Burkhart v Bradley [2012] NTSC 86

PARTIES:	BURKHART, Ashley James
	v
	BRADLEY, Sandi lee
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 15 of 2012 (21132195)
DELIVERED:	26 October 2012
HEARING DATES:	19 October 2012
JUDGMENT OF:	RILEY CJ
APPEAL FROM:	MR G BORCHERS SM

CATCHWORDS:

APPEAL – appeal against finding of Magistrate – whether Magistrate erred in finding that the appellant was not acting in self defence – whether Magistrate erred in analysis of evidence - appeal dismissed.

APPEAL – appeal against sentence of Magistrate – whether sentence was manifestly excessive – appeal dismissed.

Criminal Code s 29

Zecevic v DPP (1986-1987) 162 CLR 645, followed.

REPRESENTATION:

Counsel:

Appellant:	P Elliot
Respondent:	S Robson

Solicitors:

Appellant:	Self-Represented
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Ril1215
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Burkhart v Bradley [2012] NTSC 86
No. JA 15 of 2012
(21132195)

BETWEEN:

ASHLEY JAMES BURKHART
Appellant

AND:

SANDI LEE BRADLEY
Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 26 October 2012)

[1] On 4 July 2012, following a trial in the Court of Summary Jurisdiction, the appellant was found guilty of having unlawfully assaulted Joshua Robertson in circumstances where Mr Robertson suffered harm and was unable to effectually defend himself. The appellant was convicted and fined $400. He now appeals against both the conviction and the sentence imposed upon him.

[2] At the relevant time the appellant was a serving police officer. On 18 August 2011, in the course of his duties, he escorted Mr Robertson to the Alice Springs Hospital where Mr Robertson was seen by medical

staff. As the appellant was escorting Mr Robertson back to the police vehicle he escaped from the appellant's custody. The appellant chased Mr Robertson on foot and eventually caught up with him at the rear of the Memo Club in Alice Springs. The appellant ground stabilised Mr Robertson. Another police officer, Brodie Anderson, arrived and, shortly thereafter, a caged police vehicle containing police members Patrick Egan and Ryan Perry also arrived. The appellant escorted Mr Robertson to the rear of the police vehicle and, as the appellant was about to place Mr Robertson in the vehicle, the appellant struck Mr Robertson with a forearm to the face. The evidence of the appellant was that Mr Robertson turned his head, pushed backwards and tensed his arms such that the appellant feared that Mr Robertson was about to commit an assault upon either himself or other police members. The appellant identified the feared assault as being "either spit or head-butt"[1] signified by the suggestion that Mr Robertson turned his head and that "he had no reason to turn around and face me"[2]. The live issue at trial was whether the appellant was acting in self defence.

[3] The complainant, Mr Robertson, and the three attending police officers gave evidence in the Crown case. The appellant also gave evidence.

[1] Transcript, 7 June 2012 at 81.
[2] Ibid.

[4] Mr Robertson gave evidence that he was taken to hospital for chest pain. He was transferred in a caged police truck by the appellant. At the hospital he received treatment. As he returned to the police vehicle he was not held and was not handcuffed. He ran from the police officer and ended up at the rear of the Memo Club. He was intending to climb over the fence but elected not to run further. He lay down on the ground with his hands behind his back. He did this so he would not be tackled. The appellant approached and put his knee in his back, handcuffed him and lifted him to his feet. At about this time the additional police vehicle arrived and the female police officer arrived in a different car. The appellant escorted him across the road to the back of the caged police vehicle and the cage doors were opened. Mr Robertson said he was being held and "then next minute, I feel a punch on my face"[3]. At the time the punch was delivered he was about to enter the vehicle. Mr Robertson said that he had not said anything or done anything to the police officer before being punched. He was, he said, "just standing normal"[4] and he had not turned his head towards the police officer.

[5] The first additional officer on the scene, Constable Brodie Anderson, gave evidence that she was travelling home and stopped to assist her fellow officer. A police van arrived shortly afterwards. Constable

[3] T9, 7/6/2012.
[4] T20, 7/6/2012.

Anderson said that she was having a conversation with Constable Egan and "out of the corner of my eye, I noticed a movement and saw (the appellant's) elbow move in a striking motion."[5] She had seen the elbow strike first followed by movement of the prisoner's head. She said she did not see anything done or said by the prisoner prior to the elbow movement. She said "I wasn't paying attention to the prisoner at the time; so, no, I don't know"[6].

[6] Constable Patrick Egan gave evidence of arriving with Constable Perry. When they arrived Mr Robertson was lying face down. Constable Egan went to the rear cage of the Police vehicle and opened the door. The appellant escorted the prisoner across the road and stopped at the rear of the cage with the prisoner facing the vehicle. Constable Egan said he saw the appellant "throw an elbow strike towards the aboriginal male"[7] which connected to the right side of his jaw. Constable Egan was watching the prisoner at the rear of the cage at the time and said he did not see him make any movement or gesture before the elbow strike was delivered by the appellant. He said he had been "watching the prisoner's eyes, seeing if he had any movements that he might run again, or something like that"[8]. He said that at the time of the strike the

[5] T29, 7/6/2012.
[6] Ibid.
[7] T38, 7/6/2012.
[8] T42, 7/6/2012.

"prisoner's head was straight"[9]. When asked "so you say the strike was for no reason at all?" The officer replied "yes"[10]. He said he was confused by what had taken place and he later reported the matter to his superior. The learned magistrate accepted Constable Egan as an honest witness and also accepted that "he was vigilantly watching Robertson being restrained at the rear of the police vehicle"[11].

[7] Constable Ryan Perry gave evidence that he was unsighted at the relevant time. He could not see the prisoner being placed into the rear of the vehicle. When asked about the demeanour of the appellant as he was walked to the back of the vehicle he agreed that the crossing of the road was "completely routine".[12]

[8] In dealing with the issue of defensive conduct the magistrate said:[13]

> I do not accept that the tensing of the arms gave rise to a reasonable apprehension that Robertson was about to assault Burkhart. His arms were restrained behind his back and the chain between the handcuffs was being held by Burkhart. A movement back from the vehicle and a slight turn of the head occurring very quickly may have caused Burkhart to be apprehensive, but provided him with no reasonable grounds for subjectively believing that Robertson was about to assault him. As the Federal Court in *East v Repatriation Commission* (1987) FLR 242 defined reasonableness:

[9] T44, 7/6/2012.
[10] Ibid.
[11] T111, 7/6/2012.
[12] T57, 7/6/2012.
[13] T113, 4/7/2012.

> There requires more than a possibility, more than something fanciful and unreal and it must be consistent with the known facts.

It does not have to meet the standard of balance of probabilities but it must be pointed to by the facts. Burkhart's subjective view that he was about to be assaulted by Robertson, a person in his custody being restrained by him with his arms handcuffed behind his back, is not in any way based upon reasonable grounds, as the facts do not support the hypothesis that Robertson was about to assault him. At the rear of the police vehicle, Robertson was completely under the physical control of Burkhart.

As to whether Burkhart's actions are a reasonable response to the circumstances as he perceived them, I have already indicated that there was no such reasonable grounds on which Burkhart could form the view that Robertson was about to assault him. Accordingly, it was unreasonable and unlawful for him to strike Robertson.

It is to be noted, however, that if Burkhart apprehended on reasonable grounds that Robertson was about to assault him, there are other reasonable responses he could have resorted to rather than delivering a "clearance strike"; not the least, he could have called for assistance. Not only didn't he, but he didn't see fit to mention to any of the other police officers anything about the "clearance strike" immediately after it occurred. This alone does not make the strike unlawful or unreasonable, but together with all the other matters I have mentioned, the strike was not reasonable.

Ground 1: The learned Magistrate applied the wrong test in finding that there was no basis for the appellant to have believed that he was, or other police were, about to be assaulted, or may be about to be assaulted.

Ground 2: The learned Magistrate erred in applying the test of reasonableness.

[9] Section 29 of the *Criminal Code* provides for defensive conduct. A person who engages in defensive conduct is not criminally responsible for his act. Relevant for present purposes the section provides that a person engages in defensive conduct only (a) if the person believes that the conduct is

necessary to defend himself or another person and (b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.

[10] It was submitted on behalf of the appellant that the reasons for decision reveal that the magistrate accepted that the appellant held a belief that he was about to be assaulted but then determined that the belief was not reasonable. Reference was made to the observations of his Honour that "Burkhart's subjective view that he was about to be assaulted by Robertson… is not in any way based upon reasonable grounds"[14] and to other passages in the remarks.

[11] Although some of the words employed by the magistrate, taken in isolation, may suggest that his Honour applied the test of reasonableness to the subjective view of the appellant, in my view a fair reading of the whole of the remarks makes it quite clear that this was not the case. It would be an error to import a test of reasonableness as to the belief of the appellant but, in my opinion, his Honour did not do so.

[12] As counsel for the respondent has pointed out the magistrate accepted the evidence of Mr Robertson and of the police officers, Constables Perry and Anderson. His Honour placed particular reliance upon the evidence of Constable Egan who, he found, was "vigilantly watching" the incident and saw nothing regarding the behaviour of Mr Robertson to give rise to any

[14] T113, 4/7/2012.

concern. His Honour then went on to consider and then reject all of the factual bases upon which the appellant relied to establish his belief that the appellant was about to be assaulted by Mr Robertson. The magistrate noted that:[15]

> On the evidence, I find that there is nothing in Robertson's behaviour from the time he was handcuffed on the western side of South Terrace until he was led under physical restraint to the rear of the police vehicle that caused any concern to Constables Egan, Perry and Anderson. I accept that (the appellant) was wary of Robertson, as Robertson had escaped from (the appellant) while in (the appellant's) custody, but there was nothing that Robertson did from the time that he was restrained on the ground which would suggest that he was anything but compliant.

[13] Whilst the form of expression employed by the magistrate may have been unfortunate it is apparent that his Honour was determining whether there was any basis to support the claim by the appellant that he had subjectively formed the view that he was about to be assaulted by Mr Robertson. His Honour went on to say that the "facts do not support the hypothesis that Robertson was about to assault"[16] the appellant. The magistrate noted that Mr Robertson was at the rear of the police vehicle, his arms were restrained behind his back and the chain between the handcuffs was being held by the appellant. Mr Robertson was "completely under the physical control"[17] of the appellant.

[14] If that interpretation of the remarks of his Honour be wrong and his Honour did apply the wrong test, the result of the proceedings would not be affected.

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[15] T111, 4/7/2012.
[16] T113, 4/7/2012.
[17] Ibid.

The magistrate concluded that, if the appellant held a subjective belief of the kind indicated, the conduct of the appellant was not a reasonable response in the circumstances as he reasonably perceived them. His Honour correctly approached this issue and, even if error had been disclosed in relation to the first limb of the test of defensive conduct, the onus upon the prosecution in relation to the second limb was satisfied to the requisite standard.

Count 3: The learned magistrate erred in his analysis of evidence relating to the appellant having accessed the complainant's antecedents on the police database.

[15] The findings of the magistrate indicate that his Honour did not accept the appellant as a witness of truth. The appellant complained that, in relation to one aspect of the consideration of his evidence, his Honour erred.

[16] In the course of his evidence the appellant stated that it is his normal procedure before escorting a prisoner to look into the history of the prisoner and make a risk assessment. He said that on this day, before the escort commenced, he looked at the criminal history of Mr Robertson and discovered Mr Robertson had an extensive criminal history. The appellant said that he conducted his research on the computer of another member of the police service. He did not log on to his own computer to do so. He acknowledged that he was aware of an instruction in the police force that officers must log on under their own ID but, he said, he logged in on someone else's computer to save time. He agreed he subsequently checked on Mr Robertson's record on two or three occasions using his own ID.

[17] The magistrate did not accept the appellant’s evidence that he had checked Mr Robertson's history prior to taking him to the hospital. In summary his Honour noted that there was no independent record of the appellant having checked the history of Mr Robertson. The appellant had used his own ID to access Mr Robertson's history on three subsequent occasions. His Honour observed that the fact that the appellant did not place handcuffs upon Mr Robertson or hold him when they left the hospital was inconsistent with his having searched Mr Robertson's history which included charges of assaulting police and resisting arrest.

[18] The appellant asserted that these matters did not provide a basis for the conclusions of his Honour and that the actions of the appellant in relation to Mr Robertson before the escape "were reasonable and merciful". It was asserted that the reasons given for finding the appellant did not check Mr Robertson's history could not support the finding.

[19] In my opinion there was a solid evidentiary basis for the conclusion reached by his Honour. There was no dispute that the appellant accessed the records subsequent to the event. It is unlikely that he would have done so if he had already gathered the relevant information. In addition the actions he said he took would have been contrary to police instructions and, had the information been available to him prior to the escape, it is unlikely he would have allowed Mr Robertson to proceed to the hospital and from the hospital without handcuffs or, at least, being held.

[20] It is apparent from a review of the whole of the evidence that the magistrate did not find the appellant to be a reliable witness. That finding was not confined to the circumstances of which the appellant now complains. The submission of the appellant ignores the fact that his Honour made an assessment of the credibility of the appellant on the basis of the evidence as a whole. This was but one part of that evidence. The general assessment made by his Honour as to the reliability of the appellant was, no doubt, a contributing factor to his conclusion. I see no error on the part of the magistrate.

Ground 4: The learned magistrate erred in finding that he had, with one exception, no reason to reject the complainant's evidence.

[21] In the course of delivering reasons for decision the magistrate observed:[18]

> Although it appears clear that Robertson was hit by (the appellant) using his left arm and that Robertson's evidence on this point was wrong, he said that he was hit by (the appellant's) right arm, it is also clear that Robertson was caught off guard by surprise when he was hit. He didn't anticipate it and he probably reconstructed what happened. In all other respects, I have no reason to reject his evidence. He was unshakeable in cross-examination.

[22] The appellant submitted that there were parts of the evidence of Mr Robertson that were material to a consideration of what exercised the mind of the appellant at the relevant time and which differed from the evidence of some of the other witnesses. Whilst that may be so it remained a matter for the magistrate to determine what evidence he accepted and did not accept. His Honour made it plain that he accepted the evidence of Mr Robertson on

[18] T111, 4/7/2012.

the central issue of what happened at the time the blow was delivered. There may have been errors made by Mr Robertson on issues not directly related to the central issue of defensive conduct. However on that central issue the evidence of Mr Robertson was largely consistent with that of the other significant witness, Constable Egan. Both gave evidence different from that of the appellant. The magistrate accepted their evidence over that of the appellant on the central issue. I see no error on the part of his Honour in so doing.

Ground 5: The finding of guilt is against the weight of the evidence.

[23] It was submitted on behalf of the appellant that, in light of all of the evidence, the magistrate should have entertained a doubt as to whether the appellant was of the view that it was necessary to strike Mr Robertson in self defence and, further, whether the strike was a reasonable response in the circumstances as the appellant reasonably perceived them to be. It was necessary for his Honour to bear in mind the circumstances in which the appellant was placed at the time, and approach the "task in a practical manner without undue nicety".[19]

[24] It was submitted on behalf of the appellant that if he had been intent on assaulting Mr Robertson he would have done so at the time of ground stabilising him. That situation may have provided an opportunity but that

[19] *Zecevic v DPP* (1986-1987) 162 CLR 645 per Wilson, Dawson and Toohey JJ at 662

does not mean that an assault could not take place at the later time. His Honour concluded that the appellant acted out of frustration.[20]

[25] It was submitted that Mr Robertson agreed when asked, that prior to the strike he tightened his arms and moved them up on his body. However, as the respondent points out, Mr Robertson also said, whilst answering the relevant questions: "I was just standing like this with my hands behind my back and I didn't do anything; I was just standing" and, also, "I was just standing normal"[21].

[26] It was submitted that there was evidence to suggest a movement of the head of Mr Robertson towards the appellant. If any movement had existed it may have supported the appellant's contention that he feared a head-butt or spitting by Mr Robertson. However, it must be noted that some movement on the part of Mr Robertson must have been anticipated because he was about to be placed in the rear cage of the police vehicle which involved him moving towards the vehicle. In any event his Honour accepted the evidence of Mr Robertson and Constable Egan on this issue.

[27] It was submitted that, accepting the evidence as to the tightening of the arms, the movement of the arms and the movement of the head of Mr Robertson, the application of the strike was consistent with police training and with self defence. It was submitted this was a reasonable response in the circumstances as reasonably perceived by the appellant.

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[20] T120, 4/7/2012.
[21] T20, 7/6/2012.

[28] The submission fails to recognise the evidence which was accepted by the magistrate and upon which his Honour relied to reach the conclusion expressed in his reasons for decision. It also fails to recognise the fact that his Honour did not accept the evidence of the appellant. The magistrate accepted the evidence of Constable Egan, who was paying close attention, that the head of Mr Robertson did not move. His Honour also accepted the evidence of Mr Robertson in this regard. In my opinion a review of the evidence reveals that there was a solid basis for his Honour reaching the conclusions set out in the reasons for decision. The weight of the evidence clearly supported the verdict.

Ground six: The sentence imposed upon the appellant is manifestly excessive.

[29] The sentence imposed upon the appellant was a conviction and a fine of $400. There is no challenge to the fine but the submission was made that a conviction should not have been recorded. Whilst it is true that the appellant was said to be otherwise of good character, and that the assault took place in a brief moment and was consistent with the manner in which police are trained to create separation, it is difficult to see how the penalty imposed could be regarded as manifestly excessive. This was a blow with the forearm to the head of the victim delivered by a police officer in circumstances where the victim was secured in handcuffs and held from behind. He was unable to defend himself. It was a blow delivered by a police officer who was otherwise acting in the course of his duties. This was a routine matter and the blow did not occur in circumstances where the victim provoked the

appellant in any real way. Apart from the trouble caused to the appellant by Mr Robertson escaping after he had been accorded a degree of trust by the appellant, there was no explanation for the offending. The appellant expressed no remorse and did not accept responsibility for his actions. As his Honour observed this was an abuse of power by the appellant which occurred whilst the victim was in police custody. In my opinion the imposition of a conviction was appropriate in all the circumstances.

[30] The appeal is dismissed.
