

CITATION: *Mosel v DT* [2012] NTMC 021

PARTIES: JEFFREY DAVID MOSEL

v

DT

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: Criminal

FILE NO(s): 21143059

DELIVERED ON: 15 June 2012

DELIVERED AT: Darwin

HEARING DATE(s): 23 March 2012 and 22 May 2012

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – ASSAULT – POLICE OFFICER IN EXECUTION OF DUTY –
POWER TO APPREHEND CHILD UNDER THE CARE AND PROTECTION OF
CHILDREN ACT

REPRESENTATION:

Counsel:

Complainant: Ms Garraway

Defendant: Ms Kepert

Solicitors:

Complainant: ODPP

Defendant: NTLAC

Judgment category classification: A

Judgment ID number: [2012] NTMC 021

Number of paragraphs: 29

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

No. 21143059

[2012] NTMC 021

BETWEEN:

JEFFREY DAVID MOSEL
Complainant

AND:

DT
Defendant

REASONS FOR DECISION

(Delivered 15 June 2012)

Ms Sue Oliver SM:

1. DT was charged with a single count of unlawfully assaulting a police officer whilst in the execution her duty contrary to section 189A of the Criminal Code. On 22 May 2012 I found DT not guilty of the charge and said that I would deliver written reasons in due course as the matter turned on the power of police officers to remove a child from the street pursuant to provisions in the *Care and Protection of Children Act* for which there appears to not be any previous authority. These are my reasons.
2. Evidence in the matter was given by the two police officers, Constable Alicia Bailey, who was the officer alleged to have been assaulted and Senior Constable Michael Milde. The prosecution also called some young people who were with the defendant at the time of the incident. These young people were LM who was 14 years old and AB who was 15 years old. A third young person who was present was not called.

3. The accounts given by both the police officers and the two young persons were largely consistent. In addition, an electronic record of the interview (EROI) was tendered. DT gave evidence on her own behalf. DT is 15 years old and she is a young person under a protection order in the care of the CEO of Family and Children Services. DT's account of the incident leading up to her arrest was again largely consistent with the other evidence, save that the evidence of the police officers was that she had deliberately struck Constable Bailey whereas her evidence was that she had done so accidentally in the course of freeing herself from Constable Bailey's hold. An electronic record of interview with D taken shortly after the incident was generally consistent with the other evidence of what occurred leading up to Constable Bailey being struck and was consistent with D's evidence that the strike was accidental.

The Issues

4. The issues are, first, whether Constable Bailey was in the execution of her duty as a police officer when she was struck by the defendant and secondly, if she was, whether that strike was accidental or such as would constitute an assault under section 189A of the Criminal Code.

Was Constable Bailey acting in the execution of her duty?

5. Constable Bailey was the passenger in a vehicle being driven by her senior partner, Senior Constable Michael Milde. They were travelling along Wagaman Terrace and turning into Limmen Street when they "spotted" a group of youths. Constable Bailey said she recognized one which she had dealings with previously. That young person was LM. She said she guessed he was about 14 years old. She said her partner obviously recognized one of the young persons and said that they should stop and talk to them.
6. Senior Constable Milde got out while she remained in the vehicle speaking with police communications. By the time she got out of the vehicle Senior

Constable Milde was on his mobile phone away from the youths and Constable Bailey approached them and had some conversation with them.

7. Senior Constable Milde came back and according to Constable Bailey told DT that she “was going into care [and] she’s then got aggressive”. She said from there Milde “grabbed her right arm and then I’ve grabbed her left arm and escorted her to the back of the cage”. She described their hold as a single handed escort hold which she indicated as holding the arm just above the elbow. She said there was little pressure applied as it was basically ushering DT to the back of the police vehicle.
8. When they reached the back of the cage DT pulled her arm out of her grip and came back and elbowed her in the chest area just below her throat quite forcefully which caused her to lose her breath instantly. The Officers had intended to put DT in the cage area of the police vehicle rather than in the back seat of the vehicle because that space is occupied by operational equipment, including a firearm.
9. Constable Bailey did not know DT prior to this incident. In cross-examination Constable Bailey said she recollected DT saying ‘get fucked, I’m not going with you’. She agreed that it was not an offer by them to take DT home but it was a direction that they would be taking her home. She said that her partner directed it and said ‘we’re going to be taking you back to your carer’. She said she was pretty sure that it was the carer that Milde had phoned. She still did not know who DT was when they escorted her to the van. She agreed that she was following direction from her senior partner, Senior Constable Milde.
10. It is clear from this evidence that she regarded the situation as one in which the officers were compelling D to accompany them.
11. Senior Constable Milde also described seeing the group of youths and said that he recognized DT so he pulled up to speak to them. He spoke directly to

DT and asked her if she was meant to be out or if she should be home at the carer's house at that time. He said he knew that DT was a recidivist missing person from Children Services so he wanted to find out what her situation was at that time. He asked DT if her carer knew where she was and what she was doing. DT said she had just left her carer and so he asked if he could have her number which DT gave and he called the carer. He said that the carer said that DT was meant to be going straight home and would they mind taking her back to the address at which she was then living. He said he agreed and that "I'd probably already made a determination in my mind that it wasn't good for the kids to be out, especially DT, at that time of night anyway."

12. His reasons for making that determination were that it was coming up to 7:00 and it was getting dark. The Wagaman area at that time was a trouble spot where there were itinerants and a lot of antisocial behaviour. DT was 15 and it was probably not great for her to be out in that environment. He knew that in the past she had been a substance abuser. He also knew that she had a history of running away. He also said that he knew that in the week before she had been involved in an incident where a car was stolen and driven to Katherine and that he didn't want her to be involved in something like that again. Later he said that there had been some recent attempted abductions in the area and that was also a concern.
13. Senior Constable Milde said that he believed that he had power as a police officer to take her from where she was to her home because he had made a determination that her wellbeing at risk for various reasons and he decided to take her back to a safe place which was her carer's place at that time.
14. He said he said "look [DT] you've got to come with us because I don't feel comfortable with having you out here". He placed his hand on her arm just above the elbow and Constable Bailey did the same thing on the other side. He said D was verbally abusive as she was escorted back to van. He

described DT wrenching free from Constable Bailey's grip and cocking her left elbow up and striking Constable Bailey around the chest area.

15. His description of their hold was consistent with Constable Bailey, that it was an escort hold using minimal force. He said minimal force only was required because DT was compliant walking back to the van apart from the verballing. "She wasn't struggling or anything" until they got to the end of the cage. He agreed that D had given him the carer's telephone number and that she had said she was on her way to a mate's place and that then she was going home after that. He said however it was a long walk from Wagaman to the house where she was staying in Marrara.

Did the police have power to take D into their custody?

16. It is apparent from the facts stated that D had been taken into the custody of police or at least that she would reasonably believe that she was under restraint and not able to leave.
17. The question is whether police have the power to remove a child from the streets in circumstances as have been described.
18. Division 8 of Part 2.1 of the *Care and Protection of Children Act* provides for the powers of authorised officers. Section 304 provides that police are "authorised officers" and have the powers and functions of an authorised officer under sections 35(3), 37, 38, 52, 56 to 64 and 108.
19. Sections 35, 37 and 38 deal with investigations into whether a child is in need of protection. Section 52 provides for a power to take a child into provisional protection. Section 108 provides powers to enter a place and remove a child to give effect to a temporary protection order. None of these provisions are relevant to the circumstances of this case.
20. Sections 56 and 57 are contained in Subdivision 1 of Division 8 "Moving of a Child to a Safe Place". Section 55 provides that the object of the

Subdivision is to empower an authorised officer to take action, on a temporary basis and only in limited circumstances, to remove a child from a place where the wellbeing of the child is at risk.

21. The limited circumstances in which the subdivision applies are set out in section 56. They are that
 - (a) the child is found at a place other than the child's usual place of residence; and
 - (b) the child is not under the direct supervision of:
 - (i) a parent of the child; or
 - (ii) a family member of the child; or
 - (iii) an adult capable of adequately supervising the child; and
 - (c) an authorised officer does not believe the child is in need of protection; but having regard to the circumstances in which the child is found – reasonably believes there is a risk to the wellbeing of the child if the child is not removed from the place.
22. Well being of a child is defined in section 14 and includes the child's physical, psychological and emotional wellbeing.
23. Where the criteria set out in s56 have been met, section 57(1) empowers an authorised officer to :
 - (a) enter the place to apprehend the child; and
 - (b) either return the child to the child's usual place of residence or, if it is not practicable or appropriate to do so:
 - (i) move the child to a safe place; and
 - (ii) keep the child at the safe place; and
 - (iii) make any arrangement for the care and protection of the child at the safe place.
24. An officer may use any reasonable force or assistance in undertaking those activities (s57(2)).
25. Whilst the expression “found at a place” used in section 56(1) is broad enough to cover the circumstances of this matter, in that D was found at a place namely walking on a public street/footpath, the power given to an

authorised officer is to “**enter the place**” (emphasis added). The use of the expression “enter” is in my view limiting. Whilst it might be possible to enter some geographically defined public places, for example a shopping centre or a water park, it is not possible to “enter” a public footpath or street. The word “enter” has a clear meaning. As a verb it carries the meaning “to come or go into (a place): *she entered the kitchen*”¹

26. There is no ambiguity in the provision and it must therefore take its natural and ordinary meaning. The power of a police officer pursuant to the *Care and Protection of Children Act* does not therefore in my view extend to removing a child from a public street. The taking of D by the arms to escort her to the police vehicle, even accepting that it was a minimal hold, was an apprehension of her that the police were not entitled to undertake. It would have been clear to her by what was said that she was no longer free to go.
27. The fact that her carer had asked the police to take her home did not authorise them to physically apprehend her and place her in a caged section of a police vehicle. While I accept that there could be good reasons for not placing someone in the back seat area of a police vehicle where operational equipment is kept, I think it is questionable that the Legislature could have intended this means of transport for a child whose “physical, psychological and emotional wellbeing” was considered to be at risk. I note that Section 57(1)(b) provides for the movement or keeping of the child apprehended in a “safe place”. “Safe place” is defined in s57(6) as follows”

safe place:

(a) includes:

(i) a place where the child may be temporarily kept for the child's safety (including a Part of a police station not normally used to detain a person); and

(ii) a place specified by regulation; but

¹ www.oxforddictionaries.com. See similarly Macquarie Dictionary 5th Edition 2009 “come or go in”

(b) does not include a prison, lockup or any other place that a person may be remanded in custody.

28. It seems to me unlikely that having provided for careful separation of a child apprehended under s57 who has been taken to a police station from those being held at a police station with respect to criminal charges, that it would be envisaged that transporting the child in a caged vehicle ordinarily used for the transport of those under arrest or in protective custody would be an acceptable mode of transport.
29. I am satisfied that the police officers were not entitled to undertake an apprehension of D pursuant to s57. Even if I found that the officers did possess a power of apprehension, I have some reservation in accepting that Senior Constable Milde held a reasonable belief that D's well being was at risk as required by section 56(c). I fully accept that Senior Constable Milde was concerned for D's welfare and that he was acting out of genuine concern for her. I do not think there was anything in his actions that could be seen to be bad faith. However the reasons given for his concern were almost entirely ones that could equally have applied to the other three young persons (some of whom were younger than D) but whose well being was not apparently considered to be at risk so as to necessitate them also being apprehended under the power contained in section 56(1)(a). This casts some doubt in my view as to whether, even if section 56 extended to removing a child from a street, that the criteria for the exercise of that power would have been satisfied.
30. I note that a further power of "restraint" exists pursuant to section 59. An authorised officer (which includes a police officer²) may, if an authorised officer or police officer is exercising the officer's powers under section 35, 36 or 57 in relation to the child; or a child is in the CEO's care, restrain the child if the officer reasonably believes that it is necessary to do so to

² Section 304(3)

prevent the child either being harmed or harming others. The officer may use reasonable force or assistance to do so.

31. A power of restraint is different from a power of apprehension and removal. It is in my view clear that the purpose of a power of restraint in section 59 is not only to permit immediate physical restraint to prevent harm but also to allow for the further powers of search and seizure in sections 60 and 61 to be carried out. It is also clear from s58 that the power of restraint is additional to the power of apprehension and removal in section 57³.
32. Though in some sense DT was being “restrained” in that she was not being allowed to continue on her way, it is not in my view a power that could properly be exercised in the circumstances. I base this view not only on the observations that I have made about the difference between the powers of apprehension and seizure but also even if I thought it was a power that was purported to being exercised, I would not satisfied that the officers held a belief that they needed to “restrain” DT to prevent her from being harmed. In my view, section 59 appears to be directed at immediacy of harm, not to risks from where the child is found, which is what sections 56 and 57 are directed at addressing. I am not satisfied that section 59 provided power to take hold of DT in the way in which she was escorted to the police van.
33. If I am correct that the power of apprehension and removal under sections 56 and 57 does not include the apprehension and removal of a child from a public street where there is a risk to his or her well being, then this raises a difficulty for the protection of children. There may well be occasions where it is necessary for police or other authorised officers to remove a child from a street. An obvious example would be where a young child is found out late

³ Section 58 provides This Subdivision applies to a child if:
(a) an authorised officer or police officer is exercising the officer's powers under section 35, 36 or 57 in relation to the child; or
(b) the child is in the CEO's care.

at night wandering the streets without adult supervision. It may be a matter where legislative amendment should be considered.

34. A further issue that would arise if I was satisfied that Senior Constable Milde had held a reasonable belief that D's well being was at risk is that Constable Bailey made no personal assessment of the risk issue. The issue is whether, in order to be in the "execution of her duty" she needs to have personally formed a belief as required by section 56 or whether, without inquiry, she would be entitled to rely on her partner's assessment of risk and follow his direction? In the circumstances I do not need to determine the issue but observe that the answer might depend on the immediacy of the risk perceived.
35. Consequently, I am not satisfied that the police officers had power to apprehend DT and that therefore Constable Bailey was not acting in the execution of her duty in taking physical hold of DT. Accordingly, I found DT not guilty of the charge of assaulting a police officer in the execution of her duty.

Dated this 15th day of June 2012.

Sue Oliver
STIPENDIARY MAGISTRATE