Burkhart v Bradley [2013] NTCA 05

PARTIES:	BURKHART, Ashley James v BRADLEY, Sandi Lee
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 11 of 2012 (21132195)
DELIVERED:	31 MAY 2013
HEARING DATES:	31 JANUARY 2013
JUDGMENT OF:	SOUTHWOOD, KELLY & BARR JJ
APPEAL FROM:	RILEY CJ

CATCHWORDS:

CRIMINAL LAW – Defensive conduct – Elements of defensive conduct – Section 29 *Criminal Code* – Conduct must be reasonable response in the circumstances as the person reasonably perceives them — Same requirement as common law — Requirement for reasonable grounds for the perception which prompts the response

APPEAL — Whether Magistrate applied incorrect test — Defensive conduct — Appeal dismissed

APPEAL – Whether Magistrate erred in analysis of evidence and rejection of appellant's evidence — Solid evidentiary basis to reject evidence – Appeal dismissed

APPEAL – Whether verdict against weight of evidence — Whole of evidence capable of supporting guilt beyond reasonable doubt – Appeal dismissed

APPEAL — Appeal against conviction — Whether manifestly excessive — Abuse of power by police officer and lack of remorse — Good character notwithstanding — Appeal dismissed.

Criminal Code s 29

Zecevic v Director of Public Prosecutions (Victoria) (1987) 162 CLR 645; *R v Hawes* (1994) 35 NSWLR 294, followed.

REPRESENTATION:

Counsel:

Appellant:	P Elliott
Respondent:	S Robson

Solicitors:

Appellant:	Self-Represented
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	A
Judgment ID Number:	KEL13006
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Burkhart v Bradley [2013] NTCA 05
No. AP 11 of 2012 (21132195)

BETWEEN:

ASHLEY JAMES BURKHART
Appellant

AND:

SANDI LEE BRADLEY
Respondent

CORAM: SOUTHWOOD, KELLY & BARR JJ

REASONS FOR JUDGMENT

(Delivered 31 May 2013)

THE COURT:

[1] In August 2011 the appellant was a serving police officer. As part of his duties, on 18 August 2011 he escorted Mr Robertson, who was then in police custody, to the Alice Springs Hospital. Mr Robertson escaped from custody as the appellant was escorting him back to the police van after attending the hospital, and the appellant chased him and caught up with him at the back of the Memo Club. Mr Robertson lay down on the ground so he would not be tackled. The appellant put his knee in Mr Robertson's back, handcuffed him and lifted him to his feet.

[2] At about this time three other police officers arrived on the scene, Constable Anderson, Constable Egan and Constable Perry. They were present when the appellant escorted Mr Robertson across the road to the back of the caged police van. As Mr Robertson was about to enter the back of the police van, the appellant struck Mr Robertson to the side of the jaw with his elbow.

[3] Constable Egan later reported the matter to his superior and the appellant was charged with unlawfully assaulting Mr Robertson in circumstances where Mr Robertson suffered harm.

[4] At the trial, Mr Robertson said he was being held and "then next minute I feel a punch to my face". He said he had not said or done anything to the police officer before being punched.

[5] The appellant gave evidence that Mr Robertson turned his head, pushed backwards and tensed his arms and that he feared that Mr Robertson was about to assault either him or the other officers.

[6] None of the three other officers observed Mr Robertson moving in such a manner. Constable Anderson said she had been having a conversation with Constable Egan at the time. She said, "Out of the corner of my eye, I noticed a movement and saw (the appellant's) elbow move in a striking motion." She did not see anything done or said by Mr Robertson before the blow was struck. She said, "I wasn't paying attention to the prisoner at the time; so no, I don't know."

[7] Constable Egan said he was vigilantly watching the prisoner at the back of the cage at the time and did not see him make any movement or gesture before the appellant struck him. He said that Mr Robertson's head was straight at the time he was struck. His evidence was that the appellant struck Mr Robertson for no reason at all.

[8] Constable Perry said that he did not see the incident.

[9] On 4 July 2012, following a trial in the Court of Summary Jurisdiction, the appellant was convicted and fined $400. He appealed to the Supreme Court and his appeal was dismissed by Riley CJ on 26 October 2012. He now appeals to this Court from that decision.

[10] The appellant contends that the Chief Justice erred in not allowing the appeal against the decision of the Court of Summary Jurisdiction on six grounds. In our opinion, for the reasons which follow, the appeal should be dismissed.

Grounds 1 and 2: The learned magistrate applied the wrong test in finding that there was no basis for the appellant to have believed that he was, or other police were, about to be assaulted, or may be about to be assaulted. The learned magistrate erred in applying the test of reasonableness.

[11] At his trial, the appellant contended that he was not criminally responsible for his action in striking Mr Robertson as it amounted to defensive conduct within the meaning of s 29(2) of the *Criminal Code*. Sub-sections 29(1) and (2) provide (relevantly):

(1) Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.

(2) A person engages in defensive conduct only if:

(a) the person believes that the conduct is necessary:

(i) to defend himself or herself or another person;

…….

and

(b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.

[12] The appellant contended that Mr Robertson turned his head, pushed backwards and tensed his arms, that he feared that Mr Robertson was about to assault either him or the other officers, and that striking him in the manner in which he did, was a reasonable response in the circumstances as he reasonably perceived them.

[13] The magistrate at first instance made the following findings in dealing with the issue of defensive conduct:

> I do not accept that the tensing of the arms gave rise to a reasonable apprehension that Robertson was about to assault Burkhart. His arms were restrained behind his back and the chain between the handcuffs was being held by Burkhart. A movement back from the vehicle and a slight turn of the head occurring very quickly may have caused Burkhart to be apprehensive, but provided him with no reasonable grounds for subjectively believing that Robertson was about to assault him. As the Federal Court in *East v Repatriation Commission*

> (1987) FLR 242 define reasonableness, there requires more than a possibility, more than something fanciful and unreal and it must be consistent with the known facts.
>
> It doesn't have to meet the standard of balance of probabilities but it must be pointed to by the facts. Burkhart's subjective view that he was about to be assaulted by Robertson, a person in his custody being restrained by him with his arms handcuffed behind his back, is not in any way based upon reasonable grounds, as the facts do not support the hypothesis that Robertson was about to assault him. At the rear of the police vehicle, Robertson was completely under the physical control of Burkhart.
>
> As to whether Burkhart's actions are a reasonable response to the circumstances as he perceived them, I have already indicated that there was no such reasonable grounds on which Burkhart could form the view that Robertson was about to assault him. Accordingly, it was unreasonable and unlawful for him to strike Robertson.
>
> It is to be noted, however, that if Burkhart apprehended on reasonable grounds that Robertson was about to assault him, there are other reasonable responses he could have resorted to rather than delivering a 'clearance strike'; not the least, he could have called for assistance. Not only didn't he, but he didn't see fit to mention to any of the other police officers anything about the 'clearance strike' immediately after it occurred. This alone does not make the strike unlawful or unreasonable, but together with all the other matters I have mentioned, the strike was not reasonable. *[emphasis added]*

[14] The appellant contends that the quoted passage shows that in dealing with the issue of defensive conduct the magistrate applied an objective rather than a subjective test. He did so by introducing the concept of reasonableness when discussing whether or not the appellant entertained a subjective belief that Robertson was about to assault him.

[15] Riley CJ rejected this ground of appeal and, in dealing with this submission, said:[1]

> "Whilst the form of expression employed by the magistrate may have been unfortunate it is apparent that his Honour was determining whether there was any basis to support the claim by the appellant that he had subjectively formed the view that he was about to be assaulted by Mr Robertson. His Honour went on to say that the "facts do not support the hypothesis that Robertson was about to assault" the appellant. The magistrate noted that Mr Robertson was at the rear of the police vehicle, his arms were restrained behind his back and the chain between the handcuffs was being held by the appellant. Mr Robertson was 'completely under the physical control' of the appellant."

[16] We agree that this ground of appeal should be dismissed, although we take a different view to that of Riley CJ as to what was intended by the learned trial magistrate in the quoted passage.

[17] The defensive conduct provision in s 29 in its current form, set out above, was inserted into the *Criminal Code (NT)* by the *Criminal Code Amendment Act 2001*[2] assented to on 19 July 2001, following a report of the Law Reform Committee of the Northern Territory on Self Defence and Provocation delivered in October 2000.

[18] The Law Reform Committee was requested to inquire into and report on whether the self defence provisions of the *Criminal Code* should be amended to: (a) reflect a concept of self defence which is readily understood by a jury; and (b) provide a more specific defence of self defence against

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1 at paragraph [13] of the judgment

2 Act No 27 of 2001

home invasion which includes immunity from civil and criminal liability. The reference followed comments by members of this Court on the difficulty in instructing juries in accordance with the then existing provisions as to self defence under the Code,[3] at the same time as the common law in relation to self defence had been greatly simplified by the High Court's decision in *Zecevic v Director of Public Prosecutions (Victoria)*[4] and the decision of the New South Wales Court of Criminal Appeal in *R v Hawes*.[5]

[19] In *Zecevic* the majority posed the test in the following terms:

> "The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self defence to do what he did."[6]

[20] In *Hawes* the New South Wales Court of Criminal Appeal held that the question of whether there were reasonable grounds for the belief in question did not import a wholly objective test: "it is the belief of the accused, based on circumstances as he perceived them to be, which has to be reasonable; and not the belief of the hypothetical person in his position."[7]

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3 The remarks made by Kearney J in *R v Wurramara and Lalara* (unrep Feb 1999) are set out in appendix 4 to NT Law Reform Committee report on self defence 2000.

4 (1987) 162 CLR 645

5 (1994) 35 NSWLR 294

6 per Wilson, Dawson and Toohey JJ (with whom Mason CJ agreed) at p 661

7 *R v Hawes* (1994) 35 NSWLR 294 per Hunt CJ at CL (with whom Simpson and Bruce JJ agreed) at p 306

[21] The Law Reform Committee recommended a provision identical to s 43BD of the *Criminal Code* which mirrors the Model Criminal Code.[8] Section 43 BD(2) provides (relevantly):

> "A person carries out conduct in self-defence only if:
>
> (b) the person believes the conduct is necessary:
>
> (i) to defend himself or herself or another person; ……. And
>
> (b) the conduct is a reasonable response in the circumstances as he or she perceives them."

[22] However, rather than accept that recommendation, the legislature enacted s 29 of the *Criminal Code* in its current form. The main difference in the two provisions is the requirement in s 29(2)(b) that, "the conduct is a reasonable response in the circumstances **as the person reasonably perceives them**" rather than "**as the person perceives them"** (in s 43BD).

[23] In our view, s 29 of the *Criminal Code* essentially enacts the common law in relation to self defence as expounded in the passages from *Zecevic* and *Hawes*, set out above. The common law requires two things for the defence of self defence to be made out: first, a belief in the mind of the accused; second, that the belief of the accused, based on circumstances as he perceived them to be, must be reasonable. The term "reasonably perceives" in s 29 imports the same requirement into the statutory test for defensive

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[8] Section 43BD was inserted into the Criminal Code on 20 December 2006 along with the rest of Part IIAA and applies only to Schedule 1 offences and other declared offences.

conduct; that is to say, the words require there to be reasonable grounds for the perception which prompts the response.

[24] The Crown can disprove self defence by negating either the first or the second requirement of the defence of self defence. It is not necessary for the Crown to negative both requirements.

[25] It seems to us that in the passage from the learned trial magistrate's decision quoted above, his Honour indicated that he accepted that the appellant had a subjective belief that Mr Robertson was about to assault him or one of the other officers [that is the requirement in s 29(1)(a)]; and was addressing the requirement in s 29(2)(b), specifically whether the appellant's perception of the circumstances was a reasonable one: the magistrate found that it was not and that, therefore, the Crown had disproved the requirements of s 29(2)(b).

[26] No error is demonstrated in the trial magistrate's application of s 29(2)(b). He found that there were no reasonable grounds for the appellant's perception that he was about to be head butted or spat at and he found also that the response was unreasonable as there were other steps the appellant could have taken to avoid any such danger.

[27] Having come to this conclusion, we note that it seems anomalous to have two different tests for defensive conduct in the *Criminal Code*, one in s 43BD applying to Schedule 1 offences, and one in s 29 applying to all other offences. Moreover, Schedule 1 offences include serious offences against the person including murder. The effect of that is that a person may

be found not guilty of murder because the killing amounted to defensive conduct (on the application of s 43BD) if (given the requisite belief) the killing was a reasonable response in the circumstances as the accused person perceived them (with no requirement for that perception to be reasonable); whereas a person charged with assault (as Mr Burkhart was) will only be found not guilty on the basis that the conduct was defensive (again given the requisite belief) if the assault was a reasonable response in the circumstances as the accused person **reasonably** perceived them – ie that perception must be reasonable (on the application of s 29).[9] We respectfully suggest that it would be appropriate for the legislature to address this anomaly.

Ground 3: The learned magistrate erred in his analysis of the evidence relating to the appellant having accessed the complainant's antecedents on the police data base.

[28] In the process of determining that he preferred the evidence of Mr Robertson over that of the appellant, the learned magistrate rejected the appellant's evidence that he had accessed Mr Robertson's antecedents on the police data base before taking him to the hospital and was aware that Mr Robertson had an extensive criminal history. There was no objective evidence that the appellant had done so as he had not logged on to the computer system under his own ID at the time he said he had conducted the search. The appellant's explanation was that he accessed the information from a computer on which

[9] In each case of course it is for the Crown to disprove defensive conduct.

someone else had already logged on, despite being aware of an instruction in the police force that officers must log on using their own ID. The appellant contends that the magistrate was wrong to reject the appellant's evidence about this matter, and that the Chief Justice erred in rejecting this ground of appeal.

[29] In our view the Chief Justice was not in error in determining that there was a solid evidentiary basis for the conclusion reached by the learned magistrate rejecting the appellant's evidence that he had checked Mr Robertson's history before taking him to the hospital. As the Chief Justice pointed out[10] there was no dispute that the appellant accessed Mr Robertson's criminal history after the event and it is unlikely he would have done so if he had already gathered the relevant information. Further, had the information regarding Mr Robertson's criminal history been available to the appellant before he escorted him to the hospital, it is unlikely that he would have allowed him to walk from the hospital to the van without being handcuffed, or at least held.

Ground 4: The learned magistrate erred in finding that he had, with one exception, no reason to reject the complainant's evidence.

[30] The Chief Justice did not err in rejecting this ground of appeal. As his Honour pointed out,[11] it was a matter for the magistrate to determine what evidence he accepted and what evidence he rejected. Mr Robertson's

[10] at paragraph [19] of the judgment

[11] at paragraph [22] of the judgment

evidence on the central issue of defensive conduct was largely consistent with the evidence of the other witnesses, in particular that of Constable Egan, and the appellant's account was inconsistent with that other evidence. The magistrate did not err in accepting the evidence of Mr Robertson over that of the appellant.

Ground 5: The finding of guilt was against the weight of the evidence.

[31] It was submitted on behalf of the appellant that, in light of all the evidence, the magistrate ought to have had a reasonable doubt as to whether the appellant held the subjective belief that it was necessary to strike Mr Robertson, and whether striking him as he did was a reasonable response in the circumstances as the appellant reasonably perceived them to be. It was submitted that the magistrate ought to have kept in mind the circumstances in which the appellant was placed at the time and to have approached the task in a practical manner without undue nicety.

[32] In our opinion, the Chief Justice was correct in rejecting this ground of appeal, for the reasons set out in paragraph [28] of the judgment. The learned magistrate accepted the evidence of Constable Egan and Mr Robertson and rejected that of the appellant, and this evidence clearly supported the verdict. Upon the whole of the evidence it was open to the

trial magistrate to be satisfied beyond reasonable doubt that the appellant was guilty.[12]

Ground 6: The sentence imposed upon the appellant is manifestly excessive.

[33] It was not contended that a fine of $400 was manifestly excessive, but the appellant submitted that the magistrate ought not to have recorded a conviction.

[34] In our opinion, the Chief Justice was correct in rejecting this ground of appeal too, for the reasons set out in paragraph [29] of the judgment. In summary, the blow was unprovoked, delivered to the victim's head by a policeman otherwise acting in the course of his duties while the victim was secured in handcuffs and held from behind, unable to defend himself. This amounted to an abuse of power against a victim in police custody. The appellant expressed no remorse and did not accept responsibility for his actions. Notwithstanding that the appellant was said to be otherwise of good character and that the assault was momentary and not sustained, it was appropriate in all of the circumstances to record a conviction.

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[12] *M v The Queen* (1994) 181 CLR 487 at 493