

CITATION: *Warden v Wurramara* [2013] NTMC 018

PARTIES: SHAYNE WARDEN  
V  
DYRRIN WURRAMARA

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: CRIMINAL

FILE NO(s): 21304405

DELIVERED ON: 18 July 2013

DELIVERED AT: Alyangula

HEARING DATE(s): 20 June 2013

JUDGMENT OF: Sue Oliver SM

**CATCHWORDS:**

CRIMINAL Law – offences against the person – aggravated assault – defensive conduct – consent to application of force

**REPRESENTATION:**

*Counsel:*

Plaintiff: Mr Humphris  
Defendant: Mr Briggs

*Solicitors:*

Plaintiff: ODPP  
Defendant: NAAJA

Judgment category classification: B  
Judgment ID number: [2013] NTMC 018  
Number of paragraphs: 34

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

No. 21304405

BETWEEN:

**SHAYNE WARDEN**  
Plaintiff

AND:

**DYRRIN WURRAMARA**  
Defendant

REASONS FOR JUDGMENT

(Delivered 18 July 2013)

SUE OLIVER SM:

1. Mr Wurramara is charged with two offences. First, an assault on Leslie Bara Bara with circumstances of aggravation that Leslie Bara Bara suffered harm and that he was threatened with an offensive weapon, namely a spear gun. Secondly, that without lawful excuse he possessed a controlled weapon, namely a spear gun in a public place, namely, outside Lot 1670 Umbakumba Community. Mr Wurramara has pleaded not guilty to each of these charges.
2. The circumstances of the matter are that the defendant was at his home in Umbakumba fixing a tyre when a group of young men approached it.
3. The alleged victim Leslie Bara Bara gave evidence that he was walking around with some other young men or boys looking for gunja. They came to Mr Wurramara's house and Simon [Mamarika], who was part of the group, was looking at the defendant and his friend "roughly". Mr Bara Bara said that they had been walking along the road and shouting and they saw the two other boys fixing the tyre. The defendant was one of the "boys". The house

was next door to “grandmother’s house”. He said that Simon gave a dirty look to those two and they were looking back at Simon and from there they (he and Simon) went to get the spears.

4. He was shown a statement that he made shortly after the incident in which he said that Mr Wurramara spat at them and was saying “fuck you too” and he agreed that that statement was true. There is a discrepancy between this and the later evidence of Mr Mamarika.
5. Mr Bara Bara said that those other boys and Simon were tempting him to get spears and go back to the house so he and Simon got spears. He got one and Simon got two and they walked back to the house. On the way, they saw Basil and Constantine, but they went past them and started throwing spears at “Dyrrin” (the defendant). The defendant was standing on the verandah of the house. He said that Simon threw spears, two spears that went through the windows and that he threw a spear that hit the stone.
6. He said Dyrrin came towards him and that he “poked” him. He said he was running around the car because he was being chased with a fish gun and that he fell down and that was when he was poked with the fish gun.
7. Subsequently though he said that he fell down and that Dyrrin threw the fish gun, however, when the spear gun was produced, he physically indicated what the defendant had done by demonstrating a two hand downward thrust. This action was consistent with his earlier description of being “poked” rather than a throwing of the spear gun.
8. He was “poked” on the left side of his torso and he showed the wound to the Court. He said he couldn’t remember how many times he was poked, that he was paining and that he couldn’t remember what happened next. He said he got medical treatment at the “hospital” at Umbakumba where he got some medication and later went back. He was paining for two nights.

9. Photos were also tendered which show a small round laceration to Mr Bara Bara's left side. It appeared to me consistent with a description of being "poked" with the spear gun (which was tendered). No medical report was tendered or evidence called. There is a reasonable inference to be drawn, in my view, from the description (both verbal and physically demonstrated) of "poking" by Mr Bara Bara (and the other witness Simon Mamarika), the photographic evidence and the lack of any extensive treatment to the wound, that it did not involve deep penetration of Mr Bara Bara's torso. I note also that the spear was in the spear gun at the time and the apparatus as a whole would seem unlikely to be able to be used to inflict a wound other than in the manner described.
10. In cross-examination, Mr Bara Bara agreed that he and Simon wanted to get spears and that they both had the idea to get the spears. He agreed that the spears were fishing spears and said that Simon took two and that he took one and that Simon had a machete. He agreed that Basil and Constantine had tried to stop them and that Basil and Constantine were respectively grandfather and cousin-brother and were persons for whom there should have been respect. He agreed that they did not listen to them, but pushed past them to Dyrrin's.
11. Mr Bara Bara said that he threw the first spear; that he only had one spear and that Simon's spear went through the house. He agreed that it hit someone inside the house. It was after that that Dyrrin picked up the spear gun from the verandah and ran out.
12. He also agreed that after Mr Wurramara had poked him that Simon had chopped Mr Wurramara on the back with a machete.
13. Mr Simon Mamarika gave evidence and it was largely consistent with that of Mr Bara Bara. He said that they couldn't find any "armada" (the Anindilyakwa word for cannabis). He said that there was staring between himself and Mr Wurramara and that he spat at him because he couldn't find

armada (whereas Mr Bara Bara agreed with a passage from a statement put to him that Mr Wurraramara spat at Mr Mamarika). His evidence also differed from Mr Bara Bara's in that he said he had only one spear and the machete whereas Mr Bara Bara had said that Mr Mamarika had two spears.

14. He agreed that he threw the spear and that Dyrrin dodged the spear. He said he was too busy to see what Leslie was doing. He described Mr Wurraramara as walking slowly from his house carrying the "fish gun" and that he was chasing Leslie and Leslie was going around the car. He said that Leslie fell, tripped himself, but then he wasn't there when Dyrrin did something with Leslie because he went home. However, later he said that when Leslie fell down, that Dyrrin poked him with the spear gun. I note that Mr Mamarika used the same descriptor as Mr Bara Bara for what the defendant did with the spear gun, that is, he "poked" him. He then said he chased Dyrrin and cut him with the machete just once. He said that Dyrrin went to Basil's and he went home.
15. In cross-examination, he agreed that he was stressed out because they couldn't get any armada. He agreed that Mr Wurraramara was minding his own business working on his car. He said that when people stare at each other in Umbakumba, you fight with spears and that everyone does that. He agreed that he and Leslie went to Grandmother's to get spears and a machete to fight Mr Wurraramara.
16. Senior Constable Srhoj gave evidence that he received a phone call about a disturbance at Umbukumba and that he got to the community about 10pm. He went to the Health Clinic where there was a large group of people gathered. He was unable to get any information from anyone but spoke to the nurse who said she had a patient with an abdominal wound. He saw Mr Bara Bara who had a bandage on his abdomen and was obviously in pain.
17. He subsequently spoke to Basil Mamarika and then to Dyrrin. He retrieved several spears from the road, including a steel spear and a broken spear and

then later the spear gun from another person. Mr Mamarika gave him 3 more spears that were said to have been involved. There was no mention of the machete on the night.

18. The fishing spears were called for and tendered. The full length fishing spears are in the order of 8-10 feet (250cms) long including barbed three pronged heads themselves approximately 20-25cms in length. In my view they are clearly weapons that could inflict a serious injury if a person were to be struck by one.
19. Senior Constable Srhoj was also the member involved in taking an electronically recorded interview with Dyrrin Wurramara. The interview was conducted with the assistance of an interpreter. The electronic recording was played and Mr Wurramara made admissions in the interview closely aligned to the evidence that was given by Leslie Bara Bara except that he identified Simon Mamarika as having four spears. He also said that Leslie had a tomahawk and shovel spears. He described dodging the spears. He said he had the spear gun to protect because the boys had spears and that Leslie had thrown an axe.
20. Mr Wurramara said that he had been fishing that day and had been gutting fish. He was changing the tyre of a vehicle when they came down the road. They yelled at him to fight for no reason and that Simon came back with the spears and they had a fight. Mr Wurramara described a more protracted incident than the account given by Mr Bara Bara and Mr Mamarika that included 2 incidents of fighting and him fighting them off and a return with further weapons.
21. In my view there were more spears and other weapons involved than either Mr Bara Bara or Mr Mamarika were willing to admit to. Mr Wurramara gave a very clear and frank account of his involvement in his interview and the actions of the other two whereas the evidence of both Mr Bara Bara and Mr Mamarika was lacking in detail and in the case of Mr Mamarika at times

inconsistent. The fact, for example, that there were more spears involved than the three suggested by them is supported by the evidence of Senior Constable Srhoj as to what he found in the vicinity and what he was given. I note that both Mr Bara Bara and Mr Mamarika both have some interest in downplaying their individual acts and involvement in the incident given that someone inside the house was struck by a spear thrown by one of them. I prefer the defendant's more detailed account given in his record of interview.

22. It was submitted that the question of whether Mr Wurraramara is guilty of the offences charged is whether his action in poking Leslie Bara Bara with the spear gun is defensive conduct pursuant to section 29 of the *Criminal Code*. The section provides that defensive conduct is justified and a person, who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event. The relevant part to this matter of the provision is

29 (2) A person engages in defensive conduct only if:

- (a) the person believes that the conduct is necessary:
  - (i) to defend himself or herself or another person;...and
- (b) the conduct is a reasonable response in the as the person reasonably perceives them.

23. In essence the prosecution says that the spears possessed by Mr Bara Bara and Mr Mamarika having all been thrown means that the actions of defendant were in retribution for those acts and not in defence of himself or another.
24. The defence says that what occurred was an unprovoked violent attack upon Mr Wurraramara in which another person was struck by a spear and that rather than the attack being at an end at that time it was still on going because Mr Mamarika had the machete at that time. It was submitted that the act of Mr

Wurramara is to be viewed in the context of an innocent person having been speared inside the house and that in that context the defendant picked up the spear gun and poked Mr Bara Bara, having pursued him round the car, in order to disable him. It was submitted that it is clear on the evidence that both Mr Mamarika and Mr Bara Bara were acting in concert and they had not run off after discharging the spears. Indeed Mr Mamarika remained armed with a machete. It is put that the danger to the defendant and those at his home was on going evidenced by the fact that Mr Mamarika subsequently struck Mr Wurramara with the machete.

25. In my view Mr Wurramara's act in "poking" Mr Bara Bara with the spear *in situ* in the spear gun was justifiable defensive conduct within the meaning of section 29. The attack upon Mr Wurramara was unprovoked and committed by a group who on the admissions of Mr Mamarika and Mr Bara Bara were "stressed out" because they couldn't get any amada. They were armed with serious weapons and one had already struck a person. There was no indication that they had given up the attack at that point, indeed Mr Mamarika was still armed with a machete with which he subsequently struck the defendant. They were in a community where there was no immediate police presence (noting that Umbukumba is 45 minutes to an hour drive from the police station at Alyangula and that on the evidence the time between when this started and the first police attendance was at least about 2 hours). The assailants on Mr Wurramara had ignored two senior men who tried to stop them going there with the spears. In that context it was a reasonable belief on Mr Wurramara's part that he needed to take physical action against them to defend himself and others from further attack.
26. The further question is whether objectively the conduct was a reasonable response in the circumstances as the defendant reasonably perceived them. Mr Wurramara could have fired the spear at Mr Bara Bara or Mr Mamarika. It was loaded in the spear gun. Instead he picked up the loaded gun, which could only be described as an unwieldy weapon, and used it to chase Mr



Bara Bara and then poke him when he fell over. Mr Bara Bara was not disabled by the fall. There was nothing to prevent him from getting up and essentially having another go, if that was what he had in mind. Mr Wurraramara “poked” him. In my view it went no further than a disabling action to remove the threat of one of the assailants who, as I have said, had not given any indication that the “fight” was at an end.

27. I am satisfied that the conduct of Mr Wurraramara was defensive conduct within the meaning of section 29 of the Criminal Code and that he is therefore not guilty of an assault on Leslie Bara Bara. He is also not guilty of the charge of possession of a controlled weapon because he had a lawful excuse for doing so.
28. In addition I raised with the parties the question of whether, section 29 aside, the defendant was not guilty of the assault because Mr Bara Bara had, on his evidence, given consent to the application of force on him because he had agreed, in fact instigated, a fight with the defendant. I was subsequently given two authorities in that regard, *R v Raabe* (1984) 14 A Crim R 381 and *Lergessner v Carroll* (1990) 49 A Crim R 51. Both are decisions of the Queensland Court of Criminal Appeal with *Raabe* discussed by the court in the latter case.
29. Similar to the Queensland Criminal Code, section 187 of the Criminal Code (NT) relevantly defines assault as

In this Code *assault* means:

- (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;

30. In *Lergessner v Carroll* the Court of Criminal Appeal held that *Raabe* did not decide that consent is not a defence to a charge of assault occasioning bodily harm. The Court said that the true view was that in some cases of

assault occasioning bodily harm the prosecution will, on the evidence, have to negative consent beyond a reasonable doubt. Each case is to be determined on its own facts and the question for the tribunal of fact will be whether the degree of violence to the person exceeded that to which consent was given.

31. Copper J said “The consent is to the application of force and not to the consequence that follows from it. Thus the jury must determine the limits of the consent before the first blow is struck in a fight , and that will include a consideration as to whether or not the person giving consent intended that it should be withdrawn or expire if any subsequent event should occur, eg if the person should become incapable of defending himself.” (at 65)
32. Mr Bara Bara’s evidence is that he (and Mr Mamarika) wanted to “fight” Mr Wurraramara. They were verbally aggressive and then they went off to obtain spears and other weapons to fight Mr Wurraramara. The issue is not whether Mr Wurraramara wanted to fight back but what Mr Bara Bara was consenting to when he determined to enter a “fight”. He was prepared to throw spears at Mr Wurraramara. In my view it cannot be excluded from his conduct that he anticipated (or indeed was inviting) a similar exchange from Mr Wurraramara. That is essentially what he got when “poked” by the spear.
33. It is not my view that his consent to the application of force had expired when he tripped. As I have said there is nothing on the evidence that would suggest that either he or Mr Mamarika were ready to desist in their attack.
34. Consequently, it would also be my view that the prosecution have failed to prove, beyond a reasonable doubt, that Leslie Bara Bara did not consent to the application of force on him by being poked with the spear in the spear gun and on that basis I would also find the defendant not guilty of the assault charge.

Dated this 18<sup>th</sup> day of July 2013

A handwritten signature in black ink, appearing to read 'Sue Oliver', written over a horizontal line.

Sue Oliver  
STIPENDIARY MAGISTRATE