Westrupp v The Queen [2010] NTCCA 01

PARTIES:	WESTRUPP, Te Tuhi Puru v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 17 of 2009 (20817212)
DELIVERED:	1 APRIL 2010
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JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & SOUTHWOOD JJ
APPEAL FROM:	OLSSON AJ

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION

Conviction for unlawfully causing serious harm – whether conviction unreasonable – whether evidence supported finding of guilt – appeal against conviction dismissed.

MFA v The Queen (2002) 213 CLR 606, cited.

REPRESENTATION:

Counsel:

Appellant:	M Croucher
Respondent:	P Usher

Solicitors:

Appellant:	Peter Elliott
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Westrupp v The Queen [2010] NTCCA 01
No. CA 17 of 2009 (20817212)

BETWEEN:

TE TUHI PURU WESTRUPP
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 1 April 2010)

Martin (BR) CJ:

Introduction

[1] This is an appeal by leave against a conviction for unlawfully causing serious harm. Although a notice of appeal was filed, which contained three grounds relating to the admission of evidence and directions to the jury, at the hearing of the appeal those grounds were abandoned. The sole ground argued is that the verdict was unreasonable and cannot be supported having regard to the evidence.

[2] For the reasons that follow, in my opinion this ground of appeal is not made out and the appeal should be dismissed.

Evidence

[3] The events occurred at a nightclub in the early hours of 22 June 2008. Many of the witnesses had consumed significant quantities of alcohol. The trial Judge gave careful directions concerning alcohol and other factors which were capable of affecting the reliability of evidence of witnesses who were in the nightclub at the relevant time.

[4] The complainant gave evidence that he was walking in single file with others making his way to the dance floor when he bumped into the appellant and was then struck by the appellant. The complainant explained the circumstances in the following passage:

> "I was heading towards the dance floor, I bumped into his chest at the front. I stood back to like apologise because I didn't know what had happened, saw the glancing blow off the side of my right shoulder and on to his right shoulder. And then when I stood back and turned around to apologise, that's when I was struck."

[5] Asked to describe the strike, the complainant said:

> "It was with a glass in the front of his hand that had a handle on it, with the glass right there and then struck with the right fist into the left-hand side of my face. So when I turned away, that's when it struck sort of downwards because he's taller than me, and hit here and got - cut open my face and about 100 stitches.

[6] At the trial the following facts were admitted.

- The appellant struck the complainant in the face.
- As a result of the strike by the appellant to the face of the complainant, glass struck the complainant in the left eye and caused serious harm.

- As a result of the strike to the complainant, the appellant suffered a laceration to his hand which required sutures.

[7] The appellant was interviewed by police and gave evidence at trial. He denied drinking from a glass with a handle. He said he was drinking from a spirit glass and felt a “really hard” bump or contact which pushed him over the table. It was a bump from behind at an angle. He said it caused him to grab the table to keep his balance and he turned around to see a person who he did not recognise standing in front of him. According to the appellant, he gave the person a “fair push” because “he's pissed me off and he's - and he's standing right in front of me.” The other person caught his balance and came straight back at the appellant and the appellant threw his hands out to stop him.

[8] The appellant said that he was unaware whether he was holding a glass or not and his only intention was to stop the person from getting to him. He said he did not intend to strike the person. The appellant accepted that there had to be glass involved because of the injuries to the complainant, but said he did not know who had the glass. He felt it was possible, but unlikely, that he was holding the glass.

[9] Four witnesses gave evidence of observing an altercation. Not surprisingly, given the consumption of alcohol and their different positions and perspectives in the crowded nightclub, there were significant variations between those witnesses as to the essential events. Each of the four

witnesses said they were unaware of a glass in the hand of the appellant, but it must be said that the incident occurred in a very short space of time and the circumstances in which the witnesses made their observations were less than ideal. As to the nature of the contact, the evidence varied from positive evidence of a punch to a push in the face.

[10] Against the background of the contest as to whether the appellant was holding a glass with a handle at the time contact was made with the complainant, the evidence of a fourth witness was of particular importance. He described standing near the dance floor in the nightclub and turning around to see where everyone was. Behind him he saw the complainant holding his hands to his face and bleeding from his eye. Asked if he saw anyone else with the complainant, the witness replied:

> "A. Andrew was sort of turning around and walking away by himself but just directly in front of me were a group of men standing near a table and one of the gentlemen was dropping a glass handle off his hand.
>
> Q. When you say he was dropping a glass handle off his hand, can you describe what it was that you actually saw?
>
> A. It was like a circular glass handle that's on the side of like a beer glass. Yeah, that was left on his hand with some broken glass and it was - I saw it fall off his hand onto the floor."

[11] In cross-examination the witness was asked whether it could have been a piece of glass in the hand of the man as opposed to a handle and he responded:

> "No. What I definitely saw was a handle that, that actually stood out in my mind that there was a circular ring of glass around his finger."

[12] The witness also said he saw glass on the floor in that general vicinity and the circular piece of glass was probably about 10 ml in diameter.

[13] The witness did not identify the appellant as the person who dropped the glass handle. However, he said that in the group where the person dropped the glass handle was a person called William Jones. In his evidence at trial, the appellant said that at the time of the incident there was a group of men standing around the table and that group included Bill Jones.

Appellant's Contentions

[14] The appellant submitted that it was not open on the whole of the evidence for a properly instructed jury to be satisfied beyond reasonable doubt that the complainant was injured by a glass held by the appellant or, alternatively, that the appellant was aware that he was holding a glass at the time he struck the complainant. I do not agree. It was admitted that in the process of the appellant striking the complainant, glass struck the complainant in his left eye. It was not a realistic possibility to suggest that a glass held by a third person was responsible for the injury to the complainant. Either the glass was held by the appellant or it was the complainant's own glass that caused the injury to his face.

[15] There was no positive evidence to suggest that when the appellant struck the complainant in the face, somehow the complainant's hand holding a glass

was pushed into his own face. Counsel for the appellant accepted that it was implicit in the evidence of the witnesses who saw a blow or push that they saw the complainant's hands at his face only after the blow was struck. In any event, it was open to the jury to accept the evidence of the complainant that the appellant was holding a glass with a handle. Given the circumstances in which the other witnesses made their observations, it was open to the jury to be satisfied that the observations of these witnesses were deficient with respect to the question of the glass.

[16] Of particular importance was the evidence of the witness concerning the person who dropped the glass handle from his hand. This evidence is to be considered in conjunction with the admitted fact that as a result of the strike to the complainant, the appellant suffered a laceration to his hand which required sutures. The laceration to the appellant's hand was consistent with being caused when a handled glass being held by the appellant broke when the appellant struck the complainant, that is, broke on impact with the complainant's face.

[17] It was open to the jury to accept the evidence of the complainant as to the appellant holding a glass with a handle which broke on impact with the complainant's face. The presence of a person in the appellant's group after the blow was struck who was dropping a broken glass handle to the floor, coupled with the injury to the appellant, provided significant support for the evidence of the complainant in this regard. On the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the

appellant was holding a glass with a handle at the time that he struck the complainant.

[18] Further, in my view it was open to the jury to be satisfied beyond reasonable doubt that the appellant well knew he was holding a glass at the time he struck the blow. It was open to the jury to reject the appellant's version of a push and to accept the other evidence that the appellant punched the complainant. The appellant's version was less than impressive. Having rejected the appellant's version of a push, it was open to the jury to reject his evidence that he was unaware that he was holding the glass and, from a totality of the proven evidence, to be satisfied that the appellant well knew he was holding the glass at the time he struck the blow.

[19] The learned trial Judge instructed the jury that the Crown was required to prove that the appellant either intended to cause serious harm or foresaw the causing of serious harm as a possible consequence of his conduct. In addition, his Honour directed that, “as a matter of logic”, proof of “the relevant intention or foresight necessarily implies proof by the Crown that the accused was holding the handled glass in his right hand and also realised that he was so holding it at the time at which he struck [the complainant]”. It follows that in order to convict the appellant, the jury was satisfied that the evidence of the complainant was reliable and that, at the time of the blow, the appellant was both holding the handled glass and was aware he was holding it.

[20] In all the circumstances I am not left in any doubt about guilt and, in my view, it was open to the jury to find beyond reasonable doubt that the charge was proven.[1]

[21] In my view, the appeal should be dismissed.

Mildren J:

[22] I agree with the Chief Justice. Having considered the evidence myself and the submissions of Mr Croucher, both in writing and this morning, I am not left with any doubt as to the accused's innocence. I agree with the order of the Chief Justice.

Southwood J:

[23] I, too, agree with the reasons for decision of his Honour, the Chief Justice. In my opinion, the whole of the evidence was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the crime of unlawfully causing serious harm to Andrew Bruce Blain. Having considered the whole of the evidence, I am not left in any doubt.

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[1] *MFA v The Queen* (2002) 213 CLR 606.