Doolan v Edgington [1999] NTSC 130

PARTIES:	DOOLAN, Darren John
	v
	EDGINGTON, Steven Mark
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	12 of 1999 (9815484)
DELIVERED:	26 November 1999
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JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:

Appellant:	K Kilvington
Respondent:	J Watson

Solicitors:

Appellant:	CAALAS
Respondent:	DPP

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

Doolan v Edgington [1999] NTSC 130
No. 12 of 1999 (9815484)

BETWEEN:

DARREN JOHN DOOLAN
Appellant

AND:

STEVEN MARK EDGINGTON
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 26 November 1999)

[1] This appeal goes to the conviction of the appellant before the Court of Summary Jurisdiction at Tennant Creek on 25 November 1998 for causing unlawful damage to a mattress, the property of the Police Force, and assaulting a police officer, namely Constable Eaves, by spitting into his face, whilst in the execution of his duty. The offences were alleged to have been committed during the night and early morning of 25 and 26 July 1998 whilst the appellant was in the custody of police in cells at the police station in Tennant Creek.

[2] There was evidence from three policemen, all of whom were involved in the incidents during the night, Constables Ming, Cook and Eaves. Sergeant

Smith who was also at the station during these events was absent on leave and no evidence was produced from him. So far as the police witnesses were concerned, his Worship had no reason to call any of their evidence into question, such discrepancies as there were were not material to the outcome. As to the appellant, for reasons which will appear, it was clear that his Worship had difficulty in accepting all he had to say when he gave evidence on his oath.

[3] The following summary of facts is taken from his Worship's reasons and uncontested evidence.

[4] The appellant was taken into custody late in the evening of 25 April, probably prior to 11pm, although there is some difference on the police evidence about that. He was observed by Constable Ming, when taken into custody, to be badly affected by alcohol, abusive and swearing and that conduct continued for some time into the night. He was seen to be staggering on his feet and waving his arms about. None of that is disputed by the appellant who readily conceded on his oath that he was drunk, and that when taken into custody there was a fight brewing between himself and others. It was for those reasons that the police exercised their powers under s 128 of the *Police Administration Act* 1979 (NT) to take the appellant into what is commonly called "protective custody". The word "protection" or the like is not used in the legislation, but there is power in the police under ss 128(3)(a) and (b) to search a person so taken into custody and, inter alia, to remove from the person any item that is likely to cause harm to himself.

The power is not of direct application in this case, but it does point to the concern of the legislature that an intoxicated person may cause harm to himself and to enable the police specifically to act to reduce that prospect. It is not disputed that the appellant was lawfully held until his release the next morning.

[5] The appellant is an Aboriginal man and was placed in cells at the police station. There are video cameras in place whereby images of what is going on in the cells are projected to the nearby muster room. The cameras are obviously for surveillance purposes, and to enable them to operate effectively, lights are left on. The appellant had no clothing on the upper part of his body and was clad only in a pair of shorts. There was no acceptable evidence as to the temperature in the cells, but his Worship was prepared to find that the appellant would have felt cold at a time he was in custody, but after damaging the mattress. He was not provided with a blanket and that has given rise to contention in this case.

[6] The appellant had suffered a work related injury to his left hand a few days prior to those events. It caused him pain during the course of that night which may have been aggravated by the application of handcuffs, another issue in contention. The injury was so serious, that on the appellant's evidence when he was taken to hospital after his release from custody, he was admitted for a week. He was taken to hospital by Constable Cook, to whom he complained about pain in his hand whilst he was being

fingerprinted shortly after his release. There was no acceptable evidence that he drew the attention of police to the injury as such prior to that.

[7] Shortly after he was placed in the cells, police noticed by the surveillance cameras that he was "stuffing" toilet paper into his mouth, "three or four bundles" and had placed wads of it partially over the lens of the surveillance camera. His Worship was not persuaded that the appellant had chewed on it, as he asserted in evidence, to relieve pain in his hand. Constable Ming and Sergeant Smith went to the cells and handcuffed the appellant's wrists behind his back whilst he lay face down upon the concrete floor. He was left in that position. Constable Ming said that the purpose of the handcuffs was to stop the appellant placing anything in his mouth or doing anything to himself which may cause harm.

[8] The first objective of the handcuffing was not achieved. The appellant was observed shortly thereafter to have maneuvered his arms and legs so that his handcuffed arms were in front of his body. His Worship thought that he may have aggravated the injury whilst doing that. The appellant was then seen to pick up a mattress, bite it, and tear a strip off its vinyl cover. The police returned to the cells and removed all the mattresses, the number is not established, but not less than two, and the toilet paper. On that and all previous occasions, the appellant was swearing at and abusing police. Until that stage, the appellant could have lain down upon a mattress and pulled another over him if he was cold. He acknowledged that he did not think of that because he was too "bleary".

[9] According to Constable Eaves, he and the other police officers continuously assessed, as between themselves, whether the handcuffs should remain in place, and agreed that due to the appellant's continuing abnormal or aggressive behaviour, they should remain on. He added that he made his own assessment that they should remain. He was not taxed any further about the subject.

[10] His Worship had some difficulty with the evidence regarding the appellant's requests for a blanket. He seems to have accepted that a request for a blanket was made, but not to any of the police who gave evidence that he did not make such a request to them. Sergeant Smith was absent, and his Worship inferred that the request for a blanket was made to the Sergeant after the mattresses had been removed. He said that there was no reason for him to believe that the appellant had complained about anything until after that event. By then the facts to found the charge of unlawful damage to the mattress had occurred.

[11] I have reviewed the appellant's evidence in relation to the issue of his request to Sergeant Smith for a blanket. He was not positive in his evidence that he mentioned being cold or asked about a blanket of the Sergeant prior to putting the paper in his mouth. He also said that he asked the other policemen, but they had just kept going. He then said that he told the Sergeant he wanted a blanket and asked him if he could get the handcuffs off and that he would then settle down. It will be recalled that the handcuffs were applied after he had chewed the paper, and that the next time he and

the Sergeant were together was when the Sergeant came down to remove the mattresses after he had bitten into one of them. Although entitled to do so, I would not be prepared to draw a different inference from the established facts than was drawn by his Worship.

[12] The appellant gave evidence as to why he ripped the mattress, "I was trying to keep warm, so I put my hand inside to keep my hand warm, to keep the pressure down".

[13] Constable Eaves' evidence as to the assault upon him was corroborated to some extent by that of Constable Cook. The incident was recorded on the video. Constable Eaves was performing a cell check when the appellant approached the vertical bars and spat in his face. His Worship found that Constable Eaves had not received any coherent complaint from the appellant about a blanket or any other matter.

[14] Given the appellant's state of intoxication when taken into custody, his continuing conduct towards police and his evident agitation and anger, it is no wonder that his Worship felt that much of his evidence was unreliable and that where it conflicted with that of the police they were to be accepted. The video film, though not perfect by any means, basically corroborated what the police say they had observed of his behaviour in the cells in relation to the toilet paper, mattress and assault.

[15] The appellant's position before his Worship and on appeal was that he had discharged the evidentiary onus so as to raise a number of issues in relation

to both charges which the prosecution had then failed to displace so as to prove its case beyond reasonable doubt.

[16] The grounds of appeal, as amended, follow:

> "1. In respect of the offence of unlawfully damaging property contrary to s.251 (1) Code. The learned Stipendiary Magistrate erred:-
>
> a) in holding that s.33 or s.43 Criminal Code did not apply to excuse the Appellant from Criminal responsibility;
>
> b) in holding that s.34(1) Criminal Code did not apply to excuse the Appellant from criminal responsibility;
>
> c) in holding that the handcuffing of the Appellant was not unlawful;
>
> d) in impliedly ruling that the onus of proof as to the lawfulness of the handcuffing lay on the Appellant;
>
> e) in the holding that any provocation was "incited" by the Appellant;
>
> f) in finding that the Appellant had not requested a blanket of male officers other than Sergeant Smith which request was refused;
>
> g) in holding that s.27(g) Criminal Code did not apply to excuse the Appellant from Criminal responsibility;
>
> h) in holding that the Court of Summary Jurisdiction did not have jurisdiction to grant a stay of proceedings in respect of the charge by reason of abuse of process.
>
> 2. In respect of the offence of assaulting a Police Officer whilst in the execution of his duty, contrary to s.189A Criminal Code. The learned Stipendiary Magistrate erred:-

a) (Abandoned)

b) in holding that s.34(1) Criminal Code did not apply to excuse the Appellant from Criminal responsibility;

c) in finding that the officer did not provoke the Appellant by:-

i) disregarding his requests for blankets;
ii) disregarding his request for handcuffs to be removed;
iii) breaching his duty imposed by s.149 Criminal Code;
iv) breaching s.196 Criminal Code by reason of confining the Appellant against his will;

d) in holding that any provocation was "incited" by the Appellant;

e) in holding that the count (sic) of Summary Jurisdiction did not have justification to grant a stay of proceedings in respect of the charge by reason of abuse of process."

[17] For reasons I have already indicated, in so far as any of the grounds of appeal call in question his Worship's findings of fact, I am not persuaded that he erred, including as to the inferences which he drew. In so far as there were discrepancies between the police, they were not material and at no stage did his Worship find any of them unworthy of belief. The same cannot be said about the appellant because of his condition.

Damage to the Mattress

Does Section 33 of the Criminal Code Apply?

[18] Section 33 provides:

"Subject to the express provisions of this Code relating to self-defence, provocation, duress and coercion, a person is excused from

> criminal responsibility for an act or omission done or made under such circumstances of sudden and extraordinary emergency that an ordinary person similarly circumstanced would have acted in the same or a similar way; and he is excused from criminal responsibility for an event resulting from such an act or omission."

[19] His Worship held that the circumstances prevailing prior to the damage to the mattress did not amount to a sudden and extraordinary emergency. I agree. Assuming that the appellant was cold and in pain, those conditions existed and no where is there evidence to suggest that either or both of those conditions were of sudden and extraordinary onset such as to constitute an emergency, that is, something requiring immediate action.

Does Section 43 Apply?

[20] Section 43 provides:

> "A person is excused from criminal responsibility for damage caused to property by the use of such force as was reasonably necessary for the purpose of defending or protecting himself, or any other person, or any property, from injury that he believed, on reasonable grounds, was imminent, provided an ordinary person similarly circumstanced would have acted in the same or a similar way."

[21] His Worship in effect held there was no evidence fit to be considered to show that when the appellant ripped the mattress he was defending or protecting himself from injury that he believed on reasonable grounds was imminent. I agree. The appellant may have been trying to relieve himself of some physical discomfort, be it pain, cold, or a combination of both, but he did not point to any injury he believed imminent against which he was so trying to defend or protect himself. If he was cold, and his Worship held

that he was not at that stage, that condition was already in existence. The injury to his hand and associated pain was also then present, and no less so if the pain had been aggravated by his being handcuffed or engaging in the movements necessary to shift his hands from the back of his body to the front. There is no further injury in contemplation, simply a continuation of the present conditions and circumstances. The appellant's evidence was that he was attempting to relieve those existing conditions of cold and pain, not to defend or protect himself from an injury about to happen.

Does Section 34(1) Apply?

[22] Section 34(1) provides:

> "A person is excused from criminal responsibility for an act or its event if the act was committed because of provocation upon the person or the property of the person who gave him that provocation provided-
>
> (a) he had not incited the provocation;
>
> (b) he was deprived by the provocation of the power of self-control;
>
> (c) he acted on the sudden and before there was time for his passion to cool;
>
> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way;
>
> (e) the act was not intended and was not such as was likely to cause death or grievous harm; and
>
> (f) the act did not cause death or grievous harm."

[23] The appellant faces significant hurdles in attempting to have the Court uphold his argument that there was evidence fit to be considered under this heading, such that it must be negatived by the prosecutor.

[24] It is accepted that the prosecution need only negative one of the elements contained in the definition of provocation or one of the provisos to the subsection to succeed.

[25] A "wrongful act", is defined as "an act that is wrong by the ordinary standards of the community; a lawful act may be a wrongful act, but any act expressly declared to be lawful can not be a wrongful act." It was put on behalf of the appellant that his being handcuffed and the continuation of the handcuffing amounted to a wrongful act, as did the failure to provide him with a blanket. It was also contended that either of those circumstances or a combination of them amounted to an insult. It is clear from *Stingel v The Queen* (1990) 171 CLR 312 that "wrongful act" and "insult" are alternatives (at p 323). I assume, without deciding at this stage, that the appellant's contentions are correct. It is then necessary to turn to consider whether such acts or insults were of such a nature, when done to an ordinary person, to deprive him of the power of self-control, the objective threshold test. "It is only if that test is satisfied that it becomes necessary to consider whether the accused was, in fact, subjectively deprived of his or her self-control" (p 324). As to the question posed by the objective test, the content and relevant implications of the wrongful act or insult and an objective assessment of its gravity in the circumstances of the particular case must be

identified (p 325), and the content and extent of that conduct must be assessed from the viewpoint of the particular accused (p 326). Thus "any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult." As to the "ordinary person", the law in the Northern Territory has developed so as to take into account the ordinary Aboriginal male person living in the environment and culture in which he resides. As Kearney J put it in *Jabarula v Poore* (1990) 68 NTR 25: "he is neither drunk or affected by intoxicating liquor, does not possess a particularly bad temper, is not unusually excitable or pugnacious, and possesses such powers of self-control as everyone is entitled to expect an ordinary person of that culture and environment to have", see also the comments of the Court of Criminal Appeal in that regard in *Mugatopi v The Queen* (1991) 2 NTLR 1 at p 6. Although the appellant is an Aboriginal man, there was no particular evidence before his Worship directed to those matters which in the view of Justice Kearney could also be relevant to assessment of the standard of self-control to be exercised by the "ordinary person" in that context.

[26] In my opinion, such an ordinary person would not have lost his power of self-control because of any wrongful act or insult or combination of them here alleged. It does not appear from the evidence of the appellant that he was deprived by the provocation of the power of self-control either. He said that he ripped the mattress with his teeth as a means of providing warmth

and relief from pain, which is clearly indicative that he was in control and set about the task for a particular purpose. In evidence he denied that he was angry and wanted to rip it apart.

[27] I will turn to the question as to whether an ordinary person similarly circumstanced would have acted in the same or a similar way as the accused did, later.

Was the handcuffing of the appellant unlawful and did his Worship err on the onus of proof?

[28] I do not consider that the question of whether or not the handcuffing of the appellant was lawful is relevant. None of the excuses sought to be relied upon by the appellant depends for success upon deciding that question. In so far as provocation is concerned, it is the wrongfulness of the alleged act which is to be considered, and it is not necessary that the act complained of be unlawful for it to be wrongful. See further on the handcuffing issue below.

Was his Worship in error in holding that any provocation was "incited" by the appellant?

[29] The written submissions on this point are as follows:

> "It is submitted that the Magistrate's opinion at p 115 that the appellant "incited" the provocation is untenable. Abusive insulting and irritating behaviour by a drunk can hardly be accepted as "inciting", degrading, callous and arguably unlawful conduct on the part of the police who are expected to deal with such situations with some degree of professional equanimity."

[30] All of that completely misses the point made by his Worship, which was that if the placing of handcuffs upon the appellant was provocative within the meaning of the law, then it seemed unanswerable that he had incited the provocation by his conduct in chewing the paper and not explaining himself. The avowed purpose of the application of handcuffs was to stop the appellant placing anything in his mouth or doing anything to himself which may cause harm. The verb "incite" is defined as meaning, inter alia, to "stimulate or prompt to action". There is nothing to suggest that the police were prompted into action so as to handcuff the appellant for any reason than that which was given, that reason being based upon the appellant's irrational and potentially harmful behaviour.

Did his Worship err in finding that the appellant had not requested the blanket of male officers other than Sergeant Smith, which request was refused?

[31] That was a finding of fact made by his Worship, taking into account the credibility of the witnesses, and nothing has been pointed to which suggests that that finding was in error.

Does Section 27(g) of the Criminal Code apply to excuse the appellant from criminal responsibility?

[32] That subsection reads:

> "In circumstances following, the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or grievous harm:
>
> (g) to defend one's self or to defend another"

[33] His Worship had difficulty understanding the basis for this proposition, and so do I. He thought it may have been put in "as a matter of completeness". In the written submissions before this Court, counsel for the appellant described the raising of the issue as "problematic". Having asked the question – against whom is it suggested the applicant was defending himself by ripping the mattress – and answering it "no one", the argument must be summarily dismissed.

[34] I leave consideration of the issues in relation to the stay of proceedings application until later in these reasons.

The assault upon Constable Eaves

Does Section 34(1) of the Criminal Code apply to excuse the appellant?

[35] I have dealt with some of the applicable general principles relating to provocation in circumstances such as these. In my opinion, the continued handcuffing of the appellant would probably be regarded as being wrong by the ordinary standards of the community given that there was no satisfactory evidence as to the need for the use of those handcuffs during the period after the mattress and paper had been removed. I find it difficult to perceive how he could be restricted from harming himself, and since he was alone in a cell, his aggressive behaviour could not impact upon others. However, I do not accept the submissions made by counsel for the appellant that an ordinary person would have been deprived of the power of self-control because he had been kept in handcuffs for some hours in conditions where

he was suffering pain in one of his hands and was cold. The appellant described his feelings as "distressed". Frustration and anger do not, of themselves, amount to a loss of self-control.

[36] Looking at the proviso to s 34(1), there is no evidence upon which it could be said that Constable Eaves had provoked the appellant. If he had, then I would be satisfied beyond reasonable doubt that the appellant had not acted on the sudden and before there was time for his passion to cool arising from the circumstances relied upon as amounting to provocation. They had been in existence for some hours.

[37] On behalf of the appellant, it was submitted that the provocation excuse was open in a situation where a number of people had provoked the defendant, over a period of time, provided the victim of the assault contributed to the accumulation of wrongful acts or insults. Accordingly, it was put that Constable Eaves' wrongful act or insults were the last straw for the appellant, but just what he did in that regard was not disclosed. The evidence about this incident is that he was simply conducting a cell check and had done nothing towards the appellant which could be regarded as being in itself a wrongful act or insult such as to provoke the reaction. The argument suggesting an accumulation of loss of self-control over time as a result of the actions of a number of individuals does not sit easily with the requirement that the appellant had acted "on the sudden". There is no evidence that, apart from the continued application of the handcuffs,

anything had been done to the appellant by any of the police between the time he had chewed the mattress until he was seen by Constable Eaves.

Stay of proceedings

[38] The appellant's submissions in support of the proposition that his Worship should have stayed the proceedings as an abuse of process, proceeds upon the premise that the handcuffing of the appellant was unlawful, and therefore the court's processes are not being used fairly because it was the action of the police officers which caused the appellant to damage the mattress.

[39] In support of that proposition, reliance is placed upon *Moevalo v Department of Labor* (1980) 1 NZLR 464 especially the passage at p 481 cited in *Papazoglou v Republic of the Philippines* (1997) 92 A Crim R 418 at 431:

> "It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly be State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case.
>
> It follows that in exercising its inherent jurisdiction the court is protecting its ability to function as a court of law in the future as in the case before it. This leads on the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the court's processes may lend themselves to oppression and injustice."

[40] Leaving aside for the moment the question of whether a Court of Summary Jurisdiction has power to stay proceedings, upon a consideration of such evidence as there was on this issue, I could not be satisfied that it was the actions of the police officers that caused the appellant to damage the mattress. There were a number of possible causes, amongst them the appellant's feeling cold, such pain as he may have been suffering from the work related injury, irrational thinking brought about by his intoxicated condition, anger at being locked up and the fact that he had been handcuffed. He could just as easily have done the damage to the mattress he did without having been handcuffed.

[41] It will be remembered that the ripping of the mattress took place within a matter of minutes after he had been handcuffed, and that that had been done so as to prevent him doing harm to himself. There was an obligation upon the police under s 149 of the *Criminal Code* to use reasonable care and take reasonable precautions to avoid or prevent danger to the life, safety or health of the appellant whilst he was being detained. The application of force does not amount to an offence when used in restraining a person who needs to be restrained for his own protection or benefit (s 187(c)).

[42] Recommendation 163 of the Royal Commission into Aboriginal Deaths in Custody is that police should receive regular training in restraint techniques, including the application of restraint equipment, acknowledging as well that restraint aids should only be used as a last resort. The report acknowledges

that the use of restraint equipment, which must embrace handcuffs, is not unlawful in itself.

[43] As to whether or not the Court of Summary Jurisdiction has the jurisdiction sought to be invoked, see *Bynder v Gokel* (1998) 125 NTR 1 and the decision of the Court of Appeal of New South Wales delivered at about the same time, *DPP v Shirvanian* (1998) 102 A Crim R 180. Given the facts of this case, I do not find it necessary to examine the question. Suffice it to say his Worship did not err in declining to stay the proceedings.

Person similarly circumstanced

[44] Such a person does not include a person who is voluntarily intoxicated (*Criminal Code Act, s 1* – definitions). The appellant was. Excuses available under s 33, s 43 and s34(1), all pose the question as to whether or not an ordinary person similarly circumstanced would have acted in the same or a similar way to the appellant in relation to both of these offences. Although the appellant had been in custody from somewhere around 11pm until when the assault upon Constable Eaves took place, about 6 or 7 hours, it is not contended by him that at that later time he was not intoxicated. Whether so or not, his actions are to be judged by the standards of a person who was not. It cannot seriously be argued that an ordinary sober person in the circumstances of the accused at the time he committed each of these offences would have acted in the same or a similar way. Such a person, even if handcuffed, would have had the ability to communicate clearly with

the police officers about being cold or being in pain. If unattended, he had the ability to warm himself by lying on a mattress and using another as a cover. He would have realised that tearing a vinyl cover from the top of a foam mattress would not have provided him with warmth or relief from pain in his hand. Assuming that the police had taken no notice of his request for a blanket and that his hand continued to be painful through the application of the handcuffs or otherwise, he would not have gone out of his way to spit upon Constable Eaves. On this basis alone, he could not be excused even if the circumstances providing a foundation for the excuse were shown to have existed.

[45] The appeal is dismissed.
