

CITATION: O'Neill v Christopher Roe [2023] NTLC 22

PARTIES: Julie O'NEILL
V
Christopher ROE

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22307693

DELIVERED ON: 22 September 2023

DELIVERED AT: Darwin Local Court

HEARING DATE(s): 6 and 8 September 2023

DECISION OF: Judge Thomasin Opie

CATCHWORDS:

Section 186AA(4) *Criminal Code (NT)*

Chokes strangles or suffocates

REPRESENTATION:

Counsel:

Police: Lang Williamson

Defendant: Brittany Armstrong

Solicitors:

Police: ODPP

Defendant: NAAJA

Decision category classification: A
Decision ID number: [2023] NTLC 22
Number of paragraphs: 35

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

No. 22307693

BETWEEN:

Julie O'NEILL

Complainant

AND:

Christopher ROE

Defendant

REASONS FOR DECISION

(Delivered 22 September 2023)

JUDGE OPIE

Background

1. On 22 September 2023 I delivered an oral decision in this matter. Upon receipt of an application to publish my reasons I have edited them for clarity and grammar. I have redacted the names of the complainant and her mother who were witnesses.

Charges

2. Christopher Roe is charged with four counts arising from an incident on 11 March 2023. The charges were contested. The prosecution adduced evidence from the complainant and her mother. A 000 call was played with consent of the parties. The prosecution adduced tendency evidence. The defendant did not give or call evidence.
3. The complainant was a compelling witness. She made concessions where appropriate and was unshaken in cross examination. Her evidence was given in a calm and measured manner. I find that she was a witness of truth and her evidence was reliable. The mother of the complainant also gave evidence. She was a more emotional witness and her evidence was at times more vivid than that of the complainant. Where there were discrepancies between the accounts of the two women they were of a minor nature and reflected naturally occurring differences of perception and recollection.

Count 1 Breach of domestic violence order

4. The prosecutor provided particulars of this charge as including the actions comprising counts 2, 3 and 4, the uncharged act of causing damage to the sliding door, the defendant

verbally abusing the protected person, the defendant exposing the children of the relationship to domestic violence and the defendant consuming alcohol in the presence of the protected person.

5. The prosecutor adduced evidence that the domestic violence order was in force and had been served upon the defendant as at 11 March 2023.
6. On the evidence of the complainant and her mother I find that the defendant engaged in the behaviours alleged by the prosecutor; that all such behaviour constituted a breach of the domestic violence order; that the order had been properly served; and therefore that the order was in force as at 11 March 2023. Accordingly I find the charge proved.

Count 2 - Aggravated assault upon the complainant on 11 March 2023

7. The prosecutor provided particulars of this charge as *"the incident where the defendant slapped the cigarette from the mouth of the complainant"*.
8. The complainant gave evidence that *"I had a cigarette in my mouth. He smacked the cigarette out of my mouth"*. She gave evidence that *"He followed me up the stairs and slapped the cigarette out. Mum told the police 'he slapped her' and Chris said 'I slapped the cigarette, not her'."*
9. The complainant's mother gave evidence of the encounter. Her evidence was that the defendant actually slapped the complainant in the face.
10. Counsel for defence submitted that the complainant's evidence rather than that of her mother should be accepted. I agree. The complainant's mother was inside the house and was on the phone to the police at the time of the encounter. Her evidence suggested that she had inferred that the blow actually connected the complainant's face *"because her head moved"*. In my view, this is a reasonable if incorrect conclusion. It is probable that the complainant did move her face back to avoid the anticipated blow of the defendant. This may well have led the complainant's mother to mistakenly conclude that the blow contacted her face rather than the cigarette.
11. Counsel for defence suggested that the act of slapping a cigarette out of the mouth of the complainant did not amount to an assault because the blow connected the cigarette rather than the complainant. I disagree. In circumstances where the cigarette was in the mouth of the complainant and the defendant's blow caused the cigarette to fall out of her mouth it is my view that the conduct constitutes an assault in the form of an indirect application of force. Having said this, I find that the first aggravation of count 2 - that is - that the defendant caused *harm* to the complainant is not made out.
12. I find that count 2 is made out with a sole aggravation that Mr Roe was a male and the complainant a female.

Count 3 Aggravated assault upon complainant on 11 March 2023

13. The prosecutor provided particulars of this charge as being the instance where the defendant pulled the shirt and shorts of the victim.

14. The complainant gave evidence of the encounter as follows: *"As I was walking up stairs he grabbed me by the back of my shirt and shorts. He's gone to pull me and said "Come! Come!" and I hit his hand away and got free." She said "I was on the fifth stair when he pulled me by the shirt. I was able to remain standing up."*
15. The complainant's mother's account was largely similar. She maintained that the defendant *"grabbed the back of her shorts and pulled her down the stairs. She was walking upstairs and he grabbed the back of her pants. She sort of stumbled down the stairs"*.
16. Counsel for defence noted a difference between the accounts, that is, that the complainant maintained that she remained upright while her mother suggested that she stumbled down the stairs. In my view the distinction between the accounts was not significant. I accept, on the basis of the two accounts, that the defendant grabbed the back of the complainant's shirt and shorts and pulled her while saying *"come!" Come"*. I make no finding as to whether she stumbled. I accept that the complainant remained upright.
17. I accept the complainant's account that she did not give the defendant permission to pull at her clothing. On that basis, I find the assault is proved. I find no evidence of the first aggravation of harm. I find the second aggravation – male/female proved. I find the third aggravation that the complainant was unable to defend herself not proved. Notwithstanding the fact that the defendant pulled her from behind she was able to hit his hand away and get free. In fact, she was able to defend herself and she did so.

Count 4 Intentionally choking, strangling or suffocating the complainant on 11 March

18. This charge was particularised as the defendant *"putting his hands around the throat of the complainant and squeezing"*.
19. The complainant gave evidence that the defendant grabbed her by her neck and said *'I wanna hurt you'*. She elaborated that *"He was in my face and then he grabbed my neck. I grabbed him back by the throat and it took seconds. After he choked me he ran downstairs and I followed swearing. He turned and I ran upstairs and he chased me."*
20. It was put to the complainant that the defendant was touching her shoulders rather than her neck. She rejected this. It was put to her that she was confused or mistaken and she rejected this too. She emphatically maintained that the defendant had *"choked"* her.
21. It was then put to the complainant that the defendant only grabbed her throat for 1-2 seconds. The complainant maintained that it took as long as 5 seconds.
22. In re-examination the complainant further clarified that the defendant's grabbing of her *"was hard"*; that is was *"by the throat"* and that *"there was strength to it"*.
23. The complainant's mother described the incident in the following way: *"Chris stood behind her with his hands around her throat. He looked like he was trying to lift her by the neck."*
24. The evidence of the complainant was unembellished and compelling. She maintained her account and was unshaken in cross examination. Again, the complainant's mother's evidence differed in some details but was largely consistent. Where differences occur I prefer the evidence of the complainant.

Legal argument on the definition of s186AA(4) *Criminal Code (NT)*

25. During closing submissions counsel for the defendant submitted that the definition of “*choking, strangling or suffocating*” requires the prosecution to prove that the defendant impeded the complainant’s breathing. Counsel relied on the ACT case of *R v Green*¹ where it was held that the elements of “choke”, “suffocate” and “strangle” are constituted by the stopping of breath. Counsel for defence submitted that as the complainant had not alleged a loss of breath or even an impediment to her breathing, the charge had not been proved.
26. The prosecutor pointed to the definition found in s186AA(4) of the *Criminal Code (NT)* to argue that the case of *R v Green* is not applicable in the NT. The definition in ss (4)(a) provides “*applies pressure to any extent to the person’s neck*”. The prosecutor submitted that a plain reading of the subsection establishes that an impediment to breathing or airways is not an element of the charge.
27. Defence counsel argued that more must be read into the definition because it would be absurd if even the lightest touch to any part of a person’s neck could satisfy the provision.
28. The NT Supreme Court has not considered the specific provision and the Court adjourned to allow parties to file written submissions.
29. The parties filed well-considered and researched submissions. The prosecutor submitted that the list comprising the definition of “*chokes, strangles or suffocates*” must be read disjunctively and interpreted broadly.
30. The section defines chokes, strangles or suffocates in four wide categories:
 - a) Applying pressure to any extent to the neck of another person’s 186AA(4)(a). This would include using an implement such as a rope or pole on the neck or squeezing the neck with hands;
 - b) Obstructing a person’s respiratory system or accessory system 186AA(4)(b). This would include covering the mouth or nose of a person with an implement or hands;
 - c) Interfering with the operation of a person’s respiratory system 186AA(4)(c). This would include placing a weight on a person’s chest;
 - d) Impedes to any extent the person’s respiration 186AA(4)(d). This is a catch-all definition and may include restricting access to oxygen within a place or intoxicating or applying chemicals to impede a person’s respiration.
31. I agree that the section’s wording strongly suggests that the definition is disjunctive. In particular:

¹ *R v Green (No 3)* 344 FLR 324.

- a) The definition of the phrase “*chokes, strangles or suffocates*” starts with the word “includes”, indicating that the list is non-exhaustive and can include conduct not included in the definition itself;
 - b) The legislature has drafted the provision without the word “and” between each paragraph indicating that the legislature did not intend a conjunctive reading; and
 - c) The subparagraphs (b)(i) and (c)(i) end with the disjunctive “or”.
32. The prosecutor further contended that a disjunctive reading of the section does not give rise to absurdity or unreasonableness because conduct such as gentle touching or stroking of the neck would not be an offence ordinarily in a domestic relationship as that conduct would generally be consensual or would amount to contact occurring through the ordinary course of life. In any event, the prosecution would still need to prove an absence of consent and knowledge or recklessness as to that lack of conduct.
33. The prosecutor noted that a construction of the section requiring that a person’s breathing is actually restricted does not promote the purpose of specifically criminalising high-risk behaviour in a domestic relationship. Conversely, a construction that includes a broad range of conduct, including conduct that may not be ordinarily seen as choking but that still carries risk to a person’s respiratory system does support the purpose of the provision. Furthermore, if the legislature had intended the provision to incorporate only actions that impede breathing then the words about applying pressure “to any extent” would not have been included. Rather, ss(4)(a) would read something like “*applying pressure to the neck of the person to the extent that breathing is impeded.*”
34. In the present case, in circumstances where the complainant specifically used the word “choke” in her description of the defendant’s action; where she described his “grabbing” of her throat as “hard”; and where she stated that there was “strength to the grab” I am satisfied that the defendant’s conduct constituted a choke as set out in s186AA. I therefore find the defendant guilty of this charge.
35. Finally I note that while tendency evidence was relied upon by the prosecution in this case, it has not been relevant to my decision making in circumstances where the complainant’s evidence was accepted.
-