

CITATION: *Cahill v Ayom* [2012] NTMC 015

PARTIES: LEIGH CAHILL

v

MAJAK AYOM

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: CRIMINAL

FILE NO(s): 21136152

DELIVERED ON: 24 May 2012

DELIVERED AT: Darwin

HEARING DATE(s): 24 March 2012; 27 April 2012

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW- Failure to Provide Personal Particulars – Assault- Resist a Police Officer in the Execution of his Duty- Arrest – Unnecessary Force

REPRESENTATION:

Counsel:

Complainant: Ms Swindley

Defendant: Mr Welfare

Solicitors:

Complainant: Summary Prosecutions

Defendant: Robert Welfare

Judgment category classification: B

Judgment ID number: [2012] NTMC 015

Number of paragraphs: 48

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

No. 21136152

BETWEEN:

LEIGH CAHILL
Complainant/Informant

AND:

MAJAK AYOM
Defendant

REASONS FOR DECISION

(Delivered 24 May 2012)

Sue Oliver SM:

1. The defendant is charged with three offences. First, that he failed to give his personal particulars when required by a member of the police force contrary to Regulation 9(5) of the Traffic Regulations. Secondly, that he assaulted a police officer in the execution of his duty contrary to s189A of the Criminal Code and third, that he resisted a member of the police force in the execution of his duty contrary to section 158 of the *Police Administration Act*.
2. The defendant was the front seat passenger in a vehicle being driven by his friend. Another friend was seated in the backseat. The vehicle was followed and then pulled over in the Litchfield Court area at Nightcliff by police officers Burnell and Baumann. Constable Burnell is the officer alleged to have been subsequently assaulted by the defendant.
3. When the vehicles pulled up the driver got out of his vehicle and walked towards police. He was met about halfway and an alcohol breath test administered by Constable Burnell. The test produced a positive result and

the driver was arrested for the purpose of a breath analysis and placed in the cage section of the police van.

What was the purpose of requiring the defendant to give his name and address?

4. The police officers approached the vehicle where the defendant and the other passenger remained seated. Constable Baumann spoke to the rear seat passenger whilst Constable Burnell spoke to the defendant. According to their evidence both were requesting those persons to give their name and address.
5. Constable Burnell's evidence was that the driver had no ID at the time or refused to supply his ID. He said that they went to the vehicle "to speak to those persons to find out who this arrested driver was". He said that he asked the defendant for his name and address "to establish the identity of the driver of the vehicle and to help us in our inquiries".
6. In response to being asked whether the driver refused to give his name and address he said "He stated that he had no ID on him or driver's licence and from his speech and what he was saying he couldn't clearly identify who he was or his date of birth." He said further that he did not know "if he refused to tell me [his name and date of birth] or the level of his intoxication he couldn't tell." He did however think he had said the car was his wife's and that establishing the ownership of the car was another factor [in asking the passengers for their particulars] "It could have been stolen for all we know".
7. Constable Baumann's evidence of their purpose was put somewhat differently. She said that she had walked to and taken a quick look at the car while Constable Burnell was talking to the driver but did not notice anything that she should be concerned with so went back to Constable Burnell and the driver. She said after placing him in the van, they wanted to get the details of the occupants. She took down the name, date of birth and

address of the rear seat passenger Elicio Cunguara. She said “It is usually something we do if there is a traffic offence involved. We take the persons details as witnesses.”

In what circumstances can police require a person to give their personal particulars?

8. Regulation 9 of the Traffic Regulations allows an “authorised person”, which definition includes a police officer, in certain circumstances, to require a driver or another person to give his or her personal particulars. “Personal particulars” is defined as

“the person's name and address, whether the person is the holder of a licence and, if so, whether the licence is provisional or a permit licence and includes providing a sample of the person's signature.”

9. It is an offence to fail to provide personal particulars if required to do so. An offence under Regulation 9(5) is not a regulatory offence¹. Contravening a provision of the Regulations is an offence carrying a penalty not exceeding 20 penalty units or imprisonment for 6 months although contravening regulation 9(5) may also be dealt with by way of a traffic infringement notice in the amount of \$50.

10. Regulation 9(2) provides

“If an authorised person believes a driver has committed an offence against the Act or these Regulations, the authorised person may require a person to provide:

(a) his or her personal particulars; and

(b) any information within the person's power that may identify the driver of the vehicle or assist in investigating the alleged offence.

11. In my view, Regulation 9(2) does not create a discretion at large for a police officer to require a person to provide their personal particulars. It appears to me to be intended primarily to empower police to obtain details of witnesses

in relation to traffic offences in circumstances where the driver is unknown or further investigation of the circumstances of a traffic incident is required.

12. It is not in my view a provision that permits an officer to require particulars as a matter of routine, such as seemed to be suggested by Constable Baumann's evidence.
13. I have some reservation that the officers could reasonably form a view that either of the passengers was required as witness to an offence of drink driving. The officers had identified, in a physical sense, the person driving the vehicle as they had seen him exit the vehicle. He had cooperated in a breath test and had been arrested, taken into custody and secured in their van. This is particularly because Constable Burnell was vague about whether the driver had actually refused to give his name or was simply having trouble doing so due to his level of intoxication. There is a difference between a person arrested for drink driving refusing to give his name and one who is not able to produce identification or having difficulty articulating his name due to his level of intoxication. The driver was co-operative and compliant. There was no reason to believe that he would not give his name, or be able to make his name intelligible, once his level of intoxication diminished.
14. There was certainly nothing to suggest that the vehicle was stolen. The passengers had remained seated in the vehicle whilst the driver was spoken to, breath tested, arrested and then secured in the van. Their behaviour was in no way suggestive of them being in a stolen vehicle. I do not accept that this was a reason why personal particulars were being requested. In any event Regulation 9 would not permit requiring personal particulars on that basis as it is confined in its terms to traffic offences and unlawful use of a motor vehicle or theft are not offences in the *Traffic Act*.

¹ Regulation 92

15. Regulation 9(5) is not isolated to the provision of personal particulars. It is not a stand alone requirement to provide personal particulars. Personal particulars are required in conjunction with the information to be sought under regulation 9(2)(b). The request for the person's name does not have to precede the request for information to identify the driver. Neither officer's evidence suggested that they had sought the name of the driver from either the defendant or Mr Cunguara. Given what erupted that inquiry might well have been interrupted but it is also the case, in my view, that had the purpose of the request for personal particulars been explained in advance of requiring the defendant's name some potential exists that what subsequently transpired might have been avoided. Continuing to loudly repeat a demand for his name clearly did not advance the situation to a satisfactory outcome for anyone.

Did the defendant refuse to give his personal particulars?

16. The defendant denies that he refused to give his name. He said he gave his name and address and that the officer did not have paper or pen in his hand. Constable Burnell did not say in his evidence that he had his notebook out, unlike Constable Baumann whose notes were produced and who gave evidence that the backseat passenger spelt his name as it was an African one that she would not otherwise have known how to spell. The subsequent physical actions described by Constable Burnell would be inconsistent with him having a notebook in hand when questioning the defendant. I am satisfied that he did not have a notebook in hand when requesting the defendant's personal particulars. This casts in my view some doubt on his intent in seeking to obtain personal particulars and other information under Regulation 9.
17. Constable Burnell says that the defendant was immediately aggressive when he approached him and "told me to get fucked, and "Why do I need to tell you anything?" He said he started off speaking softly but raised his voice

later in the altercation “trying to gain a vocal upper hand because he didn’t seem to be listening and he seemed to be getting louder.” He called for backup when the level of the defendant’s aggression increased. He said he couldn’t hear what the man in the backseat was saying “as I was concentrating and from the level of noise from the defendant and the volume.”

18. Constable Baumann was on the other side of the car talking to Mr Cunguara. She said that while she was still talking to him something drew her attention “which I think was raised voices and I looked over and I heard Constable Burnell say, ‘just give me your name. It is the law that you have to give me your name and address’, and he said that quite loud and I thought it was a bit strange and...Because it is not usually something where we need to raise our voice. It is usually something we just obtain name and address and that’s it.”
19. An independent witness Cara Richardson heard raised voices outside her unit and came out to see what was happening. She said she heard the male officer ask 3 to 4 times what was your name or do you have ID or something like that. The only voices she heard were the male and female police officers.
20. Mr Cunguara said that he didn’t hear Constable Burnell ask the defendant for his name. I don’t accept this evidence. The defendant agrees that he was asked for his name.
21. The difficulty in accepting Constable Burnell’s account that the defendant was immediately aggressive and increased his aggression is that if the defendant’s voice level had risen in aggression in the way suggested so that he had to get louder over the top of it, it would be expected that either Constable Baumann or Ms Richardson would have heard the defendant speaking in a loud voice, particularly, if as Constable Burnell said, he was telling him to fuck off or words to the effect that he would “smash him”.

Constable Baumann heard nothing of this and she was right there at the car with the window down talking to Mr Cuangara

22. It is possible in my view, that the defendant did give his name as he says when first asked and that Constable Burnell did not understand his name due to his accent and an unfamiliarity with African names.
23. Constable Burnell called for backup which he said was due to the level of aggression from the defendant increasing and this action is consistent with a view that the defendant was unco-operative and becoming increasingly aggressive. However, it is a possible explanation that his aggression increased as the demands for name and address continued, when he had already given it.
24. Considering all these matters, I could not be satisfied beyond a reasonable doubt that the defendant failed to provide his personal particulars.
25. In any event, I would not be satisfied that the demand for personal particulars was one properly made in accordance with Regulation 9 because the purpose for requiring those particulars has not, on the evidence before me been properly made out.
26. **Did the Defendant assault Constable Burnell?**
27. Constable Burnell said that shortly after calling for backup the defendant reached out and touched his accoutrement belt

“or touched or pushed. I wasn’t quite so sure at the time that’s when I took hold of his head, as a grip because that was the only area I could reach.”

He said further

“I wasn’t sure whether he was trying to push me, grab me, stab me, I was just so unsure, it was just so quick and unexpected.”

28. Apparent from this description is that Constable Burnell did not see what the defendant did, rather he appears to be relating what he felt. This would be consistent with the physical position of each, the defendant seated in the vehicle and Constable Burnell standing close to the open window.
29. The defendant's account is that he was grabbed by the neck with two hands and in the course of the struggle he twice pushed Constable Burnell.
30. Even if I accept Constable Burnell's account the question is whether the touching or pushing he described is sufficient at law to amount to an assault.
31. The Criminal Code defines assault in section 187 (with some exceptions not presently relevant) as
 - (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,
32. "Application of force" is defined in section 1. It includes
 - "striking, touching, moving and the application of heat, light, noise, electrical or other energy, gas, odour or any other substance or thing if applied to such a degree as to cause injury or personal discomfort."
33. Minimal physical contact can therefore amount to an assault provided that it is sufficient in terms of force "to cause injury or personal discomfort."
Leaving aside for the moment whether the touch or push was sufficient to cause "personal discomfort", an assault under s189A must be "unlawful". In this matter the prosecution must prove that the act (of touching or pushing) was intended or foreseen by the defendant as a possible consequence of his conduct.² There is nothing in evidence to support that finding. Constable Burnell was completely uncertain as to what the defendant had done. Given

the physical positions of the parties an accidental touching could not in my view be ruled out.

34. The defendant's account that he pushed Constable Burnell after he was grabbed by the throat is not inconsistent with this view, although noting the difference in the physical act by Constable Burnell. I could not exclude the possibility that there was an accidental touch of which he was not aware.
35. I find the defendant not guilty of the assault charge.

Is the defendant guilty of resisting a member of the police force in the execution of his duty?

36. Immediately following his feeling that the defendant had touched or pushed him, Constable Burnell says he reached into the car and grabbed the defendant by the head. Constable Baumann saw him with his hand in the window when she came to that side of the car to see why he was raising his voice. From that, it is apparent that there was some rapid action between the last verbal command, the touch and the grabbing of the defendant.
37. After losing his grip on him, Constable Burnell attempted to contain the defendant in the vehicle by preventing his exit from the door, initially on the passenger side and then the driver's side. There may even have been several attempts to get out either side if the defendant's account is accepted, which account is supported by the evidence of Ms Richardson. Eventually the defendant came out the driver side window although whether this was of his own volition or with the assistance of Constable Burnell is not certain. There is a difference in the accounts of the two constables as to whether all three immediately went to the ground or there was an initial struggle against the side of the vehicle. Eventually they did end up on the ground and the defendant sustained some injuries as a result.

² Section 31(1) Criminal Code

38. The question is whether the defendant is guilty of resisting a police officer in the execution of his duty by reason of the struggle in the vehicle and subsequently outside the vehicle.
39. It does not follow that having found that Constable Burnell was not assaulted by the defendant that any subsequent act by him in terms of executing an arrest is unlawful and outside the execution of his duty. The question is not whether a court at a later date has found that an offence has not been committed, the question is whether the officer believed that at the time and whether that belief was a reasonable one.³
40. I see no reason to reject Constable Burnell's evidence that he was touched or pushed in the area of his accoutrement belt as he said. I accept he was greatly concerned about being touched in this area. I accept that he regarded such a touching at the time as being an assault upon him. The question is whether that belief was a reasonable one.
41. It is not the case that a physical touching by one person to another is unlawful. In general social interaction people touch each other in many and varied ways. However a person reaching out and touching the accoutrement belt (or touching in the general vicinity of that belt) of an officer who is presently questioning them, in circumstances where some level of aggression or resistance is present would not reasonably be regarded as applying force "reasonably needed for the common intercourse of life"⁴ If such a touch was a deliberate one that may be sufficient to constitute an assault.
42. In relation to the assault charge I have found that I could not be satisfied beyond a reasonable doubt that the defendant intended to touch the officer. However it was not in my view unreasonable for Officer Burnell to hold a

³ *Ashley and Ors v Balchin* [2006]NTSC 41 at [16]

⁴ S187(e) Criminal Code

belief that he had been deliberately touched and thereby assaulted and acting on that belief, arrest the defendant.

43. However, the action that Constable Burnell says he took of reaching into the vehicle and taking hold of the defendant's head is in my view curious. In his evidence he said that he didn't know what the defendant might be intending to do, including stabbing him. If that was one of his concerns it would seem an entirely inconsistent action to step close to the vehicle and reach in to grab the defendant by the head because that would place his body in closer proximity to whatever danger he thought the defendant presented.
44. Likewise, if his intention was to arrest the defendant for assault it was an unusual way of executing it. He took hold of the defendant as described and then when he lost his grip he prevented the defendant from opening the door of the vehicle to get out. He did this either side of the vehicle at least once and potentially two or more times. If the defendant was to be arrested he had to come out of the vehicle at some point but Officer Burnell kept trying to contain him in the vehicle. He did not explain in his evidence why he took this action. If accepted that the defendant had not intentionally touched him, the officers conduct would have seemed inexplicable to the defendant. It seems inconsistent to me with affecting an arrest.
45. Just as there are restraints on the use of force by citizens, one against the other, there are restraints and limitations on the use of force by police. Section 27 of the Criminal Code provides for the circumstances in which the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or serious harm. (emphasis added) Relevantly a person may apply force to lawfully execute any sentence, process or warrant or make any arrest.⁵
46. In my view, even if I were to accept that the purpose in taking hold of the defendant's head was to arrest him (and I have some reservation about that),

in my view it was unnecessary force for that purpose. The touch or push had been minimal. The defendant had not immediately tried to exit the vehicle and back up had already been called for. The defendant could have been informed that he was to be arrested and asked to exit the car. Alternatively Constable Burnell could simply have stood by to await the arrival of the backup vehicle if he thought that he and Constable Baumann were at risk from the two passengers. He could have alerted Constable Baumann to what had occurred and sought her assistance to stand by while he asked the defendant to exit the vehicle. Instead it is apparent that he immediately took hold of the defendant through the car window. The immediacy was made clear by Constable Baumann's evidence as I previously observed. In my view Officer Burnell was not acting in the execution of his duty by applying force to the defendant in the way that he did. It was unnecessary force for the purposes of an arrest in the circumstances that presented.

47. In addition, I think that it was highly unlikely that the defendant would have appreciated that the officer was applying force for the purpose of arrest. Without determining which version of the grabbing is true, I accept what was apparent from his evidence that he thought that the officer was assaulting him. In those circumstances he was entitled to resist what he perceived to be an assault upon him and escape from it.
48. I find the defendant not guilty of resisting a police officer in the execution of his duty.

Dated this 24th day of May 2010.

Sue Oliver
STIPENDIARY MAGISTRATE

⁵ Section 27(a) Criminal Code