

CITATION: *Erica Gibson v YZ (a youth)* [2020] NTLC 013

PARTIES: GIBSON, Erica

v

YZ (a youth)

TITLE OF COURT: Youth Justice Court

JURISDICTION: Criminal

FILE NO: 21934044

DELIVERED ON: 29 September 2020

DELIVERED AT: Darwin

HEARING DATE(s): 23 July & 25 August 2020

JUDGMENT OF: Greg Macdonald

CATCHWORDS:

Assault police - Resist Police - Arrest - Youth - Exclusion of evidence - Police Administration Act 1978 - Section 138 discretion - Evidence (National Uniform Legislation) Act 2011 (NT)

R v GP [2015] NTSC 53

Robinson v Woolworths Ltd (2005) 158 A Crim R 546

The Queen v Gehan [2019] NTSC 91

R v Appleby (1940) 28 Cr App R 1 at 5

R v Galvin (No. 2) [1961] VR 740

REPRESENTATION:

Counsel:

Complainant: Ms L Jones

Defendant: Ms R McCarthy

Solicitors:

Complainant: DPP

Defendant: NAAJA

Judgment category classification: B

Judgment ID number: 13

Number of paragraphs: 25

IN THE YOUTH JUSTICE COURT
OF THE NORTHERN
TERRITORY OF AUSTRALIA
AT DARWIN
No. 21934044

BETWEEN:

Erica GIBSON

Complainant

AND:

YZ (a youth)

Defendant

REASONS FOR JUDGMENT

(Delivered 29 September 2020)

JUDGE GREG MACDONALD

Background

1. On 10 September 2019 the defendant youth (YZ), who was 14 years old at that time, was involved in a serious incident at Woolworths in the CBD together with another youth. That incident essentially involved a member of Woolworths' staff confronting YZ and another young female in her company, in circumstances where that employee believed YZ and her companion were in possession of goods in the process of shoplifting.
2. YZ was reported by the employee to have been in possession of a pair of scissors at that time, and it was alleged that YZ had raised the scissors threateningly towards the employee upon being confronted, following which she left the store with the other youth.
3. Constables AB and CD then attended Woolworths following complaint, and spoke to the employee and viewed the internal CCTV. Those members then

proceeded to search the CBD and environs towards locating YZ and the other youth.

4. The members quickly located YZ in the front yard of private premises close to the CBD and Constable AB proceeded to and did arrest YZ in relation to the earlier incident at Woolworths. Various things occurred in the course of arrest, which resulted in YZ being charged with contraventions of section 189A of the *Criminal Code 1983 (NT) (Code)* and s158 of the *Police Administration Act 1978 (PAA)*. That is, 'assault police' and 'resist police' in the execution of their duty.

Issues on voir dire

5. At hearing YZ contended firstly, that the court should find Constable AB was not, through his actions and conduct, acting in the execution of his duty immediately prior to and in effecting the arrest. Second, that YZ's conduct did not contravene section 189A of the *Code* or s158 of the *PAA*. Thirdly, that the necessary mental elements prescribed by section 31 of the *Code* for the purpose of the offences alleged were not made out. Lastly, that any evidence of the alleged offences was the result of improper actions and conduct by Constable AB, so should be excluded in the exercise of discretion under s138 of the *Evidence (National Uniform Legislation) Act 2011 (NT) (ENULA)*.

Evidence on voir dire

6. The evidence at hearing included oral evidence from Constables AB and CD, their sworn statements in the proceeding deposed on 10 September 2019¹, and the body worn footage (BWF) recorded by each of their devices upon their attendance in the front yard of the private residence². The Defendant's position is that the BWF is independent contemporaneous evidence of what occurred and, to any extent that it conflicts with the members' statements and oral evidence, the BWF should be accepted.
7. During the patrol referred to at [3] above, Constable AB saw a young female fitting the description of YZ sitting on a trampoline in the front yard of private premises in a residential street. The members parked their vehicle and Constable AB walked to the front fence and engaged the youth.

¹ Exhibits P2 and P4

² Exhibit P3

Although his BWF was activated, the audio was not operating at that time. The member's evidence was that he asked YZ to "come to the fence to talk", in response to which she told him to "fuck off". I accept that evidence, noting that precisely how and in what terms Constable AB made the request is not clear.

8. Apparently affronted by YZ's response, Constable AB then walked briskly down the fence line perimeter to the front gate, entered the premises through the front gate, which was ajar, and proceeded towards YZ. At that time there was also an adult female and at least two other children present in the front yard. The perimeter fence was a full height cyclone mesh fence, with the side fences exceeding that height.
9. Immediately following entry to the front yard, from approximately eight metres, Constable AB said "come here" to YZ, to which she remained on the trampoline and did not comply. Constable AB proceeded directly and quickly towards YZ and repeated that command a couple of metres from the trampoline, with YZ continuing to remain in her seated position on the trampoline, not complying. Constable AB's first direction was professional enough, with the second less so³. Constable AB continued towards YZ and was quickly in close proximity, well within arm's length of YZ.
10. Without further ado or seeking to engage with either the adult female standing nearby in the front yard or further with YZ, Constable AB grabbed YZ with both hands to her upper body and dragged her with significant force from the seated position on the trampoline to her feet off the trampoline. Upon seeing a pair of scissors in YZ's left hand he took protective action then ground stabilised then handcuffed YZ.
11. Constable AB's evidence was that immediately prior to laying hands on YZ he considered she was about to seek to evade arrest by fleeing, due to some slight movement by YZ while in the seated or kneeling position on the trampoline.
12. Despite some early oral evidence at hearing and his contemporaneous written statement which was read to the court on 23 July 2020, Constable AB's evidence was ultimately that he intended arresting YZ once he believed her to be one of the youths involved in the earlier incident at Woolworths, so prior to entering the front yard of the private residence. I accept that

³ The second video file on Exhibit P3.

evidence and also consider that arrest in the circumstances of the seriousness of the allegations was warranted⁴.

13. However, it is apparent from the BWF that, prior to effecting the forceful arrest, Constable AB did not ask YZ her name, or inform YZ that she was under arrest, or inform her of any reason for the arrest. Those aspects were not the subject of any communication by Constable AB until after YZ had been ground stabilised.
14. The evidence at hearing also included NT Police General Order - *Arrest*, (GO) which became Exhibit D1. I note section 16 of the *Youth Justice Act 2005* (NT) (YJA) empowers the Commissioner of Police to issue guidelines by way of General Orders specifically in relation to the investigation and arrest of youths, however any such guidelines are not before the court. Exhibit D1 simply refers to Division 2 of Part 2 of the YJA.

Findings

15. As noted at [12] above, Constable AB had sufficient basis on which to arrest YZ under s123 of the PAA, applied in conjunction with ss 126(2) of that Act. I accept that each of the members were very concerned at behaviour YZ had allegedly earlier engaged in at Woolworths, and particularly due to the alleged possession and threatening use of an edged weapon⁵. That concern then materialised immediately upon Constable AB laying hands on YZ and dragging her from the trampoline, at which time she held a bottle of cosmetic in her right hand and a pair of scissors in her left. Those scissors were a weapon which could have been used to inflict serious injury or worse on Constable AB.

⁴ I do not consider that any of the other four bases referred to by paragraph 14 of NT Police General Order *Arrest* (GO) were operative, despite that a risk of further offending will always exist in relation to any subject who has apparently already committed an offence. The GO became Exhibit D1.

⁵ The internal Woolworths CCTV had been viewed by the members, so they had a sound objective insight into the alleged incident, including possession of an edged weapon at that time.

16. Due to the events depicted by the BWF⁶, the contents of paragraphs [23] and [24] of Constable AB's statement⁷ and the last and crucial part of paragraph [21] of Constable CD' statement⁸ are not accepted. Noting the caution below, BWF is independent contemporaneous evidence of what occurred and, in this case, to any extent that it clearly conflicts with the members' statements and oral evidence, I prefer the BWF.
17. Contrary to paragraphs [23] and [24] of Constable AB's statement, YZ did not swing the scissors at him with force, or seek to stab him with the scissors⁹. I consider YZ was holding the scissors away from Constable AB without any apparent threat or move to inflict them upon him, and it then appears from the BWF that Constable AB immediately grabbed YZ's left hand or wrist and removed the scissors from her grasp. A still print from Constable CD's BWF would be likely to show this, however no image in that format was put before the court.
18. It is acknowledged that BWF must be examined and accepted with some caution, both due to the position from which the footage is generally recorded, and particularly due to the fact that it will rarely provide a complete record of events. Important details may be obscured due to these aspects. The BWF in this case was recorded from different perspectives, Constable CD having entered the front yard of the premises a few seconds following Constable AB's entry. In assessing the evidence provided by the BWF in this case, it is important that both editions be viewed, as each records different aspects of the incident.
19. What is clear from the BWF is that Constable AB's communication, manner and actions immediately prior to and in effecting the arrest of YZ did not comply with any of paragraphs [21], [23] or [24] of the GO - Arrest¹⁰. His communication in terms of what was and was not said, including to the adult present, fell short of the minimum standards demanded by the community of members of NT Police. More relevantly, Constable AB's actions in directly approaching YZ such that he was in sufficient proximity to immediately lay hands on her in effecting the arrest, and the way in which he then did so, was cavalier and reckless. The force applied, together with the absence of

⁶ Exhibit P3

⁷ Exhibit P2

⁸ Exhibit P4

⁹ Likewise, the BWF does not depict the motion or underlying intent deposed to by paragraph [21] of Exhibit P4.

¹⁰ Exhibit D1, and noting the discussion in *R v GP* [2015] NTSC 53.

- communication, clearly fell well short of minimum community standards expected and required of members of NT Police, including as reflected in the GO – *Arrest* and provisions of the YJA¹¹. Had YZ been a male adult I consider Constable AB would have acted very differently towards the subject. I infer that his actions stemmed from a view that he was physically superior and could easily overcome YZ, regardless of the contents of the GO and YJA.
20. I also find that YZ was not seeking to resist arrest, or evade and escape Constable AB immediately prior to the arrest. YZ's slight movement while still on the trampoline was most likely cowering in the face of a strong man in uniform giving her directions then reaching to physically apprehend her. Such a conclusion is at odds with YZ's profane and disrespectful response to Constable AB when he initially sought to engage her from the front fence, and her apparently defiant attitude, however is consistent with the BWF. I also note that the prospect of even unsuccessful flight by YZ, given the physical location and the disparities between her and Constable AB, was unlikely.
 21. The slight movement by YZ immediately prior to arrest might possibly have been a hindrance to that process, however she did not resist arrest. YZ did protest the rigorous ground stabilisation concluding with Constable AB pinning her back with his knee, but nor is that resisting arrest¹².
 22. The fact that YZ had an edged weapon in her left hand at the time of arrest could certainly amount to a contravention of s189A of the *Code*, depending on her intention, and despite the positive finding that she did not seek to strike or strike Constable AB with the scissors.
 23. Nonetheless, I consider it is appropriate to proceed to determine whether any evidence, such as it is, should be excluded in the exercise of the discretion provided by s138 of the ENULA. In my view the court need go no further than the often quoted passage of Basten J in *Robinson v Woolworths Ltd* (2005) 158 A Crim R 546 at [23]¹³.

¹¹ Including sections 3(c) and (e) and 4(d) of the YJA.

¹² *R v Appleby* (1940) 28 Cr App R 1 at 5 and *R v Galvin (No. 2)* [1961] VR 740.

¹³ Cited with approval in *The Queen v Gehan* [2019] NTSC 91 at [7] and [8].

24. The evidence of the alleged offences, such as it is, was the direct product of impropriety by the arresting member. Any evidence must therefore be of high probative value, and a contravention of s189A carries a substantial maximum sentence of imprisonment. Nonetheless, I consider the gravity of the impropriety to be significant, and note that the evidence may well have been impossible to obtain without the impropriety. In weighing these factors, I exclude any evidence obtained through the arrest of YZ on 10 September 2019.

25. I find YZ not guilty of each charge, and acquit her.

Dated this 29 September 2020

GREG MACDONALD
LOCAL COURT JUDGE