CITATION:	*Police v David (Lurnpa Tjambatjimba) Cole* [2024] NTLC 10
PARTIES:	Police v David (Lurnpa Tjambatjimba) Cole
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CRIMINAL
FILE NO(s):	22204351
DELIVERED ON:	18 October 2024
DELIVERED AT:	Darwin
HEARING DATE(s):	27 August and 14 October 2024
DECISION OF:	Judge Greg Macdonald

CATCHWORDS:

Assault – Evidence – Investigation – Disclosure – Decision to prosecute – s 31 Criminal Code – Intent or foreseen as possible - s 188 Criminal Code – 'touching' without consent – s 200 Criminal Code – Threaten detriment to hinder.

Criminal Code s 188 (1) and (2) a
Local Court (Procedure) Act, ss 60AB, 60AE, 60AF, 60AJ and 60AK

Petty and Maiden v The Queen [1991] HCA 34
Keeley v Brooking (1979) 143 CLR 162 at 169
The Queen v Dookheea [2017] HCA 36 at [36] and [41].
R v Murray (1987) 11 NSWLR 12.
Pregelj v Manison (1987) 51 NTR 1
Watson v Trenerry; Williams v Trenerry [1998] NTCA 22
Collins v Wilcock (1984) 3 All ER 374

REPRESENTATION:

Counsel:

Police:	Mr B Morgan
Defendant:	Mr B Fernandez

Solicitors:

Police:	Office of the DPP
Defendant:	NT Legal Aid Commission

Decision category classification	B
Decision ID number:	[2024] NTLC 10
Number of paragraphs:	21

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

No. 22204351

BETWEEN:

POLICE

Applicant

AND:

DAVID (LURNPA TJAMBATJIMBA) COLE

Defendant

REASONS FOR DECISION

(Delivered 18 October 2024)

JUDGE MACDONALD

Background

1. On 9 December 2021 an incident occurred proximate to the front door of the Local Court at Darwin. That incident involved the Defendant (Lurnpa) and a person carrying out their duties as a photo-journalist, known as A.

2. On that day A was sitting on one of the large spherical stone bollards affixed approximately 4 metres from the entrance to the Local Court, and saw Lurnpa walking down Harry Chan Avenue towards that entrance. He was known to A and the evidence was that A's role in employment included to obtain photographs of persons attending court for matters on which the NT News was reporting. Regardless of the various perspectives discussed below, A was undoubtedly carrying out their duties as an employed photojournalist on 9 December 2021 when they sought to take photographs of Lurnpa as he approached the entrance to the Local Court. Upon seeing A ready their large camera for its purpose, Lurnpa first sought to obscure his face with a water bottle, and then produced a mobile phone and appears to seek to commence recording A from a distance of approximately 6 metres.

3. Lurnpa then advanced on A, who remained seated on the stone ball. It is noted that A's oral evidence included him stating that the phone footage was being broadcast on social media, so

recorded to that extent.[1] The prosecution case did not include any downloads from any platform, however Lurnpa adduced the recording in evidence in his defence. The content is particularly telling, and it is regrettable that the footage (which included clear audio) was not obtained by the investigator as part of the clearly relevant evidence in the matter.

4. Some of the evidence given by A also referred to their attendance at the Darwin Police Station shopfront or public counter in Knuckey Street, at which time Lurnpa was also present. The prosecution had not particularised that aspect as comprising any part of the contraventions comprising the proceeding. Although that public space is almost certainly under CCTV surveillance, no such footage was placed before the court and nor was any evidence led from any person who may have witnessed that interaction. Some evidence indicated that the counter was not staffed, however it is possible that more than the Complainant and Defendant were present. The relevant CCTV could certainly have been of assistance. There was also the matter of the investigator's statement referred to below. Presumably the ODPP reviewed the decision to prosecute at some point during the proceeding. However, no such review could properly be carried out unless and until all relevant evidence comprising the prosecution brief was to hand. That juncture was never reached.

5. The incident at the courthouse entrance involved both oral and physical interaction between Lurnpa and A, and resulted in 3 charges being laid. Namely, unlawful assault contrary to s188(1) and (2) of the Criminal Code (Code), being aggravated by allegations that Lurnpa was male and A was female and that A suffered harm. Second, that Lurnpa unlawfully assaulted A who was working in the performance of their duties at the time, contrary to s188A(1) and (2)(a) of the Code, aggravated by an allegation that A suffered harm. Thirdly, that the Defendant had threatened to injure or cause detriment to A with intent to prevent or hinder them from doing an act they were lawfully entitled to do, contrary to s 200 of the Code.

6. On 27 August 2024 Lurnpa pled not guilty to the three charges and a contested hearing ensued. No witness list was provided to the court, although it appeared that the Defendant's counsel was aware of what witnesses the prosecution proposed. Oral evidence was given to the court by A. An investigating police officer might also have been called, however no statement from that officer had been provided to the Defendant. It was noted that the charges were approaching three years of age, and that the hearing on 27 August 2024 was the second occasion on which the matter had been listed for hearing. Also, that the hearing had been listed for some considerable period of time. Some evidentiary issues arising in the investigation are referred to below.

Evidence and findings

7. The evidence comprised sworn evidence from Complainant A, together with 11 photographs taken by A of Lurnpa firstly approaching them, then recording their interaction on his phone, then departing into the Local Court. In addition to those photographs was CCTV footage from the front of the Local Court and footage recorded by Lurnpa on his mobile phone.

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[1] It is understood that Complainant A's statement to the investigating member of NT Police also included advice that the footage being made was being live-streamed to the internet.

8. The Defendant did not give evidence, as is his right.[2] The Crown bears the onus of proof from beginning to end, to the standard of beyond reasonable doubt.[3]

9. The Crown case did not include the video recording made by Lurnpa on 9 December 2021, despite that the investigator may have surmised that the footage was destined for the Internet. The court also declined to receive any oral evidence from the investigator, in circumstances where a brief service order had been made in February 2022, but no statement of evidence from that officer had ever been disclosed to the Defendant.[4]

10. It must also be noted that, in accordance with the 1987 NSW Court of Criminal Appeal authority of *Murray*, where the prosecution case rests solely on the evidence of one witness, so is not corroborated by any other witness, "… *the evidence of the that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in*".[5]

11. Despite suggestions of the Complainant and the prosecution that the copy of the mobile phone recording of the interaction is incomplete, on my viewing the material and relevant portion of the CCTV runs from 22:21 to 23:51, being one minute and thirty seconds. The mobile phone footage runs for one minute and twenty-seven seconds. The small difference in length is readily explicable by the point of commencement and cessation of the mobile recording. There is nothing to indicate that the mobile phone footage has been edited or altered, and I consider it genuinely depicts the interaction of Lurnpa with A virtually from beginning to end. That includes through audio recording.

12. On examination of the CCTV and mobile phone footage, it is clear that Lurnpa was concerned at a media representative taking his photograph, with the attendant consequence of it then being published in connection with reporting. Lurnpa's retort was to respond in kind, including to say while recording; "*I'll publicise you as much as you'll publicise me*".[6]

13. Contrary to his counsel's suggestion, it is not the case that Lurnpa was "*annoyingly polite*" in his interactions with A. He was annoyed and sought to fight fire with fire, including by being confrontational in his mobile recording and communication with A. Ultimately, he also made contact with A's ID Card, being worn on their person.

14. However, significant inconsistencies existed as between the CCTV and mobile phone footage on the one hand, and the sworn evidence given by the sole prosecution witness, Complainant

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[2] *Petty and Maiden v The Queen* [1991] HCA 34 per Dawson J at [14], [15] and [21], and Gaudron J at [16].

[3] *Keeley v Brooking* (1979) 143 CLR 162 at 169, and *The Queen v Dookheea* [2017] HCA 36 at [36] and [41].

[4] Despite that no civilian witness is under any obligation to provide a written or sworn statement to an investigating officer, I consider investigating officers are obliged to reduce what would be their evidence to writing on oath for the purpose of disclosure. That conclusion is supported by contemporary axioms concerning essential ingredients of a fair trial. There is also ss 60AB, 60AE, 60AF, 60AJ and 60AK of the *Local Court (Procedure) Act*, and s 60AP and Practice Direction 16.3 (which were not complied with), and the direction made by the court in February 2022. The Director's Guidelines are also relevant.

[5] *R v Murray* (1987) 11 NSWLR 12.

[6] Exhibit D3.

A on the other. Those inconsistencies arose in both evidence in chief, and cross examination, and including having regard to A's original statement to the investigating member of NT Police.

15. The Defendant did not at any time during his interaction with A say "*I'll come for you*". Nor did he 'grab' A's ID card; or 'pull it towards him'; or "*grab*" A's leg. Nor did Lurnpa during his interaction with A say any "*transphobic things*", let alone 'repeat' them or excrate "*multiple times over*", during his interaction with A at the relevant time. A's evidence descended into some specifics in that regard, which are unnecessary to detail.[7]

16. Although it generally goes without saying, contrary to their evidence, A did not tell Lurnpa "*Don't touch me*" prior to him seeking to record their Identity card.[8] Nonetheless, the Defendant had no right to make contact with the Complainant's ID Card as the mobile footage shows he did, and does not to condone his failure to ask A to identify themselves by showing him the ID Card. It can confidently be found to the necessary standard that A did not consent to any physical contact from the Defendant whatsoever.

17. In relation to the significant inconsistencies referred to, the CCTV and mobile phone video are contemporaneous and reliable evidence. What Lurnpa did seek to do was confront A by recording them on his mobile phone and to ascertain and broadcast A's identity in doing so. The mobile phone footage shows that, in that process, Lurnpa placed his mobile phone close to A's ID Card, which was attached to their waist and sat to the right of their groin. It is clear from the mobile video that some contact was made with the ID Card, apparently in order to record its content.

18. What is not clear is whether Lurnpa's hand or mobile phone made actual contact with A's body, or simply the ID card. I do find that, contrary to the premise put at hearing, Lurnpa did not grab A's leg. It was his right hand or mobile or both which made contact with at least the ID Card. Regardless that the mobile video is inconclusive, the CCTV shows that the Defendant's right hand had hold of the phone at all times, so could not have also "*grabbed*" A's leg.

19. The allegations of offending are not to be determined on the basis of the sworn evidence led at hearing. Even having regard to the mobile phone footage, there is a lack of acceptable evidence that Lurnpa committed an assault on A as alleged by counts 1 or 2. It is reasonably possible that his hand or phone made contact with A's ID Card but not their person, including inadvertently, with consequential contact between the ID Card and A.[9] Having regard to s31 of the Code and the elements of assault, and despite that I consider it proven beyond reasonable doubt that Lurnpa's actions were not "*reasonably needed for the common intercourse of*

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[7] The particularly malignant and transphobic term attributed to Lurnpa was not used by him at any time during the mobile phone recording. It would be inappropriate and unfair to surmise or speculate on any other possibilities, given the absolute paucity of independent evidence of any other interactions alleged on 9 December 2021. Certainly no inference could be drawn.

[8] *Collins v Wilcock* (1984) 3 All ER 374 at 378; "*The fundamental principle, plain and incontestable, is that every person's is body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery*", approved by the High Court in *Marion's Case* (1992) 175 CLR 218. It may also be noted that some degree of malevolence, molestation or *mala fides* would ordinarily accompany a conviction, such as to attract the interference of the criminal law.

[9] It is noted that s 187 only requires, as a minimum, an "*indirect application of force*".

life", in my conclusion the contact is not proven beyond reasonable doubt to amount to an assault in the circumstances. That is even having regard to 'foreseen as a possible consequence'.[10]

20. Similarly, count 3, 'threatening to injure or cause detriment', is not proven beyond reasonable doubt. It is noted that Lurnpa was not prohibited by the *Surveillance Devices Act* from recording the public situation, and the court was not referred to any legal proscription in relation to broadcasting public interactions on the internet. Most relevantly, despite that aspects of his communication may be characterised as diatribe and potentially detrimental to A, the Defendant is not proven to have contravened the criminal law to the necessary standard by acting and speaking in the way he did.[11] It is not the court's function in the proceeding to consider potential civil legal issues.

21. If my conclusions in relation to the charges were in error, I would nonetheless proceed to determine the charges under s10 of the *Sentencing Act* in the circumstances. That includes having regard to the investigation or otherwise, and the evidence adduced at hearing.

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[10] See *Pregelj v Manison* (1987) 51 NTR 1 and the discussion of the variable demands of s 31 depending upon the elements of offence in *Watson v Trenerry; Williams v Trenerry* [1998] NTCA 22 at pp 26 to 31.

[11] Perhaps the closest the Defendant came to the threats proscribed by section 200 of the Code was to state; "*I'll publicise you as much as you'll publicise me*" and "*This is going live … We'll put it out anyway, and show you for the criminals you are.*"