt that he was not acting in self defence. His evidence about being hit first is clearly not corroborated in the footage, his admission that he got caught up in the mood and that he was angry do not support a finding that he was acting in self defence. Lewin's second punch was clearly a punch delivered by him aggressively having advanced upon Mamaku. In the footage he showed no signs of trying to get away from Mamaku until after he had delivered the punch which laid Mamaku onto the floor. Even when he did leave he returned very quickly to encourage on the other assailants by his words.
49. In relation to Raymond I am satisfied beyond a reasonable doubt that he was not acting in self defence, defence of his cousin or applying reasonable force to break up the fight. The objective evidence of the footage shows him to be aggressively kicking Mamaku after having lifted him off the floor after already having effectively separated Mamaku and Jason Davern- Raymond. Mamaku was not in a position to defend himself from the kick which was delivered swiftly and the footage did not show Mamaku acting aggressively towards Raymond at all. Defence counsel relied on the size difference between Davern – Raymond and Mamaku as justification for the actions of Mamaku. It is true that Raymond does not have to prove that his reaction to the situation was that which it should have been in an ideal world however a kick towards the upper body head region of another while he was held by another could not have been considered justified to break up a fight. Once Raymond had pulled Mamaku away from Davern–Raymond any justification for his action stopped at that point.
50. **Conclusion** - Both Lewin and Raymond are found guilty of charges of aggravated assault with the circumstances of aggravation of harm and that

the victim was unable to effectually defend himself by the operation of section 12 of the Criminal Code (NT).

51. Dated this 30th day of November 2010.

Tanya Fong Lim
STIPENDIARY MAGISTRATE