CITATION: *Wayne O'Neill v Braden Hogan* [2018] NTLC 011

PARTIES:	Wayne O'NEILL v Braydon HOGAN
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal
FILE NO:	21636936
DELIVERED ON:	26 April 2018
DELIVERED AT:	Darwin
HEARING DATE(s):	4 April 2018
JUDGMENT OF:	Greg Macdonald

CATCHWORDS:

Assault - Consent - Self Defence - Criminal Code - Degree of Force.

REPRESENTATION:

Counsel:

Complainant:	Mr M Seiler
Defendant:	Ms C Hockin

Solicitors:

Appellant:	DPP
Respondent:	NAAJA

Judgment category classification:	B
Judgment ID number:	[2018] NTLC 011
Number of paragraphs:	22

IN THE LOCAL COURT
AT KATHERINE IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21636936

BETWEEN:

Wayne O'NEILL

Appellant

AND:

Braydon HOGAN

Respondent

REASONS FOR JUDGMENT

(Delivered 26 April 2018)

Judge Macdonald:

Facts and Circumstances

1. Mr Braydon Hogan (the defendant) is charged that on 8 August 2016 he committed an assault against his partner Ms Nelson (the complainant), contrary to s 188(1) of the *Criminal Code* (the Code), aggravated by circumstances proscribed by subsection (2). Namely, that the complainant suffered harm, and that the complainant was female with the defendant being male.

2. On the afternoon of 8 August 2016 the defendant and complainant had been drinking alcohol at a relative's house at Walpiri Camp, Katherine, and were both intoxicated. After sundown the couple were in a bedroom of the house which they temporarily occupied with their son, who was asleep. That was in circumstances where an empty bottle of Jim Beam Bourbon was also

present in the room, having earlier been imbibed by the defendant and another man.

3. The complainant started 'jealousing' the defendant in the bedroom, and then began to assault him. It was common ground that the complainant had, earlier in their relationship, previously assaulted the defendant on at least two occasions. In particular, once in 2014 with a butter knife to the shoulder and, on another earlier occasion, by forcefully impacting his head on a road.

4. The defendant bore scars from those assaults. The complainant had also previously assaulted a former partner with a rum bottle, which the defendant was aware of.

5. The assault by the complainant on the defendant on 8 August 2016 began by the complainant punching the defendant to the face and then the shoulder. The defendant first responded to those blows by trying to "settle down" the complainant. That was to no avail, with the complainant then also pulling the defendant's hair and scratching his face, with the couple ending up wrestling on the floor.[1]

6. I accept that by that point in time, the interaction between the defendant and the complainant may well have constituted 'a consensual fight'. The fight culminated with the defendant placing his mouth over part of the complainant's right ear and biting "real hard"[2], completely severing a substantial portion of that ear. At that time the defendant and the complainant were lying on the floor, with the defendant either on top of or by the side of the complainant, holding her right arm with one hand and the complainant's shirt with his other.

7. Immediately prior to biting the complainant's ear, the defendant believed the complainant was reaching for the empty Jim Beam bottle, to use as a weapon

[1] None of which were the subject of any complaint by defendant Hogan to NT Police, or charge of the complainant.
[2] Transcript Page 33

against him. It is common ground that the complainant had not in fact seized the bottle at the time the defendant bit her. Nonetheless, I accept the defendant's evidence that; "*I was thinking she'll do it. I'd be bleeding, may be unconscious ... or dead*".[3] I also accept that the defendant's judgement and perceptions were clouded to the extent of his intoxication.

The Defendant's case

8. The defendant contends two propositions in defence of the charge, such that the harm sustained by the bite to the complainant's ear could not attract criminal liability. First, that at the relevant time he and the complainant were engaged in a consensual fight. As a consequence, the incident could not give rise to the offence of assault proscribed by s 188 of the Code, due to s187 requiring that the alleged unlawful force be applied without consent. Absence of consent is an element of the offence.

9. Second, that the defendant was acting in self-defence. Specifically, that the bite to the complainant's right ear constituted defensive conduct within the meaning of s 29(2)(a) and (b) of the Code, such that his actions were justified so did not attract criminal responsibility.

10. The court had the benefit of written submissions filed by the parties on 18 April 2018.

Findings

11. The evidence given at hearing clearly raised the issues of consent and defensive conduct. The complainant first commenced to assault the defendant, however I conclude that the incident also descended into a consensual fight. The complainant's actions in respect of the defendant also enlivened the defensive conduct provisions of s 29 of the Code, to the necessary threshold. The prosecution must therefore prove an absence of

[3] Transcript Page 22

consent by the complainant, and that the defensive conduct did not fall within s 29(2) of the Code, each to the standard of beyond reasonable doubt.

12. In relation to the question of consent, the Queensland Court of Criminal Appeal decision in *Lergesner v Carroll* is authority for the proposition that; "*… when an issue of consent to assault arises … it is for the tribunal of fact … to decide, in respect of the assault said to have been consented to, … whether the degree of violence used in the assault exceeded that to which consent had been given*".[4] Albeit in the context of a civil claim, that proposition was applied by the Supreme Court in *Zijlstra v NTA* [2011] NTSC 46 at [49].

13. Although the concept of "bodily harm" is no longer expressly contemplated by the Code, I consider the injury suffered by the complainant would have met to that characterisation[5]. The decision in *Lergesner* is also authority for the proposition that a person can consent to an assault which produces injury in the nature of 'bodily harm'[6], but noting that the question to be asked must focus on the degree of violence used rather than the consequence of the violence. Nonetheless, in many cases, as here, an obvious relationship between the degree of violence and the injury sustained will exist.

14. The complainant's evidence, which I accept, was that she did not give the defendant consent to bite her[7] and, to the extent that the defendant contends otherwise, I reject his assertion. Having regard to the degree of violence, or in other words force, required to completely sever a significant portion of the complainant's ear, I find without any doubt that the complainant did not consent to that application of force.

15. In relation to defensive conduct, the prosecution is obliged to exclude or disprove that the defendant believed that the conduct was necessary, or that

[4] [1991] 1 Qd R 206 at 212, and applying *R v Raabe* [1985] 1 Qd R 115 at 121.
[5] Section 1A of the Code defines "harm", and the Defendant is not charged with "serious harm".
[6] Noting that his Honour Justice Mildren appears to have taken a similar view in *R v Minor* (1992) 2 NTLR 183.

the conduct was a reasonable response in the circumstances as the defendant reasonably perceived them.

16. Proceeding on the basis of the propositions referred to at 12. and 13. above, and despite that it may be where a person is seeking to defend themselves, defensive conduct can validly include force intended to cause death or serious harm[8], the case must be determined having regard to the particular circumstances which existed at the relevant time.[9] Due to the mix of objective and subjective factors provided by s 29(2) of the Code[10], it is accepted that the defendants' intoxication is not irrelevant[11]. Likewise, although not determinative, the fact that the complainant had not in fact seized the bottle must be taken into account.

17. The principles and considerations in relation to defensive conduct are generally well settled.[12] In considering the defendant's situation at the crucial time on 8 August 2016, I have been particularly mindful of the High Court's caution that; "*No doubt it will often also be desirable to remind the jury that in the context of self-defence it should approach its task in a practical manner without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection*".[13]

18. The situation on 8 August 2016 was that the defendant was male and the complainant was female. I infer from my observations of each at hearing that the defendant was stronger than the complainant. The evidence demonstrates that at the crucial time the defendant was not physically

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[7] Transcript Page 5
[8] The natural implication flowing from s 29(3) of the Code is that such force is only certainly excluded in relation to protection of property or prevention of trespass. That approach appears not inconsistent with s 26(3) of the Code, if engaging in defensive conduct were 'a right recognised by law'.
[9] The DPP's submissions filed 18 April 2018 referred to a number of decisions involving biting, however none of those decisions are relied upon as analogous.
[10] *Baxter v Conroy* [2015] NTSC 26 at [18].
[11] *Ninness v Walker* (1998) 143 FLR 239.
[12] *Zecevic v DPP* (1987) 162 CLR 645, *R v Hawes* (1994) 35 NSWLR 294 and, in relation to the Code, *Burkhart v Bradley* [2013] NTCA 05.

subjugated to the complainant and, at the least, they were side by side. Most relevantly, the defendant had hold of the complainant's right arm with his left hand, and her shirt with his right hand.[14]

19. The defendant had a genuine belief that he needed to defend himself from the use of the bottle by the complainant, and that he needed to act. However, it was open to the defendant to restrain the complainant from further reaching for the bottle he feared, by using his right hand to restrain the complainant's free arm. Other less violent force might also have been applied. It may also be that the defendant could also have departed from the room, although I note his young son was present.

20. Instead, the defendant used his physical dominance to latch onto, bite and sever a significant portion of the complainant's right ear. Regardless of the defendants intoxication, and whether he was angry or not due to the assault he had suffered immediately prior, I have no reasonable doubt that the defendant did not genuinely believe at the time that biting with such force was necessary.

21. In addition, on any measure, the violence or force employed by the defendant, could not have been a reasonable response even in the circumstances as he might reasonably have perceived them at the time. The violence or force applied by the defendant to the complainant's ear by use of his teeth was patently excessive. The defendant conceded that he bit the complainant "real hard"[15] and obviously the force required to completely sever part of a person's ear must be significant.

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[13] *Zecevic* (supra) at 662 – 663.
[14] Transcript Page 32.
[15] Transcript Page 33.

22. I find that the prosecution has excluded or disproven defensive conduct to the necessary standard, so find the defendant guilty as charged.

Dated this 26 April 2018

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Greg Macdonald
Local Court Judge