Faatele v Cassidy [2013] NTSC 53

PARTIES:	FAATELE, Kokolua
	v
	CASSIDY, Craig
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA AS 3 of 2013 (21209774)
DELIVERED:	23 August 2013
HEARING DATES:	16 August 2013
JUDGMENT OF:	MILDREN AJ
APPEAL FROM:	TRIGG SM

REPRESENTATION:

Counsel:

Appellant:	R Goldflam and A Beech
Respondent:	T C Jackson

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Mil13527
Number of pages:	21

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Faatele v Cassidy [2013] NTSC 53
No. JA AS 3 of 2013 (21209774)

BETWEEN:

KOKOLUA FAATELE
Appellant

AND:

CRAIG CASSIDY
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 23 August 2013)

[1] The appellant was charged with having unlawfully assaulted one Hayes contrary to s 188(1) of the Criminal Code with the circumstance of aggravation that Hayes suffered harm. The appellant pleaded not guilty and raised self-defence. Following a hearing before the learned stipendiary magistrate, sitting at the Court of Summary Jurisdiction of Alice Springs, the appellant was found guilty and sentenced to five months imprisonment backdated to take account of one day in custody. The sentence was suspended forthwith on an operational period of 18 months.

[2] There was also a back-up charge. It was alleged that the appellant behaved in a disorderly manner in a public place. This charge was withdrawn upon the magistrate finding the appellant guilty on the principal charge.

Background Facts

[3] On 25 and 26 January 2012 the appellant was employed as a security guard by Outback Security. He was subcontracted by Outback Security to work at The Rock Bar in Alice Springs. He had 12 years experience in the security industry and had been subcontracted to The Rock Bar for two years. He generally worked from 7pm to 1am six days a week.

[4] On 25 January 2012 the appellant commenced his normal evening shift at approximately 7pm. He was the only security guard employed that night.

[5] The complainant, Daniel Hayes, was a patron at The Rock Bar. He arrived with the witness Neil Watson at some time between 11.30pm and 12.30am. At The Rock Bar the complainant and Watson met with one of Hayes' employees, Luke Smith, and a female friend of Hayes, Nicky Moore. They were drinking in the back beer garden area with a couple of other people who did not make statements in the matter.

[6] The appellant was known to the complainant as they had previously worked together. Their previous history was not negative in any way.

[7] At approximately 12.30am the appellant began his usual procedure to close the bar. He visited each table in the beer garden, telling all patrons to finish

their drinks and cigarettes and make their way inside. When he approached the complainant's table in this manner, the complainant and his companions said that they would do as they had been asked.

[8] Approximately 10 minutes later the appellant again approached the remaining patrons in the beer garden, asking them to move inside. Subsequently, there was a heated verbal exchange between the appellant and the complainant, immediately following which the appellant struck the complainant's face with a closed fist.

[9] The evidence was that in the garden area there were a number of wine barrels which were used as tables and around each of these wine barrels there were a number of stools. The complainant was standing at the table as were his friends Luke Smith and Neil Watson. They were smoking and finishing off their drinks. When the appellant came to the table a second time and asked them to leave, the complainant was leaning over the table and he stood up. At that stage there was a verbal altercation between them. The learned magistrate noted that there must have been music being played in the area or there must have been some noise or distraction because none of those who were present were able to hear what was being said apart from the witness Nicky Moore, who only heard part of what was said, but not what the argument was about. According to the complainant the appellant said:

> "I thought I told youse to move on."

And the complainant said:

> “Yes, we are just finishing our smoke as I said and then we are going to move on to finish our drinks inside.”

The appellant said:

> “No, get inside now”.

The complainant said:

> “Come on, mate, give us a break, just going to finish our smoke, as I said we’re not causing no drama and I guarantee you we won’t be the last ones out of here, we are going in right now”.

The complainant said that the appellant then got into his face and said:

> “Do you want to have a go?”

The complainant said:

> “No, we just finish the smoke like I just have and then move on.”

The appellant said:

> “You sure you want to have a go? You want to have a go?”

The complainant said:

> “Nope, I don’t want to have a go as I said, we are going to move on.”

The complainant said that he took a step back and he grabbed his handle of

drink, put it to his mouth to have a drink and then: “Wham, a dirty big king hit I received... and I have gone back against the wall where I was standing ... and I have curled up on this position to protect my face and [indicating an action of leaning forward and putting both hands up to his forehead and his head cowered], ...and then I received a couple of more punches and then the punches suddenly stopped and then I was grabbed and taken out the back of the fire exit of the smoking area behind The Rock Bar.”

[10] According to the appellant on the last occasion that he spoke to the complainant, Hayes had “sparked up another smoke” and he said to him that he had already told him to finish the first smoke that he had and to get inside but “that’s when he sparked up a new smoke and looked at me and I said: ‘Put your smoke out, get inside’, “No”, and when I said that – I said, “Please”, I was polite and he just still stood there with the smoke. And you know he said ‘You know, when we’re done’. And I said ‘If you don’t put your smoke out, you are going to have to go’ and that’s when he jumped off his seat and he goes ‘Do you want a fucking go, cun’?... and that’s when I had him.” The appellant said that the complainant’s hands were by his side with his fists clenched, that the complainant, when he stood up, invaded his personal space, that he felt threatened because he was surrounded by the complainant’s friends, that he felt worried for his safety and that he struck the complainant on the face- it was “a quick reaction to the fighting stance that he had.”

The findings of the learned magistrate

[11] The learned magistrate noted the two versions were not capable of standing together; one must be false. The question was which one. His Honour went on to observe that if the appellant's version was not rejected beyond a reasonable doubt, then the complainant's actions in effectively challenging the appellant to a fight, would be highly provocative and would heighten the appellant's concern about being hit. His Honour also found the complainant had his hands down by his sides with his fists clenched immediately before being struck by the appellant.

[12] His Honour then reasoned that if the appellant's version of being challenged to a fight was rejected, then his concerns about being hit would be substantially lessened. His Honour concluded there was evidence which might shed some light on the circumstances and the reality that in his view the proximity of the parties to each other and who was in whose face was capable of providing some assistance.

[13] His Honour, after discussing the evidence of the various witnesses then referred to the statement of Daniel Whyte, the Assistant Manager of The Rock Bar, who was sitting about two meters away and had an unobstructed view of what had happened. Mr Whyte was not called as a witness. His statement was tendered by counsel for the appellant at the trial. His Honour said: "If, as Mr Whyte says, Mr Hayes was standing up with his back to the wall, then he hadn't got in the defendant's face; if they were close together,

it was the defendant who had gone for Mr Hayes; not the other way round. Otherwise, Mr Hayes would not have his back to the wall. He had nowhere to go. He couldn't have gone backwards; the wall was there. And they were close together so the only person who could have made the approach was in fact the defendant. That's consistent with the evidence of Mr Hayes, who said that the defendant got into his face."

[14] His Honour found on the evidence that it was the appellant who got into the face of the complainant, that the complainant was standing up and had not been sitting down and had not suddenly leapt to his feet. He found that the complainant was in fact in close proximity to the wall with the appellant in front of him and this is where they had some heated words.

[15] As to whether or not the complainant threatened the appellant to have a fight or the appellant threatened the complainant to have a fight, his Honour said that he was not able to make a finding beyond reasonable doubt as to who had threatened whom, and that he put that matter out of his mind, even though he said: "It is more likely that it was the defendant who was verbally aggressive and challenging, simply because of the body actions and the proximity of the defendant to Hayes."

[16] His Honour then found that the appellant was in close proximity to the complainant, that he moved into the complainant's personal space, that the complainant had his back against the wall and they were having some angry words exchanged between the two of them. The complainant had his

hands down towards his side and his fists were clenched. His Honour then discussed the evidence of the witnesses Moore, Watson and Whyte, which he found was consistent with the evidence of the complainant, that the complainant was doing nothing that was provocative or which would lead anyone to believe that he was about to hit the appellant. His Honour then found beyond reasonable doubt that the complainant made no action which would indicate to a reasonable person that he was about to or imminently about to strike the appellant. His Honour then said:

> "On the evidence of the defendant, he perceived that that was what Hayes was going to do but on the evidence before me, I'm satisfied beyond all reasonable doubt that if he had such a perception – and it's not necessary for me to necessarily find whether he did or not – that such perception was not reasonable on the objective circumstances of the facts, as I have found them. As such I further find beyond all reasonable doubt that the defendant's response in striking Mr Hayes very forcefully to the right eye and cheek area was not a reasonable response in the circumstances either as he perceived them or as he reasonably should have perceived them".

He therefore found the defence of self-defence had been negatived beyond all reasonable doubt.

The Nature of the Appeal

[17] It is well established that an appeal to this Court under the Justices Act is an appeal by way of re-hearing. The appeal can be both on questions of fact as well as law. However error must be shown and the error must be such as to vitiate the decision appealed from.

The Appellant's Argument

[18] It was submitted by counsel for the appellant that the learned magistrate's finding that the appellant moved into the personal space of the complainant who had his back against the wall was not open on the evidence.

[19] The complainant's evidence was that as he stood up from leaning on the table the appellant "got in his face". He stated that when he was hit, he took a step backwards and then went back against the wall. The witness Smith said the complainant was leaning on a table near the side wall although it must be said that his evidence was of limited assistance because he did not seem to remember a great deal of what had happened. The witness Watson said that the complainant was "standing there" a drink in his hand; they were face to face when the appellant hit the complainant. At that stage he stepped in whilst the complainant "staggered back and ran into the wall and then covered himself up and a couple of other punches were thrown". Only the original strike hit the complainant.

[20] The witness Moore, from a diagram which she drew for the Police[1] indicated that both the complainant and the appellant were well away from the wall at the time the blow was struck.

[21] It would appear that the basis for the learned magistrate's findings was the statement of the witness Daniel Whyte:

> "Both were standing up and Daniel [the complainant] had his back to the wall but wasn't touching it. They were very close to each other, about a table's width and the tone of the exchange was aggressive but I couldn't make out what was said. I suddenly saw Daniel drop his hands to his side and form fists. He had nothing in his hands. His stance was aggressive but I didn't think anything was going to happen based on watching Daniel and Koko [the appellant]. I suddenly saw Koko punch Daniel twice with his right fist – the punches were straight on and hit Daniel above the left eye I think. The punches didn't knock Daniel over, he was still standing. Daniel jumped right back towards Koko as if he wanted to fight him but a male patron who I recognised as a regular, I don't know his name, had restrained Koko and was pulling him away".

[22] It was submitted that the comment in the statement that the complainant "had his back to the wall" clearly did not mean that he was right up against the wall but only that his back was facing the wall.

[1] Exhibit P3

[23] I agree with the submission of counsel for the appellant, Mr Goldflam, that it was not open to the learned magistrate to find that the complainant was standing up with his back to the wall, that he had nowhere to go and he could not have gone backwards because the wall was there.

[24] Counsel for the appellant said that the finding that the complainant had his back against the wall was adverse to the appellant in two respects. First, it supported an inference that the appellant was the aggressor. Secondly it was used by the learned magistrate to infer that the complainant could not have approached the appellant, effectively in his face, challenging him for a fight.

[25] I find that the submissions made by Mr Goldflam are made out.

[26] The submission of counsel for the respondent, Mr Jackson, did not deal with the way in which the learned magistrate had reasoned, rather he put it that this was a question of fact for the learned magistrate to determine and he submitted that the complainant and the witness Whyte gave evidence to the effect that it was the appellant who moved into the complainant's face. However the learned magistrate did not deal with the evidence in this way, probably for good reason. The learned magistrate referred to the difference in height between the parties. He described the appellant as not a small man; "he is a very large solid individual ...". He described the victim as "a solid well-built man ... not as big a man as the appellant". If the complainant had been, as he said in his evidence, bending over the table

when the appellant approached him, and he then stood up, and if the appellant was larger in his build than the respondent, it is not difficult to see how it may have appeared that the appellant moved into the respondent's personal space.

[27] The next finding which Mr Goldflam takes issue with is the use which the learned magistrate made of his inability to make a finding whether or not the complainant had threatened to fight the appellant. Whilst Mr Goldflam did not criticise the learned magistrate for taking that view of the evidence, it was put that he fell into error in that he failed to decide the issue of whether or not the appellant had a belief that the respondent was about to strike him on the basis that it had not been proved one way or the other who was verbally aggressive and challenging.

[28] Mr Goldflam submitted that the learned magistrate reasoned upon a false premise that it was the appellant who moved into the respondent's personal space, not having regard to the finding that the respondent had his fists clenched at that stage nor having regard to the appellant's evidence that he thought that he was being threatened. It was put that the learned magistrate ought to have found that there was a reasonable doubt on that issue.

[29] Counsel for the respondent ultimately did not argue to the contrary.

[30] The next finding which was challenged by Mr Goldflam is the finding that the complainant made no action to indicate to a reasonable person that he was about to strike.

[31] The learned magistrate's finding on this issue was based on the eye witnesses which was to the general effect that the appellant suddenly hit the complainant out of the blue. None of the eye witnesses saw anything in the complainant's conduct indicating that he was about to hit the appellant. The learned magistrate did not specifically state that he rejected the appellant's evidence and the learned magistrate in dealing with the appellant's evidence made no finding as to whether or not the appellant believed that the complainant was about to strike him. The appellant had led evidence as to his previous good character which the learned magistrate accepted. This was a matter which the appellant was entitled to have taken into account in his favour both in relation to his truthfulness as a witness but also in relation to the ultimate issue (see *Melbourne v The Queen*)[2].

[32] Against that view of the facts it was argued that the learned magistrate ought to have considered the question of whether or not the Crown had proved beyond reasonable doubt that the appellant's perception was a reasonable one. I accept Mr Goldflam's argument but that does not necessarily mean that the conclusion of the learned magistrate was wrong. This is a matter in which I must form a view myself bearing in mind that before an ultimate conclusion can be reached that the appellant was

[2] (1999) 198 CLR 1

wrongly convicted, I must be satisfied that the conviction was unsafe and unsatisfactory or in other words that the factual errors made by the learned magistrate vitiated his finding of guilt to the extent that the verdict of acquittal is necessary.

Conclusions

[33] I consider that the learned magistrate should have considered the question of whether the Crown proved beyond reasonable doubt that the appellant did not have a belief that the complainant was about to strike him, and if so, whether the prosecution had also proved beyond reasonable doubt that that belief was not a reasonable one. In considering these questions for myself, the following matters are relevant:

1. The complainant had been twice asked to leave and although he was saying on his own evidence that he would do so, he made no effort to actually leave. He clearly wanted to stay on until he had finished his drink and his cigarette, and must have thought that he was entitled to do so. Both parties had a reason to become angry with each other, even though there was no history of a bad relationship between them.

2. There was a real possibility that it was the complainant who was the aggressor not the appellant, because, as the learned magistrate found, the complainant had his fists clenched by his side. In this respect the learned magistrate rejected the complainant's evidence that he had a glass of beer in his hand at the time.

3. On the complainant's own account he had been leaning on the table and stood up when spoken to by the appellant and it was clear that they were close together. The action in straightening up from that position was also consistent with the complainant being in the appellant's face as the appellant maintained.

4. The appellant had had nothing to drink whereas the complainant on his own evidence had been drinking for several hours before then, although he was not drunk. This may have contributed to the complainant being argumentative. It is not unlikely, if he had his fists clenched, that he threatened to fight the appellant.

5. The observations of the witnesses as to the demeanour of the parties were not really helpful as they were not expecting anything to happen. They were unable to give an account of what was said during the argument, despite the impression that it was a heated one. The learned magistrate opined that either the music was loudly blaring or there was something to distract them, but according to the statement of Whyte, the music had already been turned down by then.

6. The appellant had no previous convictions and was a person of previous good character. This is relevant to an assessment of his truthfulness as a witness, and also shows that he did not have a propensity for violence. The complainant on the other hand, had a

previous conviction for aggravated assault in 2002 when he was drunk.

[34] The prosecution did not prove to the learned magistrate beyond reasonable doubt that the appellant did not believe that the complainant was about to strike him. In all the circumstances I have come to the conclusion that the prosecution has also not proved that the appellant's belief was an unreasonable one.

[35] The other limb of self-defence which the learned magistrate had to consider was whether the appellant's conduct was a reasonable response in the circumstances as he reasonably perceived them to be. This is an objective test. Although the learned magistrate found against the appellant on this point his findings were predicated on his finding that his perception that the complainant was about to strike him was not a reasonable one. His Honour also seems to have found further that the appellant's response in striking the respondent very forcefully to the right eye and cheek area was not a reasonable response in the circumstances as the respondent perceived them although his Honour said that he made no specific finding as to whether he had such a perception because he said that it was not necessary for him to find whether he did or not.

[36] In those circumstances it is open to this Court to decide whether based on the appellant's evidence the prosecution has proved beyond reasonable

doubt that the appellant's response was unreasonable. In my opinion the answer to this question must be resolved in favour of the appellant. The appellant was not required to wait until the complainant struck out at him. It was not suggested that the force the complainant used was excessive and in the circumstances I do not think it was. In those circumstances I consider that I have a reasonable doubt as to whether he was rightfully convicted to which the appellant is entitled to the benefit.

[37] I would therefore order a verdict of not guilty and quash the conviction and sentence.

Appeal against Sentence

[38] There was an appeal against the sentence on the basis that amongst other things it was manifestly excessive. In the circumstances it is not necessary for me to consider that ground of appeal but as that matter was argued fully and as it is possible the respondent may wish to appeal further, I consider that I should deal with the arguments of the parties.

[39] On this ground a number of matters were put but before dealing with those matters I think it is necessary to refer to the findings which his Honour made at the sentencing hearing. His Honour found that the appellant was a person of previous good character, that he was not a person of violent disposition, that the offending was out of character, that personal deterrence is not particularly necessary and that he did not pose an on-going risk to the safety of the community. His Honour noted that a

sentence of imprisonment was a sentence of last resort but with offences of violence, particularly if it is a serious blow that causes real harm to someone, then imprisonment is necessary. He observed that there is a need for some general deterrence where the defendant is working in the security industry as members of the public expect that they will not be assaulted by people in those positions. His Honour recognised that any finding of guilt and conviction which is to follow would in itself be a very serious punishment for the appellant. In this case the sentence which the learned magistrate was required to impose by s 78BA of the Sentencing Act required the Court to record a conviction and to impose a sentence of actual imprisonment which could not be wholly suspended. The learned magistrate was aware that he had lost his employment in the security industry and that at least for the short term, his conviction for violence would disentitle him from obtaining employment in that line of work. His Honour also noted that the appellant had an interest in assisting others with drug and alcohol issues and that he was working in that area but lost that employment when his employer recently became aware of these charges. His Honour noted therefore that his ability to work in his chosen areas would be damaged in the short term. His Honour also noted that he was aware that the appellant had an interest in working with children and disadvantaged youth and that again a conviction for violence would affect his ability to gain employment in those areas. Notwithstanding those matters his Honour imposed a sentence of imprisonment for five months

backdated to the day before the sentencing hearing (the appellant had been held in custody overnight) but suspended the sentence forthwith and fixed an operational period of 18 months.

[40] Arriving at this sentence, his Honour said that the starting point when one is dealing with a person who has been found guilty following a hearing, is somewhat in reverse to what the Court is typically used to doing because the majority of sentences involve people who have pleaded guilty so that the way he intended to approach the matter is to consider what sentence he would have imposed if a plea of guilty had been entered. His Honour indicated that if there had been a plea of guilty he would have imposed a sentence of imprisonment of around four months.

[41] Complaint was made that this was an error as the learned magistrate was increasing the sentence because the appellant had pleaded not guilty. I do not think that this submission can be made out. The learned magistrate obviously is more familiar with the range of sentences imposed in such cases where there have been guilty pleas and with the level of discount that guilty pleas usually are given.

[42] On the other hand I think that the sentence of five months was excessive in the circumstances of this case particularly as he was dealing with a person without prior convictions, of previous good character who had been employed in the security industry for 11 years without any difficulties and who has lost his employment opportunities.

[43] It was put that his Honour should have considered the possibility that the appellant had acted in excessive self-defence. On a finding of guilt matters in mitigation have to be proved on the balance of probabilities by the defence. The learned magistrate had already indicated that the prosecution had proved beyond reasonable doubt that any perception that he had that he was about to be assaulted was not reasonable and that his response was not a reasonable response in the circumstances either as he perceived them or as he reasonably should have perceived them. Nevertheless the learned magistrate should have considered whether the appellant had proved on the balance of probabilities that he had acted in excessive self-defence. The findings of the learned magistrate do not necessarily exclude the finding that he acted in excessive self-defence and notwithstanding a submission that was made to him along those lines, his Honour rejected it apparently on the basis that he had already found beyond reasonable doubt that the defence of self-defence had been disproved. If the correct finding had been that the appellant had acted with excessive self-defence in those circumstances, I would have thought that a sentence of imprisonment either to the rising of the Court or at least a minimal custodial head sentence was all that was warranted.

[44] As to the operative period, I also think that this was excessive. Counsel for the respondent virtually conceded as much, even if the head sentence was within range. It is difficult to see why such a long period was necessary when his Honour was of the view that personal deterrence was not

particularly necessary. If it had been necessary for me to do so, I would have quashed the sentence imposed, and re-sentenced the appellant, but before doing so, I would have requested further information as to the appellant's circumstances since the date of his conviction.

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