Zijlstra v Northern Territory of Australia [2012] NTCA 4

PARTIES:	**ZIJLSTRA, Jon Johan James**
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP7 of 2011 (20834298)
DELIVERED:	16 FEBRUARY 2012
HEARING DATES:	10 FEBRUARY 2012
JUDGMENT OF:	RILEY CJ, SOUTHWOOD & BLOKLAND JJ
APPEALED FROM:	MILDREN J

CATCHWORDS:

APPEAL AND NEW TRIAL – Appeal from Supreme Court on question of law – whether Supreme Court erred in not considering an issue raised before a Magistrate – whether facts and inferences drawn by Supreme Court were open to review as errors - whether evidence supported the contention that the commission of an offence was procured – whether facts were uncontroversial – appeal dismissed - *University of Wollongong v Metwally* (No 2) (1985) 59 ALJR 481; *Water Board v Moustakis* (1988) 180 CLR 491; *Wilson v Lowery* (1993) 4 NTLR 79.

VICTIMS OF CRIME COMPENSATION – Procedure- whether compensation should be granted - *White v Ridley* (1978) 140 CLR 342

Crimes (Victims Assistance) Act (NT) s 4(1) and s 5(1); *Criminal Code* (NT), s1, s 12(1)(c) and s 31(2)

White v Ridley (1978) 140 CLR 342, distinguished.

Pregelj v Manison (1987-88) 51 NTR 1; *University of Wollongong v Metwally* (No 2) (1985) 59 ALJR 481; *Water Board v Moustakis* (1988) 180 CLR 491; *Wilson v Lowery* (1993) 4 NTLR 79, followed.

Roncevich v Repatriation Commission (2005) 222 CLR 115; *Strong v The Queen* (2005) 79 ALJR 1171, referred to.

REPRESENTATION:

Counsel:

Appellant:	T Anderson
Respondent:	R M Murphy

Solicitors:

Appellant:	Povey Stirk
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Zijlstra v Northern Territory of Australia [2012 NTCA 4
No. AP7 of 2011 (20834298)

BETWEEN:

JON JOHAN JAMES ZIJLSTRA
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: RILEY CJ, SOUTHWOOD & BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 16 February 2012)

RILEY CJ:

Introduction

[1] In 2004 the appellant, who was a prison officer, made an application for an assistance certificate pursuant to the *Crimes (Victims Assistance) Act* (the Act) alleging that he had been assaulted during the course of a prison training exercise. The circumstances of the matter were unusual. The appellant worked at the Alice Springs Correctional Centre where, on 15 August 2003, he participated in a training exercise at the request of senior officers. The appellant, along with other prison officers, played the

role of a prisoner and took part in a mock siege in a block of the prison. In the course of the mock siege a prison officer was taken hostage by the pretend prisoners. The "siege" was made to appear realistic and most of the large number of prison officers involved were unaware that they were taking part in an exercise rather than a genuine siege. During the course of the exercise the appellant was punched or struck with a baton to the head, was exposed to CS gas, was knocked to the ground twice, had his legs “jumped” upon and also suffered a dislocated shoulder. As a consequence he suffered physical injuries and severe post-traumatic stress disorder.

[2] The application for a certificate was dismissed by the Judicial Registrar of the Local Court. The appellant appealed to the Local Court and to the Supreme Court. Both appeals were dismissed. The appellant now appeals to the Court of Appeal.

Crimes (Victims Assistance) Act

[3] The Act, which has subsequently been repealed and replaced by the *Victims of Crime Assistance Act*, established a scheme to "provide assistance to certain persons injured or who suffer grief as a result of criminal acts".

[4] In order to qualify for assistance the appellant had to show that he was a "victim" for the purposes of the Act by demonstrating that he was injured as a result of the commission of an offence by another person.[1] An "offence" was defined to mean an offence, whether indictable or not, committed by

[1] Section 5(1) and the definition of "victim" in s 4(1) of the Act.

one or more persons which results in injury to another person.[2] An "injury" was defined to include bodily harm or mental injury. There was no dispute that the appellant suffered an injury as defined.

The course of proceedings

[5] The Judicial Registrar determined that she was not satisfied that an offence had been committed. The Registrar could not find, on the balance of probabilities, that the relevant acts were not authorised, justified or excused such that under the *Criminal Code* an offence had occurred. In the Local Court the presiding Magistrate determined that:

> The learned Registrar correctly accepted the respondent's argument that the prison officers involved acted in the scope of their employment, their actions were a reasonable use of force and authorised under the *Prisons (Correctional Services) Act*.

[6] In the Supreme Court the learned Judge reviewed the whole of the evidence placed before the Judicial Registrar and dealt with a range of complaints regarding the decision of the Magistrate. His Honour determined that the appeal should be dismissed.

[7] In so deciding his Honour gave detailed consideration to the circumstances surrounding the exercise. The appellant had agreed to play the role of a prisoner in the exercise and, along with some other officers, dressed in prisoners clothing. The group was located in H Block where, at the commencement of the exercise, they took a prison officer "hostage" and the

[2] Section 4(1) of the Act.

alarm was raised. The group retreated into a dormitory in H Block. The "hostage" was released. There was then a confrontation between the "prisoners" and the riot squad with the riot squad advancing upon the dormitory. The learned Judge described the events as they related to the appellant as follows:

(a) As he was standing there, he smelt gas. This caused him to have difficulty breathing and his eyes started to water. He tried spraying water on his face until it was turned off by someone else. He says at that stage he could not see because of the gas which had affected his eyes, nose and breathing. He could hear a deafening noise with a lot of yelling and screaming and the sounds of shields colliding. Someone grabbed him by his arms forcefully. He was swung around and struck on the back of the head by something, which felt like a clenched fist. He felt three hard, fast punches to the middle or centre of the back of his head. At that stage, he was still focused on getting oxygen as he was having difficulty breathing. He was then taken to the ground by someone and landed on his stomach, face down.

(b) He felt someone holding him down by applying pressure to the back of his neck. He also felt that his ankles had been held and he felt someone apparently jumping on the back of his lower legs. He was in pain, but could not speak. The next thing the appellant remembers was kneeling on the grass outside of H Block on all fours with mucus coming out of his nose, and his eyes stinging. He felt someone place the palm of a

hand against his back and say, "Holy fuck, it's Zilly". The appellant went to walk away and someone grabbed his left arm. The appellant said, "Fuck off" pulling his left arm away, believing that the exercise was all over.

(c) The next thing the appellant says occurred was that he was jumped upon and taken to ground. He did not resist. He heard PO Ryan and PO White say, "Get your hands behind your back". He complied and when that occurred, he was handcuffed from behind. After that, he was lifted up by someone holding the swivel links of the handcuffs into a horizontal position. He felt pain in his right shoulder.

(d) After he got his breath back, he demanded to be let go. Whoever was holding the handcuffs let go, but he was then grabbed on either side under his biceps and lifted by persons who placed their hands underneath his shoulders and back up in front of his collarbone. He stood to his feet and was marched down to a separate confinement.

[8] The matter comes before this Court pursuant to 4 grounds of appeal.

Ground 1

His Honour erred in finding that there was evidence capable of sustaining the learned Magistrate's finding that the use of force was not excessive when the appellant was assaulted inside the Block.

[9] In the Supreme Court the appellant submitted that the evidence "was all one way that the use of force was excessive". It was said that the appellant's

evidence was clear that at the time that he was forced to the ground, struck, jumped on and suffered the effects of the gas, he was not offering any resistance. This evidence was supported by evidence from some other witnesses.

[10] In dealing with this issue his Honour noted that the evidence of Chief Prison Officer Carroll differed from the evidence of the appellant and was to the effect that he had been present at the relevant time and that he observed that the "prisoners" (which included the appellant) were "attacking the riot formation which was against the orders". Contrary to the submission made on behalf of the appellant the evidence was not all one way. There was evidence that the appellant and others were resisting at the relevant time.

[11] The evidence of CPO Carroll was supported by the evidence of PO Friedl who described having helped to subdue a prisoner (subsequently identified as the appellant) who was "a very big man" and who was "definitely violent in resisting… I don't mean he was striking or anything like this but I mean he was just definitely some shoving, pushing".

[12] His Honour went on to say that the difficulty with the submission made on behalf of the appellant was that:

> [T]o the extent that there was conflicting evidence as to the facts, if the Court below preferred one account to another, that decision is a question of fact to be determined by the Court and is not reviewable on appeal, even if it is patently wrong.[3]

[3] See *Wilson v Lowery* (1993) 4 NTLR 79 at 84.

[13] The learned Judge concluded:

> In relation to the alleged assaults committed by the prison officers in respect of the incidents which occurred inside of each Block, I am not satisfied that the learned Magistrate erred in law. It is only if the Court had drawn an inference which cannot reasonably be drawn that the Court has erred in point of law such that its decision can be reviewed.[4]

[14] His Honour correctly stated and applied the relevant legal principles. There was an evidential basis upon which it could be held that the use of force against the appellant was not excessive in the circumstances. I see no error on the part of the learned Judge in refusing to intervene.

[15] It is convenient to deal with grounds 2, 3 and 4 together. They are as follows:

Ground 2

His Honour erred in finding that he did not have jurisdiction to deal with the appellant's contention that the learned Magistrate ought to have considered the position of CPO Carroll (and others) because no such submission was made before the learned Magistrate.

Ground 3

In the alternative to ground 2 his Honour erred in declining to consider the appellant's contention (raised in ground 2) as it was in the interests of justice that he do so.

[4] See *Wilson v Lowery* (1993) 4 NTLR 79 at 85.

Ground 4

His Honour erred in not finding that the appellant was a victim of CPO Carroll or others aware he was not a prisoner.

[16] In the Supreme Court a submission was made that the Magistrate failed to consider an argument that CPO Carroll and Superintendent Williams were guilty of offences by virtue of the doctrine of innocent agency. It is well settled at common law that a person who commits a crime by the use of an innocent agent is himself liable as a principal offender.[5] However, we are here dealing with offences under the *Criminal Code* and not an offence at common law.

[17] The Northern Territory is a codified jurisdiction and as such common law doctrines of criminal responsibility, such as innocent instrument, do not apply.[6] In order to impose criminal responsibility upon CPO Carroll it would be incumbent upon the appellant to satisfy the relevant provisions of the *Criminal Code* and establish that CPO Carroll had counselled or procured the relevant prison officers to assault the appellant[7] and, also, negate the exculpatory provisions under Part II of the Code.

[18] The appellant contended such offending had been established on the evidence placed before the Court. He submitted that CPO Carroll and other

[5] *White v Ridley* (1978) 140 CLR 342 at 346.
[6] *Pregelj v Manison* (1987-88) 51 NTR 1 at 12.
[7] Section 12(1)(c) of the *Criminal Code*; see also the definition of "act", s 1 *Criminal Code*, ".. not limited to bodily movement and includes the deed of another caused, induced or adopted by him or done pursuant to a common intention".

officers were responsible for devising the exercise and knew that the appellant was not a "prisoner". They were not under any mistaken belief as to the extent to which the appellant had given his consent. They could not rely upon s 62 of the *Prisons (Correctional Services) Act* or s 31 of the *Criminal Code*.

[19] The issue of innocent agency, or offending of a similar kind under the terms of the *Criminal Code*, had not been raised before the Magistrate. The Judge reviewed the relevant authorities[8] and held that it was not an error of law by the Magistrate to fail to consider the argument. His Honour said:

> I do not think I have jurisdiction to deal with the point as it was never argued in the Court below. The Court below was therefore not required to consider it and it cannot, in my view, be said to be an error of law on the part of the learned Magistrate to have failed to consider it. If I am wrong in this conclusion, I decline to consider it in the exercise of my discretion on the ground that no exceptional case has been made out as to why I should now consider the point.

[20] In this Court the appellant submitted that his Honour erred in concluding that the point was not argued in the Court below stating that a submission had been made to the Magistrate "albeit without direct reference to the doctrine of innocent instrument". Reference was made to a passage in which the liability of the officers directly and physically involved in the exercise was being discussed. Counsel who was appearing for the appellant in the Local Court advised the Magistrate that the actions of the Superintendent,

[8] *University of Wollongong v Metwally* (No 2) (1985) 59 ALJR 481 at 483; *Water Board v Moustakis* (1988) 180 CLR 491 at 497; *Roncevich v Repatriation Commission* (2005) 222 CLR 115; *Strong v The Queen* (2005) 79 ALJR 1171.

CPO Carroll and another officer, a PO Sizeland, were not authorised by the Code:

> So that may well, in itself, be an issue that I hadn't considered, your Honour, but it may well be open here, in terms of the commission of an offence. That is that those persons responsible for directing the conduct liable, under the Code, for the assaults perpetrated.

[21] The submission went no further. To determine whether the issue was raised it is necessary to consider the actual conduct of the proceedings.[9] The entire thrust of the case for the appellant throughout the proceedings in the Local Court was that the relevant offence or offences were direct assaults upon the appellant by those fellow prison officers who were physically involved in the training exercise. The question of the liability of those who organised the training exercise and who had knowledge that the appellant was not a prisoner was not raised:

(a) in the application for an assistance certificate,

(b) in the submissions before the Judicial Registrar,

(c) during the proceedings before the Judicial Registrar,

(d) in the notice of appeal from the determination of the Judicial Registrar, or

(e) in the submissions to the Magistrate hearing the appeal.

In my opinion the passing remark regarding a matter that had not even been considered by counsel and which did not address the elements of any

[9] *Water Board v Moustakis* (1988) 180 CLR 491 at 497.

supposed offence that may have been committed by the identified officers could not be said to raise the issue for the consideration of the Magistrate.

[22] The appellant submitted that, at the very least, the evidence established an offence was committed against the appellant upon the application of the doctrine of innocent instrument. By reference to the provisions of the *Criminal Code* it was argued that CPO Carroll effectively procured the commission of the offences in the knowledge that the appellant was not a prisoner and with foresight of the possible consequences, by instructing the officers to "conduct a charging assault" on the appellant, in circumstances where an ordinary person similarly circumstanced would not have proceeded. [10]

[23] The appellant relied upon the principle that "where all the facts have been established beyond controversy or where the point is one of construction of law, then a Court of Appeal may find it expedient in the interests of justice to entertain the point".[11] It was submitted that, in this case, a question of law was raised on uncontroversial facts and it was therefore expedient in the interests of justice to entertain the point notwithstanding that the matter was then raised for the first time. I do not accept the submission.

[24] The manner in which the case was conducted before the Judicial Registrar deprived the respondent of the opportunity of obtaining evidence to answer any assertion concerning innocent agency or similar offences under the

[10] Section 31(2) of the *Criminal Code*.
[11] *Water Board v Moustakis* (1988) 180 CLR 491 at 497.

relevant provisions of the *Criminal Code* as they applied to the identified officers. Although CPO Carroll gave a statement to investigating officers and that statement was received into evidence, the statement did not address issues relevant to whether or not he may have been liable for assault. His evidence was obtained and received in the context of allegations that any assault that may have been committed arose out of the conduct of others.

[25] In defending the appellant's claim the respondent had not been required to meet a case that CPO Carroll or any other senior officers may have been guilty of assault. In conducting its defence the respondent was only required to, and did, seek to meet the case which was actually put on behalf of the appellant. In those circumstances it was appropriate not to entertain the submission.[12]

[26] In any event there was no evidence to suggest that CPO Carroll foresaw that the "prisoners" and, in particular the appellant, may be assaulted as a result of conducting the training exercise. CPO Carroll was not asked to address this issue in the evidence provided to the Court. Further, he was not given the opportunity to identify the factors that were relevant to his decision to proceed with the exercise. If he had foresight of any possible problems there was no basis for considering whether an ordinary person similarly circumstanced would not have proceeded with the exercise.

[12] *Water Board v Moustakis* (1988) 180 CLR 491 at 498.

[27] Such evidence as was available suggested the contrary. But for unexpected developments the exercise would have been unremarkable. The use of force by the responding prison officers against the appellant was precipitated by the "prisoners", including the appellant, when they elected to attack the riot formation inside of H Block. The "prisoners" had been directed that they were not to assault the prison officers once they entered H Block and were instructed that once the prison officers got close to them the “prisoners" were to drop to the floor with their hands on their heads. CPO Carroll was entitled to assume that those instructions would be followed. CPO Carroll was also entitled to assume that the responding prison officers would act lawfully and in accordance with their training which included understanding the level of force a prison officer could lawfully use to maintain the security and good order of the prison.

[28] In my opinion the appeal should be dismissed.

SOUTHWOOD J:

[29] I agree the appeal should be dismissed and agree with the reasons given by the Chief Justice.

BLOKLAND J:

[30] I agree the appeal should be dismissed and agree with the reasons given by the Chief Justice.
