Parnell v Verity [2011] NTSC 47

PARTIES:	JOSHUA PARNELL
	v
	BRETT JUSTIN VERITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 5 OF 2011 (21026236)
DELIVERED:	24 JUNE 2011
HEARING DATES:	18 MAY 2011
JUDGMENT OF:	MILDREN J
APPEAL FROM:	E MORRIS SM

CATCHWORDS:

APPEAL AND NEW TRIAL – appeal against conviction – charges of resisting arrest and assaulting police in the execution of duty – whether arrest lawful – appeal allowed – *Domestic and Family Violence Act 2007* (NT), s 84

Domestic and Family Violence Act, s 5, s 41(1), s 84

REPRESENTATION:

Counsel:

Appellant:	P Bellach
Respondent:	M Johnson

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID number:	Mil11494
Number of pages:	12

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

Parnell v Verity [2011] NTSC 47
No JA 5 of 11 (21026236)

BETWEEN:

JOSHUA PARNELL
Appellant:

AND:

BRETT JUSTIN VERITY
Respondent:

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 24 June 2011)

[1] This is an appeal from the Court of Summary Jurisdiction.

[2] The appellant was convicted of resisting a member of the police force in the execution of his duty, contrary to s 158 of the *Police Administration Act,* and of unlawfully assaulting a police officer whilst in the execution of his duty, with the circumstance of aggravation that the said police officer suffered harm, contrary to s 189A of the *Criminal Code*. The appellant has appealed his convictions on the grounds that:

(1) Having regard to the evidence the learned Magistrate's findings of guilt were unsafe and unsatisfactory.

(2) The learned Magistrate made findings of fact that were not reasonably open on the totality of the evidence; and

(3) The trial Magistrate erred in the interpretation of s 84(1) of the *Domestic and Family Violence Act* (2007) NT.

[3] At the conclusion of the hearing, I allowed the appeal on each of those grounds and quashed the convictions. I said that I would publish my reasons at a later time. These are my reasons.

The Facts

[4] In the early hours of the morning of 8 August 2010, Constable Arnott and Constable Martin were on night shift. At about 5:45 am they received a call to investigate an alleged domestic disturbance. A female by the name of Shauna O'Connor had called for the police and they arranged to meet her at the front of the Rapid Creek shops on Trower Road. When police arrived, Ms O'Connor was visibly upset, distressed, shaking and crying.
A conversation with her ensued. The police formed the view that there were grounds to seek a domestic violence order from an authorised police officer pursuant to s 41(1) of the *Domestic and Family Violence Act 2007* as in force at that time. In order to achieve this, they intended to take Ms O'Connor to the Casuarina Police Station and obtain a statement from her. The police vehicle did not have any room for passengers other than in the cage at the rear of the vehicle where persons who are arrested are

usually placed. Apparently, Ms O'Connor voluntarily entered the vehicle and sat in the cage for this purpose.

[5] Constable Arnott drove the police vehicle along Trower Road intending to turn left into Lakeside Drive en route to Casuarina Police Station. As the police vehicle turned left into Lakeside Drive, Ms O'Connor saw the appellant standing in the front yard of house premises on the opposite side of Trower Road. She drew the police officers' attention to the appellant. Constable Arnott said at this stage, "…we had two choices, whether to carry on to the police station and take the statement or we could take the defendant into custody there and then". He discussed it quickly with Constable Martin, conducted a u-turn, turned left into Trower Road and stopped the vehicle directly opposite the premises, 126 Trower Road, where the appellant had been seen.

[6] Constable Arnott's evidence was that when the police vehicle stopped he looked outside of the driver's side window and observed the appellant at the gate of that residence smoking a cigarette. He was pacing back and forth along the gate and he was "sucking pretty heavily on the cigarette and we could just see that because of the glow on the cigarette".

[7] The police alighted and as they were crossing the road the appellant shouted, "You can fuck Shauna off out of here. You can tell her that I'm fucking her sister. I'm fucking everyone." He allegedly repeated this twice more as the police crossed the road. Ms O'Connor remained in the vehicle.

[8] At the time, the premises at 126 Trower Road were occupied by the appellant's mother and two other males who were apparently relatives.

[9] According to Constable Arnott's evidence, whilst conveying Ms O'Connor on Trower Road the police had received information by radio concerning the appellant which made them wary of him.

[10] As the police approached the gate, Constable Arnott said to the appellant, "Look, mate, we need to sort out what's going on here. What's happening? What happened? What's your side of the story?" The appellant told the police to "fuck off". The appellant stopped pacing and glared at the police. According to Constable Arnott he "fixed his jaw and it became apparent to us that communication was quickly becoming not an avenue that we could pursue. Due to the situation, we wanted to get him out of there and get it resolved; get the DVO in place as soon as we could. Because of his aggressive nature, we could no longer communicate and I drew my taser and I didn't point it at him. I distinctly remember showing it to him like this and saying, 'Look, mate, have you seen one of these work?' and he immediately – his expression changed. He relaxed. He took a step back. I said, 'You've got to come with us. You're under arrest for a Section 41 DVO'". Constable Arnott then reholstered and ordered the appellant onto his knees. The appellant got down onto his knees. The police officers walked through the gate, which until then was closed. Constable Arnott told the appellant to put his hands behind his back. He then handcuffed him. As soon as that was done the appellant's demeanour changed. He became

aggressive and belligerent again. He rolled onto his side and started screaming to his mother for help, making allegations that the police were assaulting him.

[11] As a result, a woman whom Constable Arnott presumed to be the appellant's mother, came out of the house followed by two males. They approached police. The police identified themselves. The appellant's relatives started to become aggressive demanding that the police release the appellant. Eventually the police had some success communicating with the appellant's family. At this stage, the appellant kicked out at Constable Arnott who then stepped forward and put his right foot on the appellant's left leg. The appellant started screaming again. The appellant's family started to approach the police and Constable Martin drew his taser and pointed it at the family and told them to get back. Constable Arnott took out his pepper spray. The family stopped moving. Whilst Constable Arnott was not looking, the appellant kicked him with his right leg with full force to the shin. He turned his head around to the appellant who was "lining up for a second kick". Constable Arnott then sprayed the appellant with pepper spray into the face which had immediately caused the appellant to become compliant.

[12] In the meantime, Constable Martin had called for backup on the police radio and other police officers arrived. The family retreated and the police were able to get the appellant to his feet. He was then compliant and he was put into the cage at the back of another police vehicle. He was then told that he

was arrested for assault police and for being disorderly in "the hearing view of the public".

[13] Eventually the appellant was taken to Casuarina Police Station where he was processed in the Watch House, then placed in a cell. He was subsequently advised of his rights in accordance with s 140 of the *Police Administration Act*. He was later interviewed by police during which he admitted kicking one of the police officers.

[14] So far as the injury to Constable Arnott was concerned he said that although it did cause him some pain, there was no bruising or swelling as a result and no medical attention was required.

[15] The essence of the defence case at trial was that the police, when they originally arrested the appellant, had no power to do so. The arrest was, therefore, unlawful and the appellant was justified in resisting arrest. Insofar as the assault charge was concerned, he acted in self defence. Thus, it was put by the defence that the police were not acting in the execution of their duty.

Relevant Legislation

[16] Section 84 of the *Domestic and Family Violence Act 2007* as it applied at the relevant time provided as follows:

> **84 Power to remove and detain**
>
> (1) This section applies if a police officer reasonably believes:

(a) grounds exist for making a DVO against a person; and

(b) it is necessary to remove the person to prevent an imminent risk of harm to another person or damage to property, including the injury or death of an animal.

(2) The police officer may do the following:

(a) enter premises on or in which the officer reasonably believes the person to be;

(b) take the person into custody;

(c) remove the person to the nearest police station or other place where the person can be conveniently detained until a DVO is made and given to the defendant.

(3) However, the person must not be detained for more than 4 hours after being taken into custody.

(4) When exercising powers under subsection (2), the police officer may use reasonable force or assistance.

The Trial before the Learned Magistrate

[17] The argument in the Court below and in this Court was that the police did not reasonably believe that it was necessary to remove the appellant to avoid imminent risk of harm to another person or damage to property, including the injury or death of an animal.

[18] It is clear from s 84(1) that in order for the power to remove and detain to operate under that section, first there must be a belief of the relevant factors by the police officer and secondly the belief must be objectively reasonable.

[19] Counsel for the appellant submitted that there was no evidence to show that the police entertained a belief that it was necessary to remove the appellant

to prevent an imminent risk of harm; or if such a belief was held that it was objectively reasonable.

[20] The way the trial was conducted in the Court below was that when Constable Arnott was asked about information as to his belief, it was objected to by counsel for the appellant on the basis that it was hearsay. The learned Magistrate overruled the objection, but the matter was not really further pursued. Virtually no evidence was led as to what Ms O'Connor had conveyed to the police which led them to believe that grounds existed for the making of a DVO against the appellant.

[21] Certainly, it was made clear that they believed such grounds existed, but apart from the fact that the person against whom the Domestic Violence Order was to be sought was the appellant and that he was intoxicated, the Court had no information upon which a finding could be made as to the reasonableness of the police officer's state of mind. The learned Magistrate, in her reasons, said that it was not controverted that there were grounds that the police believed reasonably that they had grounds for making a Domestic Violence Order against the appellant from the information that had been conveyed to them by Ms O'Connor. However, counsel for the appellant at trial had said that there was no evidence led as to "the nexus of where the domestic violence is supposed to have occurred". As I read the appellant's submissions there was no concession made that the police had a reasonable belief. Certainly it was not put that they did not have the belief at all, and it

may be inferred that they did have such a belief as otherwise they would not have been taking Ms O'Connor to the Casuarina Police Station.

[22] As the learned Magistrate recognised, evidence as to what the police had been told by Ms O'Connor was admissible on the issues which needed to be proved, that subjectively they had such a belief and that objectively the belief was a reasonable one. It was for the Crown to prove both elements in order to make out its case under s 84(1)(a). One may infer from the shouting from the appellant at his mother's house on Trower Road that he and Ms O'Connor had some kind of argument, presumably over an allegation that the appellant had had sexual intercourse with another woman. It was not in contention that they were, in fact, in a family relationship. Evidence was given in the record of interview which was tendered at the trial in which the accused admitted that they had been in a relationship for six or seven years, that there was a stepson and two boys from the relationship aged five and four and that they were all living together at 7 Sandalwood Court, Leanyer. The police also had formed the view that the appellant was drunk. In the record of interview the appellant admitted that he was intoxicated at the time.

[23] The only other evidence concerning the circumstances of the argument came from the appellant's record of interview with the police which was held at 12.56 pm on 8 August 2010. According to the appellant's version he had been driving out of town along the Stuart Highway when he saw Ms O'Connor walking along the footpath outside of the premises occupied

by Kerry Holden. She was drunk. He has tried to get her into the car. Initially she refused, but eventually he persuaded her to get in. As he drove the car in the direction of Nightcliff, an argument ensued. He eventually told her to "fuck off" and, whilst the car was still moving, she tried to jump out of the vehicle. In order to prevent her from injuring herself, he tried to grab her and he pulled the car over. She then jumped out and he drove to his mother's place. According to his version, he did not assault her. He claimed that she was "a head case". Nothing was put by either of the police officers conducting the record of interview (who were different officers from the police officers who gave evidence) as to what Ms O'Connor's version was.

[24] Ms O'Connor was not called as a witness.

Conclusions

[25] On the basis of the evidence before the learned Magistrate, there was no evidence of "domestic violence" as defined by s 5 of the *Domestic and Family Violence Act* and, therefore, it was impossible for the Magistrate to have made a finding that the police reasonably held the belief that grounds existed for the making of a Domestic Violence Order against the appellant.

[26] However, the principal issue at trial concentrated on the second limb of s 84(1)(b), namely whether the police reasonably believed that it was necessary to remove the appellant to prevent an imminent risk of harm to another person.

[27] On this question, the learned Magistrate asked Constable Arnott what information he had which led him to place the appellant under arrest. Constable Arnott said in response to the question, "Okay, the information I had was firstly the grounds for a Section 41 which as police we can take as hearsay and my statement covers that. The information that I had received was that it may have been the defendant's intention to return to the home address and to remove the children from that address and being intoxicated and in no state to be looking after anybody, that was not something we could allow."

[28] The difficulty with that evidence is that there was simply no evidence that the appellant was likely to cause any harm to anybody. Apart from some vague assertion that Ms O'Connor believed that he was likely to return to the house and remove the children, there was simply nothing upon which a Court could infer that either police officer held a reasonable belief that it was necessary to remove the appellant because of an *imminent risk of harm* to anyone else.

[29] The learned Magistrate recognised that there was no imminent risk to Ms O'Connor, who was safely secured in the back of the police vehicle. After considering the dictionary definitions of the word "imminent" which she noted meant "means about to happen" or "means likely to occur at a moment impending" the learned Magistrate correctly found that what is an "imminent risk" depends upon the circumstances.

[30] The learned Magistrate then said:

> In my view it was reasonable to believe then that there was an imminent risk of harm to another person. Whilst that risk would not have occurred in the next perhaps five, ten minutes, the distance between Jingili and Leanyer where apparently the children were residing, was not large and certainly something where the defendant could have, in my view, could have got there. When I say in my view, of course *there is no evidence before me that he had intended any threat*. This is what is acting in the minds of the police officers at the time. So I do find that were grounds, reasonable grounds from what the police officer believed that it was necessary to remove the person to prevent an imminent risk of harm to another person. (italics mine)

[31] Whilst I accepted that it is possible that the appellant might have been able to have caught a taxi or got someone to drive him, or perhaps even driven himself, to his home, which was possibly only 10 minutes away, there is nothing in the evidence to suggest that he was about to do that. Nor was there any evidence, as the learned Magistrate said, that he intended to harm either the children or anyone else.

[32] In those circumstances, the Crown failed to prove beyond reasonable doubt the police had lawfully arrested the appellant and that they were, therefore, acting in the exercise of their duty. That being so, the appellant was entitled to resist his arrest and to use reasonable force to do so. The force used was not excessive. It therefore followed that the appellant should have been acquitted of both charges.
