

CITATION: *The Northern Territory Police v PS [2018] NTLC 013*

PARTIES: NICHOLAS

V

PS

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: CRIMINAL

FILE NO(s): 21749298

DELIVERED ON: 28 MAY 2018

DELIVERED AT: DARWIN

HEARING DATE(s): 17 January 2018; 27 February 2018; 28 March 2018

JUDGMENT OF: JUDGE SUE OLIVER

CATCHWORDS:

CRIMINAL LAW- Assault a Worker – “employment related duties (work) in any lawful capacity” – Power of security officer to apprehend or arrest a person
Criminal Code - Section 441

REPRESENTATION:

Counsel:

Police: Ms Bochman

Defendant: Mr Jehne

Solicitors:

Police: DPP

Defendant: NTLAC

Judgment category classification: A

Judgment ID number: 013

Number of paragraphs: 27

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

No. 21749298

BETWEEN:

Nicholas
Police

AND:

PS
Defendant

REASONS FOR JUDGMENT

(Delivered 28 May 2018)

JUDGE OLIVER:

1. PS is charged with assaulting a worker, namely a security officer Mr Sam Kamara, at the Palmerston Shopping Centre on 6 September 2017 pursuant to section 188A of the Criminal Code. Section 188A provides:

(1) A person who unlawfully assaults a worker who is working in the performance of his or her duties is guilty of an offence

2. The elements of the offence that require proof beyond a reasonable doubt are that Mr Kamara was:
 - a. assaulted by the defendant
 - b. a “worker” as defined
 - c. working in the performance of his duties

Was Mr Kamara assaulted by the defendant?

3. Section 187(1)(a) of the Criminal Code provides the definition for an assault. Relevantly “In this Code assault means:

a. the direct or indirect application of force to a person without his consent...”

4. The defendant did not deny applying force to the back of Mr Kamara although there was some dispute as to the mechanism of the physical force. The defendant stating that it was a 2 handed push to his back while Mr Kamara, although not seeing what happened, believed it to be different in nature

So you can't be sure how the force was applied to your back, can you?---The thing is I can – you can tell if someone shoulder hits you or punch you from the back even – even you didn't see, but you can feel the force. So if someone tackle and hit you by the elbow – yeah, and just deliver a force at somehow. If it was just a push I know someone push me. But that was a clear like a elbow hit, you know, or a shoulder hit, but I didn't see what he'd done at the time.

So it's possible then that it was a two-handed push?---No, no. That's not two-handed push, no, 'cause two-handed push you'll feel the push, you'll feel if someone push you two hands you feel it even. You feel the – the both hands.

5. The other security officer, Mr Asiata gave evidence that the defendant hit Mr Kamara with his elbow. The CCTV footage that was tendered was not sufficiently distinct to be able to identify the exact mechanism by which the defendant applied force to Mr Kamara.

6. Ms Holden who was a store attendant at the shop in front of which the incident occurred gave evidence as to what she said occurred. However the detail of her evidence of the number of people involved and the nature of the strike (a punch to the head) were so completely inconsistent both with the accounts of the security guards and the CCTV footage that it cannot be relied upon.

7. In any event the precise nature of the strike/push does not need to be determined because of my further findings with respect to the proof of the elements of the offence.

What was the event that lead up to the defendant pushing/striking Mr Kamara?

8. Mr Kamara's evidence of what occurred is that he was suspicious of the activities of a group of young boys (which did not include the defendant) and he followed them down to the Target store. Whilst waiting outside, a store attendant told him that soft drinks had been stolen. One boy, Raymond, came out and Mr Kamara said he had drinks in his pocket. He asked him if he had a receipt and when he could not produce one, told him that he had to come with him to the office. He said he was going to take details and give him a trespass notice. He said he was not going to call the police.
9. The relevant part of his evidence as to taking Raymond to the office is

Now when you were speaking to Raymond- -?---Yeah.

- - - you told him that you were going to take him back to the security office to talk with him further about the drinks, correct?---
Yeah, yeah.

And, you told him that he wasn't free to leave, correct?---Yeah, yeah, yeah.

And, your intention in taking him back to the security office was to talk with him further, as you said?---To talk to him further, yeah, yeah.

And, also to give him a trespass notice?---Yes, that's correct as well, yeah.

And, that's what you told Lemmy Aziarcher?---Yeah, yeah.

And, after giving Raymond the trespass notice you were going to let him go?---I – yeah, I didn't even write a trespass notice because I didn't – we didn't get a chance even to write a trespass notice.

But your – your plan when you were taking - - -?---That’s – yeah, that was my plan, yes, yeah.

Now when you were walking Raymond back to the office you were holding his arm?---Yes, yeah, that's correct, yeah.

And, Raymond didn’t want to go back to the office with you, did he?---No. First he agreed to come there, to go there, and then he started halfway at the Gloria Jean’s section he stopped. I told him just – can you please walk because we don’t want to make any scene here ‘cause I know his – his drinks are still in his pocket at the time. So I told him, “We just walk to the office so we can talk privately about it.”

And, he didn’t want to come with you and that’s when you took hold of his arm, correct?---Yeah. He started to get a bit worried, I said, “Look, don’t worry, you know, just come quietly and then we will sort this matter”, yeah.

And, you asked Lemmy to take hold of Raymond’s other arm because Raymond was resisting?---He was – yeah, he was resisting, yeah, yeah.

So you and Lemmy were both holding one of Raymond’s arms, you each had an arm?---Yeah, we – yeah, we both had like we grabbed him, not hard – we both escorted him to the office, but just – I called Lemmy just to be there, just to be witness, to witness that I don’t want to physically grab him and drag him inside the office, that’s not my intention, but just to do it quietly in a manner that he won't be embarrassing as well in front of the public, you know, yeah.¹

10. Mr Kamara’s evidence that Raymond still had the drinks in his pocket when being taken to the office is inconsistent with the evidence of the other security guard, Mr Asiata. Mr Asiata said they told him to give the drinks back and that he gave them to a staff member. In the CCTV footage tendered, which shows Raymond being escorted by Mr Kamara, there does not appear to be any bulge in his shorts consistent with having cans of drink in them.

Earlier in examination in chief Mr Kamara had said

¹ Transcript page 38

Can you remember if you let him go from the security office, or from right there?

---From there, no not from the security office in the office, but it was – there was a security office hallway. There's a fire exit door inside there. There's another little hallway there as well. So, he was standing there and I was standing – I was talking to him a bit, tell him, “Just calm down.” And, he was crying at the time, so I said, “Look, you returned your stuff. Just go.” Yeah.

And, when you say, “Returned your stuff”?---Returned the stuff that he took or the items that he took, I tell him because he returned it back, you know, there's no need here to go any further. So, he can just – I just had to let him go. Because, the situation was getting – it was escalating at the time. So, I had to let him go. Yeah.

11. Raymond cannot both have had the drinks in his pocket when they passed Gloria Jeans and then returned them by the time they reached the hallway where he was released given what transpired between those two places. I am satisfied that the drinks were given to a Target staff member before Mr Kamara began to escort Raymond to the office.

Was Mr Kamara “a worker” when the defendant pushed/struck him?

12. Section 188A defines a worker as being someone who “carries out employment related activities (work) in any lawful capacity, including work as any of the following:
 - a. an employee
 - b. a contractor or subcontractor
 - c. ...(g)”
13. Mr Kamara’s evidence is that he was at the relevant time a security officer working for Wilson Security and on duty at the Palmerston Shopping Centre. The terms under which he performed that work were not elucidated, however it was not contested that the terms of his work with Wilson Security fit within the definition of “employment related activities (work)”.

14. Mr Kamara was not asked in examination in chief whether he was a licensed security officer however given his evidence that he worked for Wilson Security and in cross examination that he had signed the Code of Practice for Security Officers (“the Code”) I accept that he was at the relevant time a licensed security officer under the *Private Security Act*.

15. That Act does not provide any power or authority to Security Officers to apprehend or arrest persons they suspect of having committed offences. Indeed the Code instructs

3.16 In the course of their duties use mediation, negotiation, communication and conciliation as the primary methods of dealing with members of the public and not resort to physical contact where such can be avoided.

16. The Code at 2.3 draws attention to other legislation that affect security officers in the performance of their duties, “*being the*

a) Summary Offences Act: sections 47 and 56(1)(d)2

b) Trespass Act: sections 7 and 8, and

c) Criminal Code: sections 27, 28, 149, 152, 154, 3 155 and 441 and the definitions contained in section 1 of Division 1 and the common law principles relation to the application of force.”

17. Of these provisions, two are relevant to circumstances in which a security officer may lawfully apprehend a person.

18. First, section 27 of the Criminal Code provides for circumstances in which an application of force to a person is justified. Section 27 provides:

“In the circumstances following, the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or serious harm:

² There is no 56(1)(d) in the Act. Presumably it was repealed by one of the many acts that have amended that section.

³ Section 154 was repealed in 2005

- (a) to lawfully execute any sentence, process or warrant or make any arrest;
- (b) to prevent a person who is being or who has been lawfully arrested from escaping or from being rescued;
- (c) to prevent the continuance of a breach of the peace or a renewal of it and to detain any person who is committing or about to join in or to renew the breach of the peace for such time as may be reasonably necessary in order to give him into the custody of a police officer;
- (d) to suppress a riot;
- (e) to prevent the commission of an offence;
- (k) in the case of a person who is entitled by law to the possession of moveable property, or a person acting by his authority, and who attempts to take possession of it from a person who neither claims right to it nor acts by the authority of a person who claims right to it and the person in possession resists him, to obtain possession of the property, provided he does not intentionally do him harm;
- (p) in the case of a parent or guardian of a child, or a person in the place of such parent or guardian, to discipline, manage or control such child;
- (pa) to prevent a person reasonably believed to be attempting to, or about to, kill himself, from killing himself;
- (q) in the case of the person in command of a ship on a voyage or an aircraft on a flight, or a person acting by his authority, to maintain good order and discipline on board the ship or aircraft;
- (r) to assist a person to do any of the things aforesaid.”

19. It is readily apparent that none of these circumstances exist so as to permit the physical apprehension of Raymond other than if there is a lawful arrest under s441 of the Criminal Code in which case section 27(a) would permit an application of force for that purpose. An argument was advanced that the defendant could rely upon the excuse of defensive conduct (defending Raymond from the “assault” by the Officers) pursuant to section 29(2)(a)(2). It is not necessary for me to consider that argument given what follows.

Was there a lawful arrest of Raymond pursuant to section 441 of the Criminal Code?

20. The relevant provision⁵ that permits a lawful arrest by a person other than a police officer under common law what was (often colloquially referred to a “citizens arrest”) is section 441 of the Criminal Code. In order to establish that Mr Kamara was “[carrying] out employment related activities (work) in any lawful capacity”⁴ his authority to physically restrain Raymond and walk him to the security office must be found within section 441. It is in these terms:

Arrest without warrant

(1) A person shall not be arrested without warrant except in accordance with this Code or an Act expressly giving power to arrest without warrant.

(2) A person, not being a member of the Police Force, may without warrant arrest a person (*the offender*) where the person:

(a) finds the offender committing an offence or doing an act or behaving or conducting himself, or in such circumstances, that the person believes on reasonable grounds that the offender has committed an offence and that the arrest of the offender is necessary:

(i) to ensure the appearance of the offender before a court of competent jurisdiction; or

(ii) to preserve public order; or

(iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or

(iv) for the safety or welfare of members of the public or of the offender; or

(b) is instructed to do so by a member of the Police Force having power under an Act to apprehend the offender; or

⁴ The requirement for the definition of “worker” in s188A of the Criminal Code

⁵ The common law powers of arrest no longer exist – see *Hulley v Hill* (1993) 69A Crim R 52

(c) believes on reasonable grounds that the offender is escaping from legal custody or aiding or abetting another person to escape from legal custody or avoiding apprehension by some person having authority to apprehend the offender in the circumstances of the case.

(2A) A reference in subsection (2) to a member of the Police Force does not include a person who has not taken an oath under section 26 of the *Police Administration Act*.

(3) A person who is arrested under subsection (2) and in custody shall not be questioned in relation to an offence other than by a member of the Police Force in accordance with the *Police Administration Act*.

(4) As soon as practicable after a person is arrested under subsection (2), the person shall be delivered to a member of the Police Force, and the *Police Administration Act* shall apply to and in relation to the person and the member as if the arrest had been made under that Act.

(5) A person who is arrested under subsection (2)(a) shall be held in custody only while the reason for the person's arrest, as referred to in that paragraph, continues.

(6) A person who is arrested under subsection (2)(a) shall be released immediately from custody where it becomes apparent that the person did not commit the offence for which the person was arrested.

(7) For the purposes of subsection (2)(a), **offence** does not include a contravention of or failure to comply with an instrument of a legislative or administrative character.

21. It is clear both from the oral evidence and from the CCTV played and tendered that Raymond was not voluntarily accompanying the security guards to their office. They gave evidence of his resistance and the CCTV shows him being very firmly restrained by them and being obliged to walk with them. His apprehension by them will only be lawful if it is found to be an arrest permitted by section 441 of the Criminal Code.
22. The relevant part of that provision is subsection (2). If the evidence is accepted that the youth Raymond had stolen soft drinks from Target or that Mr Kamara believed on reasonable grounds that he had committed that

offence, it must still be shown that the arrest was necessary for one of the reasons set out in section 441(2)(i)to(iv). These are:

(i) to ensure the appearance of the offender before a court of competent jurisdiction; or

(ii) to preserve public order; or

(iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or

(iv) for the safety or welfare of members of the public or of the offender; or

23. Section 441(2)(ii) and (iv) have no application on the facts of this matter nor does section 441(2)(i) as Mr Kamara's evidence was that he intended to talk to him more about it, give him a trespass notice and then release him.
24. The remaining ground for a lawful arrest under section 441 is "to prevent the continuation or repetition of the offence or the commission of a further offence". As I have found, the drinks were returned to a staff member from Target. The offence if there had been one was complete at that time. Even if the drinks had not been returned, in my view the offence (stealing) was complete at the time that Raymond exited the store. There was no ongoing offence that required prevention.
25. Further, it is apparent from the evidence of Mr Kamara that there would have been a failure to comply with the further requirements of section 441, that is subsections (3) and (4). Both security officers evidence was that there was no intention to further hold Raymond after taking him to the security office. He was to be released after having his name taken and being given a trespass notice. He was not going to be delivered to a member of the Police Force.
26. Consequently, I cannot be satisfied that Mr Kamara was, at the time at which he was struck/pushed by the defendant, "carr[ying] out employment

related activities (work) in any lawful capacity". His apprehension of Raymond was outside the scope of any power or authority he had as a security officer or available under section 441 of the Criminal Code.

27. That being the case, the prosecution have failed to establish all the elements of the offence required to be proved beyond a reasonable doubt and the defendant is found not guilty.

Dated this day of 2018

LOCAL COURT JUDGE