Liddle v Pryce [2001] NTSC 22

PARTIES:	LIDDLE, Anthony
	v
	PRYCE, Leonard David
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 64 of 2000
DELIVERED:	4 April 2001
HEARING DATES:	26 February 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL
Justices – appeal against findings of guilt – assault – excuse of provocation – whether an ordinary person similarly circumstanced would have acted in the same or similar way
Justices Act 1928 (NT)
Criminal Code 1983 (NT), s 1 and s 34
Masciantonio v The Queen (1994-95) 183 CLR 58 at 67, considered.

REPRESENTATION:

Counsel:

Appellant:	S O'Connell
Respondent:	G McMaster

Solicitors:

Appellant:	CAALAS
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	mar0109
Number of pages:	8

Mar0109

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

Liddle v Pryce [2001] NTSC 22
No. JA 64 of 2000

BETWEEN:

ANTHONY DALE LIDDLE
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 4 April 2001)

[1] Appeal against findings of guilt for assault and breach of a domestic violence order. The issues go to the excuse of provocation.

[2] The findings were recorded on 13 October 2000 by the Court sitting at Alice Springs after trial of the appellant upon two charges:

[3] The first that on 22 June 2000 he unlawfully assaulted Jacqueline Keighran, accompanied by circumstances of aggravation, namely, that she suffered bodily harm and she being a female and he a male, and, secondly, that on the same day he being a person against who a restraining order issued in accordance with the Domestic Violence Act 1992 (NT) was in force, and

having been served with a copy of the order, failed to comply with the terms of that order contrary to s 10 of that Act.

[4] Ms Keighran's evidence was that she had been in a relationship with the appellant for some time. On the day in question they had both been drinking to excess and she recalled an argument breaking out about his association with another woman or women, but she could not recall exactly. She could recall being hit, but nothing else. She identified photographs of her face taken at the police station that night. Her only evidence concerning the Domestic Violence Order was that her recollection was that she had obtained one.

[5] When cross-examined she conceded that her recollection was affected because she was fairly drunk at the time. She conceded various possibilities going to her having started the argument, keeping it up over a fairly long period, that she was angry, and that she was standing and the appellant sitting when she punched him twice to the face, "… I just recall a fight".

[6] Mr Krueger, who was present, said that Ms Keighran was repeating a girl's name, the appellant was on the other side of a table at which they were sitting, the appellant was mumbling and drunk, Ms Keighran started punching the appellant in the face, a fight started, and he, Mr Krueger, left. He returned and noticed that the appellant had a blood nose. It seems he did not observe Ms Keighran's face at that time.

[7] Constable Andrew went to the premises, arrested the appellant and took Ms Keighran to the police station where photographs of her face were taken and then to hospital where she was seen by a doctor. The Constable described the appearance of Ms Keighran's face at the premises as, "Very swollen right cheek by reason of which she was unable to open her right eye, she was black beneath both eyes and blood was caught between her nostril and cheek". When spoken to the appellant had admitted to the Constable that there was a Domestic Violence Order in place.

[8] The appellant gave evidence. He confirmed the relationship with Ms Keighran and that he had been drinking during the day, that he returned to the house where he and his father lived, and Ms Keighran was there. He said they played cards together, listened to music and had a few beers. His evidence proceeded that she then "started jealousing at me over another woman". He then got up and punched her in the face a couple of times. He got up and said, "we had a fight … she was still throwing punches at me … then I just threw about two or three back".

[9] In cross-examination the appellant said he could not remember how hard he had punched Ms Keighran, but he recalled seeing her injuries depicted in the photograph. Asked whether he had inflicted them on her, he said:

> "I'm not too sure, I remember hitting her, but I don't remember doing this much damage. She could have fell down and hit the wall or something .. when wrestling around so she could have brought her face up on the wall … I was pretty drunk … couldn't be able to recall because it all happened so fast, see".

[10] The appellant considered that the injuries could be those inflicted by his punching her. He said he lost his temper, but did not say why he had done so.

[11] Turning to the Domestic Violence Order, the appellant admitted that one of its terms was that he not assault or threaten to assault Ms Keighran.

[12] The photographs depict injury to Ms Keighran of the kind described by the Constable.

[13] The prosecutor and counsel for the appellant addressed the Court with particular reference to the excuse of provocation. The prosecutor pointed out that the breach of the Domestic Violence Order, being a regulatory offence, (Domestic Violence Act, s 10(1)) the excuse was not available to that charge (see the Criminal Code 1983 (NT) s 22) to the extent that the appeal goes to the finding of guilt in respect of that count it can not succeed.

[14] As to provocation, the Court either expressly or by implication accepted that Ms Keighran's act was wrongful and of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control (Criminal Code, s 1 – definition of "provocation"), that the appellant had not incited the provocation, that he was deprived by the provocation of the power of self-control, that he acted under sudden and before there was time for his passion to cool and his act was not intended and was not such it was likely to cause death or grievous harm. The issue became whether an ordinary person similarly circumstanced would have acted in the same or a

similar way (s 34). By definition "person similarly circumstanced" does not include a person who is voluntarily intoxicated (s 1). The appellant was. The test to be applied is whether the prosecution has shown beyond reasonable doubt that a sober adult man in similar circumstances as those shown on the evidence before the Court would have acted in the same or a similar way as the appellant acted. The consequences of that act, in the circumstances of this case, are irrelevant.

[15] Counsel for the appellant in grounds of appeal before the Court frequently referred to "proportionality". That was dealt with by the High Court in *Masciantonio v The Queen* (1994-1995) 183 CLR 58 at 67.

[16] The evidence supports the learned Magistrate's findings that the appellant lost self-control as a result of Ms Keighran's assault upon him. Apart from the appellant's statement that he lost his temper, the fact that he punched Ms Keighran two or three times to the face in the presence of Mr Krueger suggests a loss of self-control. The fact that he was intoxicated at the time may have been a factor as well. It is also important, I think, to notice what their Honours said at p 69:

> "The question is not whether an ordinary person, having lost his self control, would have regained his composure sooner than the accused, nor is it whether he would have inflicted a lesser number of wounds. It is whether an ordinary person could have lost self-control to the extent that the accused did. That is to say, the question is whether the provocation, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to form an intention to kill or do grievous bodily harm and to act upon that intention, as the accused did, so as to give effect to it."

[17] I consider that this passage has equal application where the offence under consideration is that of assault. Their Honours then go on to consider the question which arises when an accused, having lost his self-control, regains it so that the continued infliction of injury was no longer provoked. However, that is not an issue that arises on the evidence in this case. What their Honours point out is that:

> "It is the nature and extent – the kind and degree – of the reaction which could be caused in an ordinary person by the provocation which is significant, rather than the duration of the reaction or the precise physical form which the reaction might take."

[18] I note that the infliction of bodily harm is not an element of the offence with which the appellant was charged, but a circumstance of aggravation going to penalty only.

[19] The learned Magistrate spent some time in her summing up in relation to the number of punches administered by the appellant upon Ms Keighran and the degree of force. She said that she would find it very surprising if the injuries were caused by only two blows to the face, identifying what was considered to be three distinct areas of injury and noted, after commenting upon the photographic evidence, that those injuries would have resulted from "a reasonably substantial blow". There was argument as to whether it was open to her Worship to make those findings, but the appellant admitted to two or three punches, the photographs show significant bruising and swelling of the face and bleeding in the area of the nostril underneath the

right eye. Complaint was also made of the reference to Ms Keighran having been "punched a number of times".

[20] Counsel for the appellant also sought to show that the learned Magistrate erred in finding that the injuries were caused by the punches, referring to the evidence of the appellant regarding the wrestling to the ground and contact with the wall. In my view that evidence was entirely speculative and the learned Magistrate was correct in not giving any weight to it.

[21] The complaint that no reference is made to the fact that the appellant had a blood nose does not carry any weight in that it was held that the appellant was deprived of the power of self-control by the actions of Ms Keighran. Nor do I think there is any justification in the suggestion that the appellant was deprived of the power of self-control by the accusations made at him before the punching began. His evidence was not to that effect, he said: "She was throwing punches at me when I got up … then I just threw about two or three punches back … she just started yelling at me again … then we just stopped fighting".

[22] I am not satisfied that the learned Magistrate applied the wrong test simply because as part of the summing up the expression "reasonable person" was used, when clearly what was meant was "ordinary person", which words were also used. I regard the error as having been no more than a slip of the tongue.

[23] However, I accept that the learned Magistrate erred when saying:

> "I accept that he was offered some provocation and that he had been struck by the alleged victim. I also accept that he lost his temper. However, I do not consider that an ordinary person, similarly circumstanced, would have acted in the same or a similar way. The photos, as indicated, show quite some injuries. … I am satisfied that the prosecution has negatived provocation in that I consider that it may well be that a person, in a similar situation, may have pushed her away or possibly delivered one punch. But I do not accept that a reasonable person, similarly circumstanced, would have caused the injuries which have been caused in this case."

[24] Having held that an ordinary person similarly circumstanced would have pushed Ms Keighran away or possibly delivered one punch, the learned Magistrate effectively held that the prosecution had not negatived provocation. Error occurred when the injuries were taken into account. The consequences of what the appellant did were irrelevant.

[25] The appeal is upheld and the finding of guilty to the charge of aggravated assault under the Criminal Code is set aside.
