CITATION: *Police v Abbott* [2012] NTMC 040

PARTIES:	DEREK JOSEPH MAURICE
	v
	BARRY ABBOTT, BARRY SHANE ABBOTT, VALERIE ABBOTT, SHAKIRA MCCORMACK AND DAMIEN MCCORMACK
TITLE OF COURT:	Summary Jurisdiction
JURISDICTION:	Summary Jurisdiction – Alice Springs
FILE NOs:	21134231, 21134239, 21134242, 21137156 and 21137160
DELIVERED ON:	6 November 2012
DELIVERED AT:	Alice Springs
HEARING DATE(s):	20 and 21 August 2012
JUDGMENT OF:	J M R Neill

CATCHWORDS:

REPRESENTATION:

Counsel:

Prosecutions:	S Geary
Defendants:	R Goldflam

Solicitors:

Prosecutions:	DPP
Defendants:	NTLAC

Judgment category classification:	A
Judgment ID number:	[2012] NTMC 040
Number of paragraphs:	43

IN THE COURT OF SUMMARY JURISDICTION
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21134231, 21134239, 21134242, 21137156 and 21137160

BETWEEN:

DEREK JOSEPH MAURICE
Police

AND:

BARRY ABBOTT, BARRY SHANE ABBOTT, VALERIE ABBOTT, SHAKIRA MCCORMACK AND DAMIEN MCCORMACK
Defendants

REASONS FOR JUDGMENT

(Delivered 6 November 2012)

Mr JOHN NEILL SM:

1. On 20 August 2012 I was asked by all parties to answer a preliminary legal question prior to the hearing of the charges against the five defendants listed to commence before me on 5 December 2012. I agreed to this course and I heard submissions the next day, on 21 August 2012.

2. The legal question was: is section 27 of the *Criminal Code Act*, and in particular subsection 27(p), available as a defence to a charge of deprivation of liberty under section 196 of the Act?

3. On 18 September 2012 I answered that question in the negative. I said I would publish my reasons, and I now do so.

Material before the Court

4. On 21 August 2012 the parties by consent tendered Agreed Facts which were read on to the record. These Agreed Facts were received as Exhibit P1. I set those out as follows:

AGREED FACTS

1. Charleston Wilalang, Walter Ahwon, Daniel Wingo, Daniel Blow, Nathan Tancred, Leon Patrick, Paul Parker and Michael Turner aka Michael Johnson were all under the age of 18 as of 9 October 2011.

2. Arthur Ninnal and Clifford Joe were over the age of 18 as at 8 August 2011.

3. The defendants were all employed as staff of Ilpurla Aboriginal Corporation (IAC) throughout the period 8 August 2011 to 9 October 2011.

4. IAC was funded to provide a residential rehabilitation facility and program for people (mainly male youths) referred by the Youth Justice Court and Court of Summary Jurisdiction, Central Australian Youth Link-Up Service (CAYLUS), Alcohol and other Drugs Services of Central Australia (ADSCA), individual family members and other agencies in Central Australia, the Northern Territory and interstate.

5. Barry Abbott was employed as full-time Program Director.

6. Valerie Abbott was employed as full-time Administration Manager. Her duties included the management of other staff, and program management.

7. Shane Abbott was employed as full-time Senior Alcohol and other Drugs (AOD) Counsellor.

8. Damien McCormack was employed as full-time AOD Caseworker.

9. Shakira McCormack was employed as part-time Junior AOD Caseworker and relief Caterer.

10. Between 8 August 2011 and 9 October 2011, the only IAC staff working at Ilpurla were the five defendants, Braedon Walmby (part-time Junior AOD Caseworker) and Joseph McCormack (full-time Essential Services Manager).

11. Between 8 August 2011 and 9 October 2011, Charleston Wilalang, Walter Ahwon, Daniel Wingo, Daniel Blow, Nathan Tancred, Leon Patrick, Michael Turner, Paul Parker, Arthur Ninnal and Clifford Joe were all persons who had been referred to the IAC, were resident at Ilpurla, and were participating in the IAC rehabilitation program.

12. Between 8 August 2011 and 9 October 2011 IAC staff had sole responsibility for the daily care and control of Charleston Wilalang, Walter Ahwon, Daniel Wingo, Daniel Blow, Nathan Tancred, Leon Patrick, Paul Parker and Michael Turner.

13. In relation to the incidents in which Valerie Abbott, Barry Shane Abbott and Shakira McCormack have been jointly charged with counts 1 to 9:

    a. These three defendants were the only IAC staff on duty at the time. Valerie Abbott was in charge.

    b. Charleston Wilalang, Walter Ahwon, Daniel Wingo, Daniel Blow, Nathan Tancred, Leon Patrick, Michael Turner, Arthur Ninnal and Clifford Joe ('the complainants') were all put in the weldmesh enclosed tray ('the cage') of a Toyota trayback vehicle by IAC staff.

    c. The door of the cage was then secured shut.

    d. The complainants were not free to leave the cage.

    e. The complainants were allowed to leave the cage by IAC staff some hours later, and did so immediately.

5. In addition, the defendants tendered 6 photographs depicting a Toyota Land Cruiser with a cage on the rear tray and with a swinging door at the rear of that

cage. The photographs further showed a heavy chain and padlocks attached to the rear of the cage clearly capable of securing the door against anybody inside the cage. Those photographs were received as Exhibit D2.

The Charges

6. The defendant Barry Abbott faces two counts of aggravated assault against two youths under the age of 18 years and two counts of depriving those same youths of their personal liberty.

7. Barry Shane Abbott faces two counts of aggravated assaults against two youths, nine counts of depriving youths of their personal liberty, two counts of failing to provide the necessaries of life, plus two counts of depriving two adults of their personal liberty.

8. Valerie Abbott faces nine counts of depriving youths of their personal liberty, two counts of failing to provide the necessaries of life, plus 2 counts of depriving two adults of their personal liberty.

9. Shakira McCormack faces seven counts of depriving youths of their personal liberty, two such counts involving adults, and two counts of failing to provide the necessaries of life.

10. Damien McCormack faces two counts of depriving two youths of their personal liberty and two counts of depriving two adults of their personal liberty.

Sections 27 and 196 of the Criminal Code Act

11. Section 27 of the *Criminal Code Act* ("the Act") provides as follows: "In the circumstances following, the application of force is justified provided it is not unnecessary force and **is not intended** (emphasis added) and is not such as is likely to cause death or serious harm". This raises the subjective intent of the person applying the force.

12. "Application of force" is defined in section 1 of the Act as follows: "*application of force* and like terms 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". The use of the word "includes" suggests that this definition is not exclusive.

13. It is established law that the last clause of this definition “if applied…personal discomfort” relates only to “the application of heat etc”; it does not qualify “striking, touching, moving” – see *Mark Andrew Simpson v The Queen* [2006] NTCCA 14 at paragraph [19].

14. Subsection 27(p) of the Act identifies one particular circumstance where the application of force might be justified, namely where a person in the place of a parent or guardian of a child applies force "… to discipline or manage or control such child".

15. "Child" is defined in section 1 of the Act to mean a person who is not an adult -- that is, who is under the age of 18 years, a youth.

16. "Unnecessary force" as used in section 27 of the Act is defined in section 1 of the Act as follows: "*unnecessary force* means force **that the user of such force knows** (emphasis added) is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion". It raises the user's subjective intent.

17. Section 196(1) of the Act provides as follows: "Any person who confines or detains another in any place against his will, or otherwise deprives another of his personal liberty, is guilty of a crime and is liable to imprisonment for 7 years".

18. Section 196(2) of the Act provides a defence to the charge of deprivation of liberty, also to a person acting in the place of a parent or guardian of a child. This subsection makes it lawful for a person “… by way of correction, to impose such confinement or detention, or to cause such deprivation of personal liberty of a child, **as is reasonable under the circumstances** (emphasis added)". This defence involves an objective test, not a subjective intent.

19. Accordingly, if section 27 of the Act were available as a defence to the charge of deprivation of liberty under section 196 of the Act then depending on the evidence yet to be received by the Court, that defence might have been of greater assistance to the defendants than the defence provided by section 196(2) of the Act. Potentially, a defence under subsection 27(p) could have been relevant to all 29 of the charges alleging deprivation of liberty of youths, which these 5 defendants face between them.

The Arguments

20. Mr Goldflam for the defendants conceded at the outset that an offence under section 196 of the Act would in some fashion have to involve the application of force to attract the operation of section 27 of the Act (transcript 21 August 2012 page 5.8).

21. His argument was that an application of force would be involved in the overwhelming majority of section 196 offences. A deprivation of liberty would almost always be accompanied at the very least by a touching of the victim by the perpetrator. He referred to the authorities establishing that the slightest unwelcome physical contact may amount to a battery. He concluded that where the conduct of confining somebody is accompanied by a battery then there is an application of force.

22. He argued that even a threat to use force could be an application of force.

23. He further argued that any battery accompanying a deprivation of liberty should not be seen as constituting a separate and distinct but uncharged assault; rather it should be seen as part and parcel of the conduct at the core of the section 196 offence. He then put it another way, namely that the gravamen of the section 196 offence includes not just the conduct of keeping a person in confinement but also the conduct involved in getting them into that state.

24. Mr Goldflam took me to a discussion by the Court of Criminal Appeal in *Zenaida Go v R* 73 NTR 1 at paragraph 112. The Court considered the hypothetical situation where a person might be locked in their room for some period while they were asleep and then the door might be unlocked while the

person still slept, with the result that the person was never aware of any deprivation of liberty. The Court considered that this would still constitute the offence of deprivation of liberty. Mr Goldflam acknowledged that this scenario did not appear to involve any application of force, whether a battery or a threat.

25. Mr Goldflam qualified his initial concession as to the necessity of the application of force. He argued that the absence of proof of battery or threat, or the absence of any battery or threat at all in rare cases, should not affect the availability of the section 27 defence. This is because that would result in the defence being available to a more violent perpetrator and unavailable to a less violent perpetrator, which he submitted would be absurd.

26. Of course, this absurdity does not arise if the defence is not available at all to a charge of deprivation of liberty.

27. He moved on to a different aspect of his submissions, and argued that the defences specific to section 196 set out in subsections (2) and (3) do not oust the availability of a section 27 defence. He submitted this is because the section 196 defences both involve objective reasonableness while the section 27 defence involves broader subjective elements. Mr Goldflam argued that the Court is required to apply the broader defence in preference to the narrower defence, because to achieve the more restrictive effect the legislation would need to state in clear and express words any intention for the section 196 defences to oust the operation of section 27. No such intention is stated in the Act.

28. Mr Goldflam concluded that while the interaction between the section 27(p) defence and the section 196(2) and (3) defences was "vague and cloudy", the Court should not construe that unclear interaction "so as to extend a penal category".

29. Mr Geary for the prosecution responded by submitting that for the purpose of statutory interpretation the specific should overrule the general -- that is, he submitted that the defences in subsections 196(2) and (3) do oust the operation of the defence in section 27(p).

30. However Mr Geary relied mainly on the submission that the application of force is not an element of the section 196(1) offence of deprivation of liberty. The deprivation constitutes the offence, not the means whereby that deprivation is effected. He concluded that any section 27 defence, including section 27(p), is relevant only to the application of force and accordingly can have no application to a section 196 offence.

Analysis

31. In response to the ouster argument I conclude that the answer to the question posed in this case does not require any such analysis of the interaction between subsection 27(p) of the Act and subsections 196(2) and (3) of the Act. No question of ouster arises for determination. This is because in my view the application of force is not an element of the offence of deprivation of liberty.

32. Section 23 of the Act provides "A person is not guilty of an offence if any act, omission or event **constituting an offence** (emphasis added) done, made or caused by him was authorised, **justified** (emphasis added) or excused".

33. Section 27 of the Act identifies circumstances which might **justify** the application of force. That application of force must be an act, omission or event **constituting an offence** before any section 27 justification of it might result in a not guilty finding pursuant to section 23 of the Act.

34. Accordingly, if the application of force does not constitute the offence of deprivation of liberty pursuant to section 196 of the Act then no section 27 defence, including that pursuant to subsection 27(p), can apply to that offence.

35. To say that the application of force does not constitute the offence of deprivation of liberty is to say that the application of force is not a necessary part or element of that offence.

36. In the 1989 Court of Criminal Appeal Decision in *Go* (above) the Court considered whether the language of section 196(1) of the Act created one or more than one offence. It was argued that it might create as many as three offences, the first involving confining against a person's will, the second

involving detaining against a person's will, and the third involving otherwise depriving a person of their personal liberty. The Court rejected this argument and said the following at paragraph 108: "Although the subsection is not free from doubt I consider that the expression "confines or detains another in any place against his will" and the expression "or otherwise" are both subordinate to the phrase "deprives another of his personal liberty". **That is the mischief which the Act is designed to prevent** (emphasis added). “Every unlawful restraint on the liberty of a person, by confining him in custody, is a false imprisonment and a common law crime.” (Brett and Waller – Criminal Law – 1983 – 5th Ed. – 3.41).”

37. At paragraph 109 the Court went on to say: "Blackstone – Book III Ch 8 II commences his discussion on the crime of false imprisonment in this way: -- "We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment…".

38. At paragraphs 110 and 111 the Court said: "Although the Code does not describe the offence as false imprisonment the subsection, in my view, is clearly based on the common law position, **the gravamen being deprivation of liberty** (emphasis added)… If there is any doubt about this I think one may properly look at the heading… The heading is "Deprivation of Liberty"."

39. In the Queensland Court of Appeal Decision of *R v Awang* [2004] 2 Qd R 672 Williams JA said at paragraph [14] as follows: "Detain means to keep in confinement or under restraint. It does not necessarily mean physical restraint in that restraint can be exercised by threats. The accused does not have to use force or take hold of the complainant to detain her. If the accused compels the complainant by threats to remain in a place against her will, then he has detained her".

40. A distinction between the direct or indirect application of force on the one hand and the attempted or threatened application of force on the other hand is made in the definition of "assault" in section 187 of the Act. Definition (a) deals with the direct or indirect application of force and definition (b) deals with the

attempted or threatened application of such force. Either category can constitute an assault.

41. This when read with the definition of “application of force” set out in paragraph 12 above suggests that the expression "application of force" as used in the Act does not alone and without further qualification include threats of and/or unsuccessful attempts to apply force, notwithstanding the non-exclusive definition in section 1 of the Act.

42. The meaning of the expression is limited to actual physical contact, at least in relation to the “striking, touching, moving” in the first part of the definition.

43. No actual physical contact is a requisite element of the offence of deprivation of liberty as appears from the discussions in *Go* and *Awang* (above).

44. Accordingly, the expression "application of force" as defined and used in the Act is not a requisite element of the offence of deprivation of liberty. I find the application of force does not constitute the offence of deprivation of liberty, for the purpose of section 23 of the Act.

45. I confirm my ruling that section 27 of the Act generally and subsection 27(p) of the Act specifically are not available as a defence to the charge of deprivation of liberty pursuant to section 196 of the Act.

Dated this 6th day of November 2012.

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John Neill
STIPENDIARY MAGISTRATE