

CITATION: *Police v Christopher John Hewitt* [2011] NTMC 019

PARTIES: Police
v
Christopher John Hewitt

TITLE OF COURT: Youth Justice Court

JURISDICTION: Criminal

FILE NO(s): 21017561

DELIVERED ON: 1st June 2011

DELIVERED AT: Darwin

HEARING DATE(s): 7th and 8th March 2011 and 11th May 2011

JUDGMENT OF: Ms Fong Lim

CATCHWORDS:

Criminal law – intention to commit an offence – common purpose- Sections 8 and 214 of Criminal Code (NT)

REPRESENTATION:

Counsel:

Plaintiff: Mr Dalrymple
Defendant: Mr Adams

Solicitors:

Plaintiff: Director of Public Prosecutions
Defendant:

Judgment category classification: C
Judgment ID number: [2011] NTMC 019
Number of paragraphs: 70

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

No.

BETWEEN:

Police
Plaintiff

AND:

Christopher John Hewitt
Defendant

REASONS FOR JUDGMENT

(Delivered 1st June 2011)

Ms FONG LIM SM:

1. Mr Hewitt faces several charges arising out of an incident in the early hours of the morning on the 22nd May 2010. Mr Schaper and his girlfriend Ella Melliush attended a 21st birthday party on the evening of the 21st May 2010. They were leaving the party after midnight and there was an altercation between Mr Hewitt and Mr Schaper and Ms Ella Melliush. The circumstances of that altercation are in dispute. At about 4:30 am that morning Mr Hewitt and three or four other young men went to the residence of where Mr Schaper and his girlfriend were living to confront Mr Schaper. The residence was the residence of the Melliush family.
2. While at the Melliush residence there was a physical struggle between Mr Melliush and Joseph Hewitt and some physical contact between Mr Chris Hewitt and Mr Schaper. The circumstances of the physical contact and Mr Chris Hewitt's involvement on that morning are in dispute. There was also some physical contact with Ella Melliush and the circumstances of that contact are also in dispute.

3. Mr Chris Hewitt is charged with :
 1. Unlawful entry of a building with the following circumstances of aggravation:
 - a. With the intention to commit a simple offence namely assault
 - b. That building was a dwelling house
 - c. The entry was at night
 2. Unlawful entry of a dwelling house and unlawful damage property in that dwelling house being glassware.
 3. Assault upon Aaron Schaper
 4. Assault upon Ella Melliush with the circumstances of aggravation:
 - a. She was a female and he was a male
 - b. She suffered harm
 5. Unlawful damage property being a side mirror of the vehicle
 6. Unlawful damage property namely glassware.
4. At the end of the prosecution case the prosecutor withdrew charge 6.
5. The Court heard evidence from Aaron Schaper, Ella Melliush, Karlie Melliush (sister of Ella), Paul Melliush (father of Ella), Densil Butler, and attending police officers. Defence called evidence from Mr Christopher (Chris) Hewitt and Mr Booth.
6. The issues to be determined are:
 - a. was there an unlawful entry into the Melliush house
 - b. was the unlawful entry with the intention of committing an assault
 - c. was glassware broken during the unlawful entry of the house

- d. did Chris Hewitt damage the side mirror of Mr Schaper's car
 - e. Did Chris Hewitt assault Mr Schaper by applying force to him without his consent
 - f. Did Chris Hewitt assault Ella Melliush by applying force to her without her consent and resulting in her suffering harm.
7. There is no issue that there was an entry of a dwelling house at night.
 8. This is a matter where the reliability or otherwise of the witnesses is at issue. The evidence of what happened at the party and later at the morning is not consistent between the witnesses for the prosecution and the reliability of those witnesses has to be questioned given those inconsistencies. On the other hand the evidence of Mr Chris Hewitt, his explanation of why he went to the residence, and what happened there even though partly corroborated by Mr Booth is also questionable.
 9. **Hewitt's credibility.** Mr Chris Hewitt gave evidence and some of his evidence was corroborated by Mr Booth and Mr Butler. If I am satisfied as to the reliability of Mr Hewitt's evidence then I could not be satisfied beyond a reasonable doubt that any of the offences are made out. If I am not satisfied as to the reliability of Mr Hewitt's evidence then I still have to consider whether I am satisfied beyond a reasonable doubt on the balance of the evidence before me as to each of the elements of the offences.
 10. Mr Hewitt gives evidence that he arrives at the party at Gulnare Road at about 1:30 -2:00am after attending at another party, he denies he was drunk. He says he was in the carpark talking to some mates when Ella Melliush attacked him for no reason. He can remember her screaming but does not remember what she was saying. He says Mr Schaper, "Chopper" then raised an iron bar at him threateningly. That is when Densil Butler intervened and then both Ms Ella Melliush and Mr Schaper jumped into the car and left. This part of his evidence is corroborated by Mr Butler. Both Ms Ella

Melluish and Mr Schaper deny attacking Mr Chris Hewitt or the use of an iron bar.

11. Mr Chris Hewitt says does not know what would have caused Mr Schaper to raise an iron bar at him. Mr Hewitt was being conveniently vague about his dealings with Mr Schaper and cannot be believed about not hearing what was being screamed at him by Ms Melluish given she was close enough to be holding his shirt and he was apparently sober.
12. Mr Hewitt's evidence of what transpired at the Melluish's residence is implausible. He admitted he was upset by the unprovoked attack upon him by Mr Schaper and told Cameron Corp about it. Cameron Corp told his brother Joseph Hewitt about the incident. Joseph Hewitt made the decision to go to the Melluish's place to "talk it out" with Chopper. Mr Chris Hewitt was steadfast that they were only going to talk to Mr Schaper and there was no intention to use physical force. When they arrived they were invited in by Karlie Melluish, The invite constituted by her going into the house and allowing them to follow her. He says at that stage there were no raised voices. He says Mr Paul Melluish "came flying out" and had a tussle with Joseph Hewitt while others looked on.
13. Hewitt says when he and Mr Booth saw Mr Schaper come out of the bedroom he had a quick tussle with Mr Schaper and then Mr Schaper threw himself to the floor in a foetal position. Mr Booth confirms this evidence. None of the other witnesses see Mr Booth there even though it is clear all of the younger people involved knew each other through school or socially.
14. So much of Hewitt's evidence is unbelievable and fanciful. He says they were all talking at a normal quiet tone. Paul Melluish's evidence is that he was woken up by screaming and shouting and he went out to investigate. That is consistent with him coming "flying out" as described by Mr Hewitt, there would be no reason for him to do so if those who were there were talking in the normal quiet tones described by Mr Hewitt.

15. It is unbelievable and even fanciful that Mr Hewitt and his brothers and friends were going to the residence of Mr Schaper at 4:30 in the morning, knowing it was most likely everyone would likely be in bed, to have a “talk” about their issues. Mr Hewitt admitted he was angry about the attack upon himself at the party. He was apparently sober and while he did not seem to be the most intelligent of people Mr Hewitt would no doubt have known that any “talk” was most likely going to include some very strong verbal persuasion for Mr Schaper to stop spreading rumours or some reprisal for what happened at the party. If only a talk was intended why would it have been necessary for all of them to go to Mr Schaper’s house in the early hours of the morning. Mr Joseph Hewitt could have entered the house alone while others waited outside. Mr Hewitt was being coy about the purpose of his group being at the residence. In any event in the normal course of what is generally socially acceptable, arriving unannounced at someone’s house at that time of the morning to talk about your disagreements is not acceptable.
16. It is unbelievable and even fanciful that Mr Schaper would have thrown himself to the ground curled up in a foetal position with no cause. Why would he place himself in a vulnerable position if there was a threat of violence to him or if Mr Schaper had no cause to feel threatened why would he have placed himself in that position at all. All of the Melluishes and Mr Schaper say the reason he curled up in that fashion was that he was set upon by at least two people.
17. While I find Mr Hewitt can be believed about uncontroversial details I find his evidence as to the altercation at the party, the purpose of the visit to the house, the method of entry to the house, the level of voices in the questioning the whereabouts of Mr Schaper and his involvement with Ms Melluish and Mr Schaper to be unreliable. Mr Booth’s corroboration of Hewitt’s evidence must also be disbelieved Mr Booth has admitted to being a good friend of Hewitt and he has corroborated an implausible scenario which cannot be accepted. None of the other witnesses who knew Mr Booth

see Mr Booth there that night. Mr Melliush, who does not know the young men, was at one stage uncertain how many young men were at his house that night but does at one stage believed there to be five young men. It is understandable there could be some confusion on behalf of Mr Melliush given he has been woken up in the early hours of the morning there are strangers in his house and he almost immediately gets involved in a physical altercation with Joseph Hewitt, however Ella and Karlie both know Mr Booth and do not see him there that night. Unless I find Ella and Karlie totally unreliable in their evidence I cannot be satisfied Mr Booth was present that night.

18. Even if I accept Mr Booth was present on the night I cannot accept as believable that Mr Schaper when faced with a group of aggressive young men would place himself in that vulnerable position of a foetal position on the floor. I disbelieve Mr Hewitt and Mr Booth on that issue. It then follows the balance of their evidence must also be viewed with caution.
19. One other matter which casts a doubt on the reliability of Mr Hewitt as a witness is the cross examination of Mr Schaper. There was vigorous cross examination about Mr Schaper past drug offences and what could have caused ill will between the Hewitts and Mr Schaper. The allegations put to Mr Schapper were denied and he positively denied any discussion of past issues with the Hewitts that night. There was also some cross examination of Mr Melliush as to his alleged approaches to the Hewitt family for \$8000 compensation for damages, those approaches were denied by Mr Melliush
20. When Mr Hewitt gave evidence he did not mention either any conversation with Mr Schaper or claims for compensation from Mr Melliush. The Court can assume defence counsel would not have cross examined on those issues without instructions and Mr Hewitt's failure to give evidence of those matters would suggest that they were either untrue or not of great

importance to him that he forgot, either way his reliability as a witness is clearly not strong.

21. Defence counsel submitted I should not make much of this inconsistency from Mr Hewitt because it really didn't matter why there was bad blood between the parties however that attitude was clearly not reflected in his vigorous cross examination of Mr Schaper.
22. I find Mr Hewitt to be an unreliable witness who was willing to tell part truths as to what happened on then night to lessen his culpability for what happened.
23. While I have found Mr Hewitt and his friend Mr Booth unreliable in their evidence and I reject their evidence as to what happened at Doxas Road residence I must still consider whether I can be satisfied beyond a reasonable doubt as to elements of each offence based on the balance of the evidence.
24. **Did Hewitt unlawfully damage the side mirror of Mr Schaper's car?** Mr Schaper gives evidence of leaving the party when he suffered an unprovoked verbal attack by Mr Chris Hewitt. He says he and Ella then got into his vehicle via the passenger door and reversed the car away. During the reversing he says Mr Hewitt holds onto the side mirror of the car damaging it while doing so, he also punches the window of the car and kicks the door causing a dent. This is corroborated by Ella Melluish. Mr Hewitt denies ever coming into contact with the car because Densil Butler intervened. Densil Butler says he saw Ella Melluish attack and yell at Mr Hewitt and he intervened to move Mr Hewitt away. It was at that time he turned to see Mr Schaper with an iron bar in his hand. He does not see the bar ever raised in a threatening manner. He confirms Mr Hewitt did not touch the car. There is nothing in Mr Butler's evidence which is internally inconsistent and he gave his evidence in a straight forward and honest manner. Mr Butler is an

independent witness and where his evidence conflicts with others I place more weight on his evidence.

25. Ms Karlie Melliush confirms her sister's and Mr Schaper's evidence that Hewitt grabbed the mirror and punched and kicked the car however there are doubts about her reliability which I will discuss later in this judgement.
26. The objective evidence of the actual damage to the mirror does not support the claim that Mr Hewitt damaged it by hanging onto it while Mr Schaper was reversing. The photos of the damaged mirror shows it to be cracked but in a position which does not suggest it had been held onto but Mr Hewitt while Mr Schaper was reversing. Mr Schaper agrees the mirror had not been readjusted by him.
27. Mr Schaper claims the damage to the vehicle was not there when he went to the party. However there was a period of time when the vehicle was not within his sight and the mirror could have been damaged then.
28. It is clear from the evidence of Mr Butler that Mr Schaper and Ms Melliush were not subject of an unprovoked attack by Mr Hewitt and their evidence about that must be rejected. Ms Melliush accepts Mr Butler was present and that he was one of the people pulling Mr Hewitt away.
29. Ms Karlie Melliush did not witness anything leading up her sister and Mr Schaper being in the car so her evidence is of no assistance on this issue.
30. I reject the evidence of Ms Ella Melliush and Mr Schaper regarding what happened when they were leaving the party and find that given what happened later that night it is more plausible there had been some action by them at the party leading to Mr Hewitt and others attending their residence later.
31. I find that Mr Hewitt, Mr Schaper and Ms Ella Melliush were all involved in an altercation part of which included Ms Melliush pushing Mr Hewitt to the

chest, and Mr Schaper having an iron bar in his hand. I cannot be satisfied beyond a reasonable doubt, given the evidence of Mr Butler, that Mr Hewitt attempted to stop them leaving by holding onto the mirror of the vehicle and even if I could, I cannot be satisfied the damage to the mirror was caused by Mr Hewitt.

32. Mr Hewitt must be found not guilty of Charge 5.

33. **Was there an unlawful entry with intent to commit an offence?**

“Unlawful” is defined in the Criminal Code as “without authorisation, justification or excuse”. Was the entry of the residence at Doxas road unlawful? It is alleged there was damage to the door opener and dents to the body of the door which would indicate the entry was forced and unlawful. However none of the witnesses heard any banging or loud noises prior to the young men entering into the house. Karlie Melliush who was the only witness observing the men enter her home did not mention and kicking of the door or loud noises. Paul Melliush, Ella Melliush and Mr Schaper did not hear any noises before some shouting and calling of “where is Chopper”. The damage to the door alleged could only have been caused by force and it would be expected that force would be accompanied by some noise.

34. Mr Paul Melliush did not think that the door was locked that night or in fact that the door was capable of being locked that night. It is entirely possible that the men entered the building without any force at all. I therefore cannot be satisfied beyond a reasonable doubt that there was any damage to the door during the entry to the building.

35. Even if the damage was not done in the entry the entry could still have been unlawful. There is no evidence that there was express permission to enter the premises. The only evidence supporting implied permission is from Mr Hewitt and Mr Booth that Ms Karlie Melliush led them into the house.

36. Ms Melliush says that a car followed her into the driveway and after both cars had parked she was approached by Joseph Hewitt who aggressively demanded to know “where is Chopper”. She claims when he was not satisfied with her response he put his hand up to her throat and pushed her back with force. He then left her and walked quickly to the house to which he gained entry. The other men followed Joseph into the house yelling “where’s the fuck is Chopper”.
37. Ms Melliush’s evidence is contradicted by both Mr Hewitt and Mr Booth who suggested that Ms Melliush opened the door for them. Again the scenario suggested by Mr Hewitt and Mr Booth is unbelievable. It defies belief that Ms Melliush would invite four young men, who had been drinking, into her home at 4:30am knowing there had been an altercation a couple of hours earlier between one of them and the person they were seeking.
38. It is highly unlikely and implausible that she would have invited them in when they had demanded to know where “fucken Chopper was” even if that request was not accompanied by a threat to her own personal safety. I do not accept the Defendant’s evidence that he felt he had been invited in because they just followed Ms Melliush into the house. I find that they were intent on finding Mr Schaper and entered the building without permission. Their entry of the building was unlawful.
39. **Was there an intention to commit an offence?** Mr Hewitt was adamant, and not shaken in cross examination that they were at the house to “talk” to Mr Schaper. While I have rejected that as a plausible explanation I cannot be satisfied beyond a reasonable doubt that at the time of entry of the house Hewitt and his brother’s and friends were intending to assault Mr Schaper. On the evidence available the shouting for “Chopper” and the time of the morning and what had happened earlier that morning I could be satisfied I can even be satisfied beyond a reasonable doubt that it was reasonably

foreseeable that an assault may occur but that is not sufficient to establish and intention to commit an assault at the time of entry.

40. With the assistance of section 214(3) of the Criminal Code if I find there was an unlawful entry (that is entry without authorisation, justification or excuse) that is evidence of an intention to commit an offence. However I must still be satisfied beyond a reasonable doubt that at the time of the entry there was an intention to assault Mr Schaper or any other offence.
41. The evidence I have in support of a finding the of intention to commit an offence is my finding of unlawful entry, the operation of section 214(3) and the circumstantial evidence that the unlawful entry was in the early hours of the morning at a residence the men had not been invited to, the intention to find Mr Schaper with whom they clearly had a dispute with and the aggressiveness which they used to find Mr Schaper.
42. While there is also of a possible assault on Mr Schaper all of the evidence together does not support a finding beyond a reasonable doubt that there was an intention to assault at the time of entry.
43. Mr Hewitt must be found not guilty of Charge 1.
44. **Was there damage to glassware out of the unlawful entry?** The Melluishes give evidence that there was some smashed glass on the floor after the incident, some remember hearing smashing glass. The residents of the house all remember glassware being on the bar before the incident and glass on the floor after. I am satisfied beyond a reasonable doubt that the glassware was broken during the unlawful presence of Mr Hewitt and his group.
45. While there are some inconsistencies in the evidence there are none regarding this issue. I find I am satisfied beyond a reasonable doubt Mr Paul Melluish challenged Mr Joseph Hewitt about his presence there was a physical altercation between Joseph Hewitt and Paul Melluish during which some glassware had been dislodged from the bar area and broke.

46. Prosecution advised at the outset that they would be most likely would be relying on a common purpose argument for criminal responsibility of Mr Chris Hewitt in relation to any damage of the property.
47. The combination of the operation of section 226B and Section 8 of the Criminal Code is clear. If I find that a group of offenders formed a common intention to unlawfully enter a premises and there has been damage to the premises or property on the premises. If each of them could have reasonably foreseen that a consequence of their unlawful entry would be the damage to some property then they are criminally responsible for the co – offenders actions in damaging that property.
48. In this case I am satisfied beyond a reasonable doubt that Mr Hewitt and his group formed a common intention to unlawfully enter the residence at Dexas Road and that in doing so Mr Hewitt ought to have reasonably foreseen that their uninvited entry into the premises to confront with Mr Schaper could end in property being damaged given all of the circumstances.
49. On that basis Mr Hewitt must be found guilty of Charge 2.
50. **Was there an assault upon Aaron Mr Schaper?** The Defence counsel submitted I should not be satisfied as to the reliability of Mr Paul Melliush's, Ms Ella Melliush's, Ms Karlie Melliush's and Mr Schaper's evidence and if I cannot be satisfied as to that reliability then it cannot prove beyond a reasonable doubt that Mr Hewitt assaulted Mr Schaper that night.
51. Mr Schaper's evidence is that he is woken by screaming and shouting "where's Chopper" he comes out of the bedroom and is almost immediately set upon by Mr Chris Hewitt, he is thrown to the ground and while on the ground being punched by Mr Chris Hewitt he hears Mr Corp join in on the assault. He cannot tell who is actually punching him but says he feels lots of blows to his head and back and has the perception that Ella is there trying to

pull them off him. He says he suffered bruising to his back out of the assault but did not need to go to the doctor.

52. All of the prosecution witnesses have Mr Schaper on the floor in a foetal position while being beaten up by Mr Hewitt and Mr Corp. Mr Hewitt agrees Mr Schaper was on the floor in a foetal position but says he did not throw him there. For the reasons set out above I do not believe Mr Hewitt on how Mr Schaper came to be on the floor.
53. Mr Paul Melliush sees Mr Schaper on the floor with two men punching and kicking him. Karlie Melliush also sees kicking, Ms Ella Melliush, who was the closest to Mr Schaper does not see any kicking she observes Mr Hewitt and Mr Corp laying into Mr Schaper with punches. Mr Schaper describes being punched. Mr Melliush and Ms Karlie Melliush are clearly exaggerating what they saw.
54. I have found Ella Melliush, Mr Schaper and Karlie Melliush unreliable in their evidence as to what happened at the party. It does not necessarily follow that I should disregard all of their evidence.
55. Each of the Melliushs have inconsistencies in their evidence about what happened that night however given the circumstances that is not something that would require me to completely disregard their evidence. They were faced with an invasion of their home of four aggressive young men in the early hours of the morning. It is understandable there is some confusion about the detail of what happened that night.
56. There is however a concern about the Melliushs' and Mr Schaper's reluctance to lay a complaint straight away. It is clear from the attending police officers' evidence that there was indecision about that by the whole group including Mr Schaper. When questioned about the delay, all of the Melliushs and Mr Schaper were evasive in their answers, "its not that simple", "they were the worst police officers I have had to deal with" , "I'm

not sure I can't remember", and " I don't remember what I said to the Police". The delay in laying the complaint is not explained.

57. Paul Melliush presented as an aggressive man not afraid of stating his opinion or letting his displeasure be known and that was demonstrated by his behaviour in the witness box. He responded sarcastically to some questions when the defence counsel challenged the form of the prosecutor's questions "that's where the fairies bent it" and aggressively when challenged in cross examination "if you want to make a better statement than me being there, go for it. And if the magistrate's so silly enough to listen to you well so be it ; that's the way the court system is". If he was as angry and as affronted as he says he was about the invasion of his home it would be more consistent with his personality to insist the police do something about the offending straight away rather than wait for a couple of days to make a complaint.
58. The oral evidence of Mr Schaper, Ms Ella Melliush and Ms Karlie Melliush about their injuries was not consistent with their statements made to the police on the night and in their formal statements. Each of them gave oral evidence of more injuries than were mentioned in their statements. They blamed sloppy police work for the omission in their statements yet each of them admitted to have read and signed their statements.
59. I find that the Melliushs had indicated to the police officers on the night they were not sure of whether they wished to lay a complaint. I find that Mr Melliush, Ms Karlie Melliush, Ms Ella Melliush and Mr Schaper were all evasive in their evidence about this issue. The reason for their reluctance in pressing charges has not been explained. I do not find them reliable on the alleged injuries to themselves or their initial reluctance to press charges. I find Mr Melliush in particular to be over exaggerating his feelings of trauma over this incident. So the balance of their evidence should be considered very carefully.

60. I am satisfied beyond a reasonable doubt that the shouting of “where’s Chopper” and “where’s fucken Chopper” caused both Mr Melliush, Ms Ella Melliush and Mr Schaper to come out of their bedrooms. I find I am satisfied beyond a reasonable doubt there was some physical contact between Mr Chris Hewitt and Ms Ella Melliush and Mr Schaper.
61. The circumstances of the contact between Mr Hewitt and Mr Schaper is in dispute.
62. The evidence of the attending police officer is that a “wrestle” between Mr Schaper and Mr Hewitt was reported to them. Mr Schaper did not tell the police he was set upon before he could do anything as he stated in his oral evidence. It is entirely plausible that Mr Schaper, upon seeing Mr Hewitt in his home after the altercation at the party, and after seeing Ms Melliush on the ground went directly to Mr Hewitt and had a wrestle with him. Mr Schaper’s evidence about who made the first contact is in question.
63. Both Ms Ella Melliush and Mr Schaper have been found by me to be willing to give evidence to put themselves in better light and this is one more example of that.
64. Despite these exaggerations and half- truths I am satisfied beyond a reasonable doubt that Mr Schaper was thrown to the floor by Mr Hewitt and curled up into a foetal position expecting to be attacked by Mr Hewitt. He did not throw himself to the floor as suggested by Mr Hewitt.
65. But because of the exaggerations and half- truths of the witnesses I cannot be satisfied beyond a reasonable doubt that there were any further blows delivered by Mr Hewitt or anybody nor can I be satisfied beyond a reasonable doubt that the Mr Hewitt did not act in self defence in throwing Mr Schaper to the floor after they had a “wrestle”. The inconsistencies in the observations about what happened to Mr Schaper while he was on the floor coupled with what was said to the police officers on the night leads me

to find them to be unreliable and therefore I am left with reasonable doubt as to Mr Hewitt's involvement in an assault on Mr Schaper.

66. I find the Defendant not guilty of Charge 3.
67. **Was Ella Melliush assaulted by Hewitt?** For the same reasons as to the reliability of the witnesses and the inconsistencies in their evidence I cannot be satisfied beyond a reasonable doubt that Ms Melliush was "thrown to the floor" by Mr Chris Hewitt as it is also entirely plausible that given her involvement in the altercation with Mr Chris Hewitt at the party that she was pushed to the floor by him while deflecting her attack on him.
68. In those circumstances I find the defendant not guilty of Charge 4.
69. **Conclusion:**
70. Mr Hewitt is found guilty of Charge 2 not guilty of all other charges.

Dated this 1st day of June 2010

Tanya Fong Lim
STIPENDIARY MAGISTRATE