CITATION: *Police v Melvin Rabuntja* [2012] NTMC 016

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| PARTIES: | DONALD JOHN EATON |
| | v |
| | MELVIN RABUNTJA |
| TITLE OF COURT: | Court of Summary Jurisdiction |
| JURISDICTION: | Summary Jurisdiction – Alice Springs |
| FILE NO(s): | 21143879 |
| DELIVERED ON: | 1 June 2012 |
| DELIVERED AT: | Alice Springs |
| HEARING DATE(s): | 27 April, 11 May 2012 |
| JUDGMENT OF: | J M R Neill |

**CATCHWORDS:**

*Double jeopardy, autrefois acquit, sections 17 and 18* Criminal Code Act; *definition of "offensive weapon" in section 3* Weapons Control Act.

**REPRESENTATION:**

*Counsel:*

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| Prosecutor: | Ruth Morley, Dr Sarah Finnin |
| Defendant: | Tim Sullivan |

*Solicitors:*

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| Prosecutions: | Police Prosecutions |
| Defendant: | CAALAS |

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| Judgment category classification: | B |
| Judgment ID number: | [2012] NTMC 016 |
| Number of paragraphs: | 28 |

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

No. 21143879

BETWEEN:

**DONALD JOHN EATON**
Police Prosecutions

AND:

**MELVIN RABUNTJA**
Defendant

REASONS FOR JUDGMENT

(Delivered 1 June 2012)

Mr JOHN NEILL SM:

1. On 23 December 2011 the defendant Melvin Rabuntja was charged on Information for an Indictable Offence that on 22 December 2011 at Alice Springs in the Northern Territory of Australia he unlawfully assaulted Pauline Moketarinja contrary to section 188(1) of the Criminal Code and that the said unlawful assault involved the following circumstances of aggravation, namely:

    (i) that the said Pauline Moketarinja suffered harm

    (ii) that the said Pauline Moketarinja was a female and the said Melvin Rabuntja was a male

    contrary to section 188(2) of the Criminal Code ("count 1").

2. On the same date the defendant was additionally charged by Complaint that on 22 December 2011 at Alice Springs in the Northern Territory of Australia he did without lawful excuse, use an offensive weapon, namely a stick, contrary to section 8(1) of the Weapons Control Act ("count 2").

3. Both counts were contested and were heard by me on 27 April 2012. The defendant pleaded not guilty to each count

4. The prosecution called evidence from the alleged victim, Pauline Moketarinja. She said in examination in chief that both she and the defendant were very drunk on the day in question, that they had an argument, and that he hit her with a stick. She could not remember what the argument was about. She could not remember whether she had first hit the defendant or whether somebody else had first hit the defendant. In response to further questioning about being hit with the stick, she said: "He just poked me". Photographs of a wound she suffered on that occasion were tendered as Exhibit P1. Those photographs show what appears to be a minor wound on the back of Ms Moketarinja's right arm a little above the elbow, and that wound appears consistent with her having been scratched or stabbed (“poked”) with the end of a stick.

5. In cross-examination Ms Moketarinja was unable to recall where she had been on the day in question immediately prior to arriving at the town camp where the alleged assault occurred. She claimed she had been too drunk to remember that detail, among others. It was put to her that she had a bottle of rum in her hand immediately prior to the alleged assault -- she couldn't remember. She was asked whether she hit the defendant on the head with a bottle of rum. She said she couldn't remember. It was put to her that she did hit the defendant with a bottle of rum. She replied: "I never drink rum". She was asked whether she might have used an empty rum bottle. She said she couldn't remember. She was asked whether she had been arguing with another woman. She made no audible response. It was then put to her that she had been arguing with another woman, following which she walked up to the defendant and hit him on the back of the head with an empty bottle of rum. She replied: "Yes". It was put to her that immediately following her attack on him, the defendant had got up and picked up a stick and hit her with it. She again replied: "Yes". It was put to her that the defendant had not previously been arguing with her at all. She again made no audible response.

6. In re-examination Ms Moketarinja was asked whether she had had an empty bottle of rum in her hand. She replied: "Yes… I hit him in the head".

7. The prosecution did not offer any further evidence. The defence called no evidence. I found the defendant not guilty of the assault in count 1 on the basis of the foregoing evidence consistent with a defence of self-defence.

8. This left unresolved the disposition of count 2. The prosecution continued to seek a finding of guilt on this count. The defence objected on the basis that the defendant's “use” of the stick alleged in count 2 comprised the assault alleged in count 1, and it had occurred in the same circumstances of self-defence which had resulted in his exculpation for that offence. The prosecution relied on subsection 8(1) of the *Weapons Control Act* which specifically excludes self-defence as a "lawful excuse" for the use of an offensive weapon. The prosecution further submitted that because the defendant had been found not guilty on count 1 there was no issue of double punishment.

9. I heard preliminary submissions on whether the circumstances of the offence of assault were the same as or sufficiently similar to those of the offence of using an offensive weapon, such that they were essentially the same offence giving rise to some form of double jeopardy. I requested and received written submissions which were argued before me on 11 May 2012. I reserved my Decision.

10. A very similar issue was considered by the Northern Territory Court of Criminal Appeal in *Roy Ashley v Ivan Marinov* [2007] NTCA 1. That Decision turned on sections 17 and 18 of the *Criminal Code Act*. That defendant was charged with aggravated assault and also with breach of a domestic violence order by virtue of the assault. At first instance he was found not guilty of assault because of the availability at that time of the defence of provocation. However, he was found guilty of breaching the domestic violence order on the basis of the same assault, because breach of a domestic violence order was a regulatory offence and the defence of provocation was not available in the case of a regulatory offence. That finding was upheld by a single judge on appeal, leading in due course to consideration by the Court of Criminal Appeal.

11. Section 18 of the Code provides:

"**18. Defence of previous finding of guilt or acquittal**

> Subject to sections 19 and 20, it is a defence to a charge of any offence to show that the accused person has already been found guilty or acquitted of –
>
> (a) the same offence;
>
> (b) a similar offence;
>
> (c) an offence of which he might be found guilty on the trial of the offence charged; or
>
> (d) an offence upon the trial of which he could have been found guilty of the offence charged".

12. Section 17 defines "similar offence" to mean "an offence in which the conduct therein impugned is substantially the same as or includes the conduct impugned in the offence to which it is said to be similar".

Sections 19 and 20 are not relevant in the circumstances of this case.

13. The Court of Criminal Appeal in *Ashley* held the offence of breaching the domestic violence order by assaulting the protected person was a similar offence to the offence of aggravated assault because "… *the conduct impugned is substantially the same or includes the conduct impugned in the offence of aggravated assault"* – paragraph [14]. Accordingly, section 18 of the *Criminal Code Act* applied, the appeal was upheld and the defendant was found not guilty of breaching the domestic violence order.

14. In view of this identification of the same or similar conduct comprising the two offences the Court of Criminal Appeal was not troubled that provocation was not available as a defence to the offence of breaching a domestic violence order. The Court was relying on the defence under section 18 of the *Criminal Code Act*, not on the defence of provocation.

15. This Decision is binding upon me. The facts and circumstances of the matter before me are very similar to those in *Ashley*. The case before me involves the same act of the accused and accompanying state of mind constituting the

elements of the offences in both counts. However, counsel for the prosecution argued I should rather hold myself bound by the Decision of the High Court of Australia in *Pearce v The Queen* [1998] HCA 57.

16. In *Pearce v The Queen* in a joint majority judgement McHugh, Hayne and Callinan JJ held that for offences to be "substantially" the same it is the elements of the offences which must be considered. It is not the transactions or courses of events in the two offences which must be considered. There must be an analysis of and then a comparison between the elements of the two offences – paragraphs 20 and 21. The elements of the two offences must be "identical" or "all of the elements of one offence must be wholly included in the other" – paragraph 24. It is not a question of whether the offences arise out of the same conduct – paragraph 25.

17. Counsel for the prosecution in the present case pointed out that the counsel for the respondent (prosecution) before the Court of Criminal Appeal in *Ashley* conceded the conviction for the breach of the domestic violence order could not be sustained, on the basis the appellant had already been acquitted of a similar offence -- see paragraph [10] in *Ashley*. Neither counsel referred the Court to the Decision in *Pearce* nor did the Court itself mention that Decision. Accordingly, it was submitted, because the Court of Criminal Appeal did not have the benefit of a contravenor and it did not appear to consider the *Pearce* Decision, it decided the issue incorrectly.

18. Counsel for the prosecution in the present case submitted the Court of Criminal Appeal in *Ashley* erred in adopting a proposition from an earlier NT Court of Criminal Appeal Decision namely *R v Hofschuster* (1994) 4 NTLR 179. That Court of Criminal Appeal at page 183 held: "*The conduct therein impugned can only mean the conduct which gives rise to the criminal liability. In this case, that means the acts of the accused and the accompanying states of mind which constitute the elements of the offence".*

19. Counsel for the prosecution submitted that because *Hofschuster* was decided in 1994 prior to the Decision in *Pearce* in 1998, the *Hofschuster* approach is now incorrect in that it focuses on conduct rather than analysing and comparing the

elements of the offences under consideration. I disagree. The reference to "conduct impugned" in *Hofschuster* and again in *Ashley* is a reference to the precise language used in the definition of "similar offence" in section 17 of the *Criminal Code Act*. The Decision in *Pearce* is based on the common law and not on the language of this or indeed any statute -- see paragraph 8 in *Pearce*.

20. Any interpretation of sections 17 and 18 of the Northern Territory *Criminal Code Act* necessarily involves a consideration of the language used in those sections. Section 18 identifies not only “the same offence” but also the distinct category of “a similar offence” in the statutory context of section 17 of conduct therein impugned. Thus it does not necessarily require that the elements of the two offences be identical. This is different from the common law position as found by the majority of the High Court in *Pearce*. I would be surprised if the counsel for the parties and the Court of Criminal Appeal in *Ashley* in 2007 were unaware of the *Pearce* Decision. It is more probable the parties and the Court did not see that *Pearce* was applicable to the statutory interpretation exercise upon which they were engaged.

21. Counsel for the prosecution in the matter before me made a further submission based on the role of the word "previous" which appears in the heading to Division 5 of the *Criminal Code Act* and also in the heading to section 18 of the Act. Counsel conceded that pursuant to section 55 of the *Interpretation Act* these headings are not part of the *Criminal Code Act* because both the Division and the section were enacted and amended only prior to 1 July 2006. They submitted nevertheless that I should have regard to these headings on the basis of section 62B(1)(a) of the *Interpretation Act* because there might be some ambiguity in the words "… has already been found guilty or acquitted of…" in section 18 of the *Criminal Code Act*. If so, it was submitted, interpreting these words through the lens of the word "previous" in the headings should lead to a different approach, one more in accord with the approach taken in *Pearce*.

22. In *Hofschuster* above, Gray AJ said at page 183: “*In my view, the construction of section 18 and the section 17 definition do not give rise to any ambiguity and I feel no impulse to turn to dictionary meanings of the words used …*”. I respectfully agree. There is no difficulty in interpreting the words "… has

already been found guilty or acquitted of…" and there is accordingly no need to have recourse to Division or section headings for that purpose. There is no requirement in the language of the statute that the prior finding of guilt or acquittal should have taken place in a previous, in the sense of a different, prosecution. It is enough in my view that the finding of guilt or acquittal should have taken place before the disposition of the next offence, whether that involves an interlude of a few seconds or some longer period.

23. This argument was not considered in *Ashley* but the Court of Criminal Appeal upheld the section 18 defence to the second count notwithstanding the two counts had been dealt with one after the other in the same proceedings.

24. I am satisfied that I am bound by the Decision of the Court of Criminal Appeal in *Ashley*. I find that the use of the stick in count 2 was in the circumstances of the present case a similar offence to its use in the assault in count 1, because the conduct impugned in count 2 is substantially the same as or includes the conduct impugned in count 1. Accordingly, section 18 of the *Criminal Code Act* provides a defence to count 2 irrespective of the unavailability of the defence of self defence in section 8(1) of the *Weapons Control Act*.

25. Quite separately from the foregoing analysis, there is another defence available to this defendant. I turn to consider the requirements of subsection 8(1) of the *Weapons Control Act* for the offence in count 2. That subsection contemplates an “offensive weapon”. It does not create an offence in respect of anything else. Section 3 of that Act defines "offensive weapon" to mean an article –

> "(a) made or adapted to cause damage to property or to cause injury or fear of injury to a person; or
>
> (b) by which the person having it intends to cause injury to property or to cause injury or fear of injury to a person,
>
> But does not include a prohibited weapon, controlled weapon or body armour."

26. Definition (a) is not relevant to the circumstances of the present case where the defendant took up a stick which happened to be lying nearby. He did not make the stick or adapt it in any way or for any purpose. Definition (b) could be relevant in that the defendant's use of the stick did cause injury to the alleged victim, but was this the defendant's intention, as contemplated by definition (b) in the *Weapons Control Act*? The evidence before me is consistent with an intention on the part of the defendant to defend himself from further attack. There is no exclusion of self defence in considering intention in the definition of "offensive weapon" in section 3 of that Act. That exclusion is limited to consideration of any "lawful purpose" for which an offensive weapon is used in section 8(1) of that Act. If the object used is not an "offensive weapon" then that consideration, and the exclusion, do not arise.

27. On the basis of the definition of "offensive weapon" and on the evidence before me I am not satisfied beyond reasonable doubt of the defendant's intention to cause injury or fear of injury to a person. Accordingly I cannot be satisfied beyond reasonable doubt that the stick was an "offensive weapon" as defined in section 3 of the *Weapons Control Act* and therefore that the defendant's use of the stick was an offence as identified in section 8(1) of that Act.

28. I find the defendant not guilty on count 2.

Dated this 1st day of June 2012.

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**John Neill**
STIPENDIARY MAGISTRATE