R v Sayson [2016] NTSC 60

PARTIES:	THE QUEEN v SAYSON, Louie
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21550447
DELIVERED:	18 November 2016
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JUDGMENT OF:	HILEY J

CATCHWORDS:

EVIDENCE – admissions – relevant to state of mind of accused - relevant to self-defence, justification and necessity.

EVIDENCE – admissibility – expert opinion evidence of police officer regarding defensive force – relevant to self-defence, justification and necessity.

Criminal Code (NT) s 27(e), s 29(2), s 188(1) & (2)(a) & (d), s 272(2)(a)
Evidence (National Uniform Legislation) Act 2011 (NT) pt 1, s 79(1), s 80, s 81(1), s 90, s 135, s 137
Honeysett v The Queen [2014] HCA 29, (2014) 253 CLR 122, referred to.

REPRESENTATION:

Counsel:

Crown:	D Dalrymple
Accused:	P Elliott

Solicitors:

Crown:	Director of Public Prosecutions
Accused:	Peter Elliott

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

R v Sayson [2016] NTSC 60
No. 21550447

BETWEEN:

THE QUEEN
Crown

AND:

LOUIE SAYSON
Accused

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered Ex Tempore 18 November 2016)

Introduction

[1] The accused stands charged that on 19 September 2015, at Darwin in the Northern Territory of Australia, he unlawfully assaulted Anderson Mamarika and that the unlawful assault involved the following circumstances of aggravation, namely, that Anderson Mamarika suffered harm and that he was unable to effectually defend himself due to his situation. This offence is contained in s 188(1) & (2)(a) & (d) of the *Criminal Code* (NT).

[2] The undisputed facts, as far as they are relevant, are that Anderson Mamarika (Mamarika) was in police custody at the Darwin Police Station. He was placed in a cell by the accused and while the accused was closing the door to the cell, Mamarika spat on the accused, the spittle landing on the head and face of the accused. The locking mechanism on the door did not engage and the door came open again to a small degree. Mamarika was standing in the cell and facing the door, which opened outwards, i.e. towards the accused. The accused re-entered the cell and assaulted Mamarika by taking him to the ground, by keeping him on the ground for a short time, and by applying further applications of force while Mamarika was on the ground. The Crown alleges that the assault included the accused forcing Mamarika to the ground, striking him to the head or neck with his elbow and pushing him in the back as he, the accused, was getting back on to his feet. The question for the jury is whether the assault was unlawful.

[3] The Crown proposes to lead evidence from Senior Sergeant Andrew Barram and Senior Sergeant Shaun Furniss. The evidence of Sen Sgt Barram is set out in a statutory declaration declared on 31 October 2015 and in the committal transcript at pp 6-33. The evidence of Sen Sgt Furniss is contained in a six page transcript of a recorded statement taken on 14 January 2016.

[4] On 4 November 2016 I conducted a voir dire concerning the admission at trial of some of that evidence. I also conducted a Basha hearing in

relation to Sen Sgt Furniss and was shown the CCTV footage of the assault.

Senior Sergeant Furniss

[5] Shaun Furniss is a Northern Territory Police officer (with the current rank of Senior Sergeant). On the night of 19 September 2015 he was working as the Northern Watch Commander, with responsibilities which included being informed of, and taking any necessary action in relation to, incidents or issues arising during his shift at watch houses and Police stations in the Northern Region of the Northern Territory.

[6] At about 10.15 pm that night Sgt Furniss received a telephone call from the accused and had a short conversation with him. He made notes of the telephone conversation in his police notebook. The accused commenced the conversation by asking Sen Sgt Furniss whether he was aware of an incident in the watch house earlier in the night. Sen Sgt Furniss confirmed that he had been informed about the incident and that it was going to be looked at further. The accused said: "*I wanted to make sure you were aware as they said in the watch house that it didn't look good and I didn't appreciate that*".

[7] During the course of the conversation which followed Sen Sgt Furniss asked: "When are you working next?" The accused briefly answered that question. He then said: "*I was angry because I was spat on before and I'm still waiting for the results…*" He mentioned that that

happened three months before, and then said: "*…I am not going to hide anything, I was angry*". He went on to say: "*…I've finished work and I was angry when I left. I am at home now and might go to the hospital for another blood test*".

[8] Sen Sgt Furniss asked whether the accused had submitted an 'injury on duty' form and a 'use of force' (referring to a standard form completed by members after they have used physical force in the course of their duty). The accused indicated that he had not completed or submitted either form and there was a brief discussion about that.

[9] The accused then said: "*I didn't think about this before I left as I was angry, I'm really angry as I had a blood test three months ago when I was spat at last time, and I haven't had any results yet, so now it'll be another three months um, of not knowing, ah I am going up to the hospital now*".

[10] Mr Elliott, counsel for the accused, has objected to those parts of the conversation where the accused told Sen Sgt Furniss that he was angry. Counsel identified several bases for that objection. Counsel's primary submission was that those statements were not admissions and therefore were not excluded from the hearsay rule – cf s 81(1) *Evidence (National Uniform Legislation) Act 2011* (NT) (**UEA**). Counsel contended that, when considered in proper context, that evidence was not relevant. Counsel also submitted that even if the statements were

admissions, the Court should exercise its discretion to refuse to admit that evidence, under s 90 and/ or s 135 UEA.

[11] Mr Elliott contended that the accused's references to being angry were references to what had happened to him on a previous occasion, some three months earlier, and not to his state of mind at the time when he struck Anderson Mamarika. Counsel contended that the Crown would need to prove beyond reasonable doubt that the accused assaulted Mr Mamarika because he was angry at being spat on by him.

[12] Mr Elliott pointed out that any person would be angry to some extent after being spat at or otherwise assaulted, and contended that such a state of mind is not relevant to subsequent conduct by that person of the kind alleged here. He submitted that the accused was exercising his lawful right to prevent Mr Mamarika from escaping from custody. He contended that there is a risk of the jury misusing the accused's statements about being angry and not regarding them in their proper context.

[13] He also contended that it would be unfair to the accused for that evidence to be adduced having regard to the circumstances in which the statements were made. These circumstances included the fact that the accused was worried about what other police officers had said about his conduct. Counsel contended that although Sen Sgt Furniss was not an investigating officer, he should have attempted to elicit more

information from the accused at the time, in order to obtain a better understanding of the circumstances in which the accused found himself at the time when he telephoned Sen Sgt Furniss.

[14] Mr Dalrymple, counsel for the Crown, contended that the statements were admissions. Whilst a jury could consider that the accused was angry because of his previous experience of being spat on, a jury could also consider that the accused was angry because Mr Mamarika spat at him as he was attempting to close the cell door and that the subsequent conduct of the accused in the opening the door, entering the cell and striking Mamarika, was partly attributable to the accused's anger after being spat on by him. The accused's statements that he was angry are relevant to his state of mind at the time when he engaged in that conduct. Further, a jury may see these statements as concessions on the part of the accused that he may have gone too far in reacting to being spat on by Mr Mamarika in the way that he did. I agree with these contentions.

[15] An admission is "a previous representation that is … adverse to the person's interest in the outcome of the proceeding."[1] I consider that the accused's statements that he was angry are strongly capable of reflecting the state of mind of the accused at the time when he engaged in the conduct complained of. Of course counsel might attempt to persuade the jury to the contrary, but I consider it very much a matter

[1] See "Definitions" in UEA pt 1.

for the jury to decide what significance it attaches to those statements. They are quite capable of being legitimately used in a way that is adverse to the interest of the accused in the outcome of this matter.

[16] The state of mind of the accused at the time of the alleged offending is relevant to the question of intent and also to questions concerning "justification" under s 27(e) of the *Criminal Code*, "necessity" under s 272(2)(a) of the *Criminal Code* and "self-defence" under s 29(2) of the *Criminal Code*. The Crown would be entitled to rely upon this evidence as evidence of the accused's belief at the time, in order to negative such defences. Evidence of whether and why the accused was angry at the time could also be "strands in a cable" from which the jury could draw relevant inferences beyond reasonable doubt. The statements are therefore admissions and relevant.

[17] Further, there is nothing remarkable about the circumstances in which the statements were made. It was the accused who telephoned Sen Sgt Furniss and volunteered the statements. There is no suggestion that Sen Sgt Furniss improperly or otherwise wrongly encouraged the accused to say what he did. Accordingly I do not consider there is any basis for exercising the discretions referred to in ss 90 or 135 UEA.

Sen Sgt Andrew Barram

[18] The Crown seeks to adduce all of the evidence contained in the Sen Sgt Barram's statutory declaration apart from that in paragraphs 7 and 8

and the last sentence in paragraph 15.[2] In summary the evidence which the Crown seeks to lead from Sen Sgt Barram includes:

(a) his expertise in relation to police defensive tactics, firearms and other police use of force options;

(b) his observations of the CCTV footage;

(c) non-opinion evidence about Northern Territory Police guidelines and training in the use of force, in so far as they may be relevant in the present matter; and

(d) his opinions as to the necessity for the accused to have used the force that he did use.

[19] The main purpose of adducing evidence from Sen Sgt Barram is to prove that the conduct of the accused, in particular his use of force as shown on the CCTV footage, was unlawful. This would be done by having Sen Sgt Barram express his opinion about this issue and whether the force used was consistent with the training that the accused and other police officers would have had been given. Part of this would include references to various defensive tactics identified and recommended in the Northern Territory Police document entitled Defensive Tactics.

[2] Those passages contain opinions concerning the ultimate issue as to whether or not the force used by the accused was excessive and unlawful.

[20] In response to queries raised by Mr Elliott, Mr Dalrymple identified particular parts of the guidelines and training materials that would be relied upon. He also identified the area of Sen Sgt Barram's expertise, relevant for present purposes, to be the appropriate use of force by a police officer in the circumstances of the accused at the time and the overriding emphasis placed on the minimisation of the use of force.

[21] It is common ground that for the opinion evidence to be admissible the requirements of s 79(1) UEA must be met. Section 79(1) provides as follows:

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

[22] Section 80 replaces the old common law rules and enables opinion evidence to be adduced even if it is about a fact in issue or an ultimate issue or a matter of common knowledge.

[23] Mr Elliott raised a number of objections to the proposed evidence of Sen Sgt Barram. Firstly, he contended that Sen Sgt Barram does not have specialised knowledge in relation to the matters referred to above. Alternatively he contended that even if he does have the necessary specialised knowledge, his opinions are not based upon such specialised knowledge but are "no more than a personal view based upon idiosyncratic belief". Thirdly, Mr Elliott contended that the

opinions are not relevant to any fact in issue. Fourthly, he contended that even if admissible, the evidence should be excluded under either of ss 135 or 137 UEA, because its probative value is nil or very slight and the danger of unfair prejudice to the accused is substantial.

[24] Mr Elliott conceded that Sen Sgt Barram is capable of giving evidence as to whether the actions of the accused are in accordance with what is taught by the Northern Territory police, and whether the actions of the accused are in accordance with the policy of the Northern Territory police. But he contended that a failure to act in accordance with police training or policy cannot be evidence of committing an aggravated assault. He submitted that Sen Sgt Barram's opinion as to the accused's use of force is immaterial, that he is in no better position than the jury to make an assessment of the inferences to be drawn about the force used and that this question is solely a matter for the jury.

[25] I disagree with these contentions. It is well established that a person can acquire the necessary specialised knowledge following the kind of study and experience which Sen Sgt Barram has.[3] This includes his experience as an operational police officer for much of his 18 years in the police force; his numerous certificates and qualifications in relation to a wide range of disciplines involving the use of force including martial arts and unarmed combat; his experience as an instructor in

[3] *Honeysett v The Queen* [2014] HCA 29, (2014) 253 CLR 122 at [23].

police defensive tactics, firearms and other police use of force options; and his responsibility in relation to the development or review of techniques, practices, or theories concerning the teaching of police use of force, including defensive tactics and firearms. He has specialised knowledge of the appropriate use of force by a police officer in the circumstances of the accused at the time and the overriding emphasis placed on the minimisation of the use of force.

[26] I also consider that his opinion about the force used by the accused is based substantially on that specialised knowledge. Brief perusal of the materials to which Mr Dalrymple has referred, including a document comprising approximately 360 pages titled "Defensive Tactics", indicates the kind of force that Sen Sgt Barram is familiar with. That material, together with his other training and experience would have provided him with far greater knowledge and expertise than one would expect of a lay person.

[27] I also reject the contention that Sen Sgt Barram's evidence will not be relevant to a matter in issue. His opinion as to the use of force, in particular what force if any was necessary in the circumstances, will be very relevant to the possible "defences" that the Crown may be required to negative. Factual issues will include the state of mind of the accused and his belief as to whether the force that he did use was necessary and reasonable, and whether his conduct was in fact a

reasonable response in the circumstances as he reasonably perceived them.

[28] I also reject the contentions that the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant (s 137). In particular I reject the contention that its probative value is nil or very slight. Mr Elliott submitted that Sen Sgt Barram's evidence would distract the jury from its real task which is to make its own assessment of the actions of the accused and that there is a real danger that the jury would place excessive reliance on what he says. He also submitted that there is a real danger the jury might impermissibly reason that because the accused acted outside of policy and guidelines he committed the offence with which he has been charged.

[29] To the contrary, I consider that Sen Sgt Barram's evidence is likely to provide the jury with important information as to how a police officer in the position of the accused could otherwise have responded in the circumstances which faced the accused, and thus be better informed as they consider the relevant issues that I have already referred to, primarily questions concerning justification, necessity and self-defence. The jury can be instructed as to how they can use the evidence concerning police policy and guidelines and any failure by the accused to follow them.

[30] Accordingly there is no basis for excluding the evidence of Sen Sgt Barram under s 137 UEA, or for exercising the discretion conferred under s 135 UEA.
