PARTIES:	MAMARIKA, Isobel
	v
	SVIKART, Gotlieb
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	DARWIN
FILE NO:	JA 27 of 1994
DELIVERED:	WEDNESDAY 22 MARCH 1995
HEARING DATES:	22 DECEMBER 1994
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Criminal law - Jurisdiction, practice and procedure - Judgment and punishment - Justices Appeal - Appeal against conviction and sentence - Aggravated assault causing bodily harm

Justices Act 1928 (NT)

Appeal and new trial - Criminal law - Facts - Oral evidence at summary trial - Credibility - Findings of fact based on demeanour of witness - Power of appellate court to set aside findings

Devries and Anor v Australian National Railway Commission and Anor (1992-1993) 177 CLR 472, followed.

Appeal and new trial - Practice and procedure - 'no case to answer' - Submission - Evidence later adduced on behalf of accused - Submission of no case to answer overruled - Appeal on ground that 'no case to answer wrongly rejected - Whether that ground available

R v Wood [1974] VR 117, applied.
Stennett v The Queen, (CCA (NT) - 11 March 1994), applied.

Criminal law - Jurisdiction, practice and procedure - Evidence - 'no case to answer' - Submission - Evidence later adduced on behalf of accused - Submission of no case to answer overruled - Appeal on ground that 'no case to answer' wrongly rejected - Whether that ground available

R v Wood [1974] VR 117, applied.
Stennett v The Queen, (CCA (NT) - 11 March 1994), applied.

REPRESENTATION:

Counsel:

Appellant: Mr Lawrence
Respondent: Mr Cato

Judgment ID number: mar95006
Number of pages: 12

mar95006

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. JA 27 of 1994

BETWEEN:

ISOBEL MAMARIKA
Appellant

AND:

GOTLIEB SVIKART
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 22 March 1995)

This appeal is against conviction and sentence in the Court of Summary Jurisdiction at Darwin. The charge was that on 29 July 1992 the appellant unlawfully assaulted Henry Walter Adamson with the circumstance of aggravation that he thereby suffered bodily harm. His Worship proceeded to convict without passing sentence and to direct that the appellant be released upon her entering into a bond to be of good behaviour for 18 months.

The charge arose from an argument and physical

contact between the appellant and Mr Adamson in a flat in Darwin on 28 July 1992. There had been an association between the two of them which seemed to have waxed and waned over time, but he told how on this occasion the two of them, and one Daisy Amagula, were drinking together at the flat. He went to sleep and was awakened by noise. The radio was playing loudly and he asked the appellant to leave. An argument started, and according to him, he took her by the shoulder and was going to push her out the door, "Just normally like that, I went to turn her around and sort of help her out the door, that was all it was". His Worship described the motions displayed in Court by the witness as indicating "both arms outstretched in front of him with a motion as in turning the person 180 degrees and then a pushing motion towards, presumably, the back of the person". Having said that his Worship enquired of the witnesses and he was told "that'd be fairly right". Mr Adamson then said the appellant grabbed his scrotum by her right hand and tore it open with one of her fingers. The wound required stitches, it became infected, he was in hospital for a few days, and according to him, his right testicle was permanently damaged. He said he could not remember hitting the accused.

In cross-examination he confirmed that he had hold of the accused with his hands, one on each shoulder, that she was facing him as he attempted to turn her around and push her out and she grabbed him. He could not remember throwing a bottle at the accused, but was firm in denying that he had

punched her, but later was not clear about it, "Its not my habit to punch people .... anything's possible but no, I don't remember anything about that". He denied that when she grabbed him by the scrotum he was standing over her and she was sitting. Such a scenario was not in accordance with the appellant's statement to the police. He acknowledged there were differences between his evidence and previous written accounts of the events made closer to the time, but put that down to confusion on his part due to a number of factors, including that his mind was not very good, that he was doing his best and when a statement was taken from him at the hospital he was in a bad way and affected by drugs. He was found by His Worship to have exaggerated the nature and affect of the injury he suffered. He accepted he had been arguing with the accused when he woke up, but could not remember throwing a bottle and punching her. He denied that she took hold of his scrotum when he was punching her. He denied the truth of questions designed to establish that he had only made a complaint to police when he decided he would make a claim for compensation.

The other witness in the Crown case was Daisy Amagula. According to the evidence-in-chief of this witness, there was an argument between the appellant and Mr Adamson, he punched her first and choked her by the neck. That was why the appellant got angry and grabbed him; he was hurt and screamed out and was bleeding. She said the appellant was blind drunk and Mr Adamson was a little bit drunk and that she

was half shot. She said she saw the cut when the appellant pulled Mr Adamson's trousers down. There was no other evidence to suggest that he was wearing anything more than underpants at the most. In cross-examination she said she saw Mr Adamson throw a rum bottle at the appellant and she repeated that he had choked her, but said it was while the appellant was standing up. She asserted that Mr Adamson was full drunk, blind drunk, when he threw the bottle at the appellant and that he was angry. When he was grabbed by the scrotum he stopped choking the appellant. In re-examination the affect of her evidence was that the appellant did not try to push Mr Adamson's hand away which she was said was choking her.

The record of the interview conducted by the police with the appellant was also placed in evidence. That interview was conducted fourteen months after the event, and in it she said that she and Mr Adamson had been in a personal relationship until sometime in 1992, and that when they were living together they had arguments sometimes. On the late afternoon of the day in question they had an argument because she was drunk and he was drunk too, and she confirmed that Daisy Amagula was there. She said that music was on and she got an ashtray and threw it at Mr Adamson's foot. After that, Mr Adamson went to bed and she and Dairy Amagula continued to play music. Mr Adamson got up, unclothed, and told her to turn the music off. She said she did that, but she was arguing with Mr Adamson. He did not come towards her, but she

grabbed him by the testicles and Daisy intervened to stop the fight. She said that when she took hold of him he did not do anything, but she noticed he started bleeding and she thought that was because she had sharp fingernails. Later in the interview she said that she grabbed him because she wanted to stop him, and in answer to a leading question, acknowledged he was trying to hit her. Asked to explain, she said that he threw an empty rum bottle at her. Mr Adamson had nothing in his hand when she grabbed him, she said, but he had punched her before. When asked why she had grabbed him, she responded "I didn't know what's gone on because I was so drunk". At the conclusion of the interview, according to her, she said that she and Mr Adamson split up because of the argument and that they had not had any arguments before that (in contrast to what she had said earlier). There was no mention in that statement to the police of any choking of her by Mr Adamson.

At the close of the prosecution case, counsel for the accused put a "no case to answer" submission which was rejected. That submission was based upon the unreliability of Mr Adamson's evidence and because the evidence was before the Court had raised the issue of self defence on the part of the appellant and the prosecution had failed to negate it. His Worship gave brief reasons for ruling which were criticised in the grounds of appeal, but the fact that the accused gave evidence after the ruling means that the criticism does not avail the appellant (*R v Wood* [1974] VR 117 and *Stennett v R* Court of Criminal Appeal (NT) 11 March 1994, unreported).

The evidence of the accused was that there was an argument, and Mr Adamson choked her. The argument was about the noise. Mr Adamson turned it off, she was sitting in a chair and he chucked a bottle to the floor near her, she estimated about an arm's length away. After throwing the bottle, which smashed, Mr Adamson then punched her to the right side of the face and grabbed her throat by one hand. She then got wild and grabbed his scrotum. Mr Adamson had loose shorts on and she grabbed him from outside the shorts, she said. She did that to make him stop, to settle him down. She did not mean to cut him, but she had sharp nails. In cross-examination when it was put to her that Mr Adamson was not choking her, she replied: "Henry bin chokin me - maybe, yeah, I don't know. I don't remember".

Throughout the evidence of the witnesses there were different versions of the alleged choking by Daisy Amagula and the appellant and the position of Mr Adamson's hands in relation to her throat. There was other evidence as to peripheral matters, including as to when and with whom Mr Adamson went to the hospital, much of it conflicting.

As to the choking, it is noted that it is not referred to in the statement to the police by the appellant and no cross-examination was directed to Mr Adamson suggesting that that is what had happened. However, evidence of it was given by Daisy Amagula in the Crown case whilst the accused

was in Court listening and she gave evidence after that. The case for the appellant was that the application of force by her was justified in that it was not unnecessary and was not intended and was not such as it was likely to cause death or grievous harm and was used to defend herself. Alternatively, she sought to be excused from criminal responsibility because what she did was committed because of provocation upon her as defined in the *Code* particularly s34.

His Worship reviewed the evidence and made findings of fact, each of which has evidence to support it, notwithstanding that it may be contradicted elsewhere. His Worship referred to evidence which had become "somewhat divergent and the parties are vague on some matters". He attributed that and other difficulties in relation to evidence as being due to a large extent to the level of intoxication of those involved rather than any deliberate attempt to mislead the Court. He drew attention to some of the discrepancies. However, having reviewed the evidence, and in particular what Mr Adamson said about his injury which "was a clear embellishment by him and was untrue", his Worship expressed himself as generally satisfied, from his observations of him, that he was trying to tell the truth of the actual events as best as he could although his recollection of events was hazy and unclear, either due to his intoxication or maybe the effects of intoxication brought on as a result of years of heavy drinking. As to the appellant, he found that her version was affected by her high level of intoxication, and

importantly, that she had reconstructed the events in her mind. His Worship also found that she was influenced in the giving of her evidence and in reconstructing the events in her mind by what she heard in the witness box from Daisy Amagula. His Worship made other observations and then found in his words, beyond reasonable doubt, that on the afternoon of the particular day the appellant and Mr Adamson had a verbal argument about the defendant playing music too loudly and drinking too much. He next found that Mr Adamson went to bed, that he was woken by loud noise, got out of bed and told the appellant to turn the music off; that the appellant was angry with him and he with her; that she threw an ashtray and hit him on the foot and he threw an empty rum bottle which hit a wall near her, about an arm's length away. He went on to find that the appellant moved towards Mr Adamson and that he put his hands on her to turn her around and push her outside, but that he did not put his hand on her throat and choke her. He rejected the evidence of Daisy Amagula in that regard and that of the appellant. He found that what Daisy Amagula saw was probably Mr Adamson grabbing the appellant to turn her around and push her out the door, and that she had construed that as a choking. His Worship then found that the appellant became wild and grabbed Mr Adamson by the testicles with the right hand, that she squeezed them, and that there was a cut inflicted by her sharp fingernails. She then became sorry for him and attended to the wound. His Worship made immaterial findings as to the sequence of events thereafter. He found that Mr Adamson's right testicle had shrivelled to about half

the size of the left, and that he had suffered intermittent pain and other disabilities.

Turning to the issues of self defence and provocation raised by the appellant, his Worship reminded himself that the onus was on the Crown to prove beyond reasonable doubt that what she had done was not by way of self defence nor excused because of provocation. Referring to the punch, which it was alleged Mr Adamson directed to the appellant, his Worship found that he was unable to be satisfied beyond reasonable doubt that such a punch was not thrown, and in fact found that he did punch her sometime prior to the incident giving rise to the charge, although he was unable to say how long before. He had found that the alleged choking of the appellant by Mr Adamson did not occur and thus that allegation laid no foundation for the justification of self defence or the excuse of provocation. He further found that the appellant had deliberately grabbed Mr Adamson by his testicles, but that at that time Mr Adamson did nothing that would put the appellant in reasonable fear of being again hit by him, and expressed himself to be satisfied beyond reasonable doubt that the application of force by the appellant was not for the purpose of defending herself. Even if self defence was open, his Worship expressed himself satisfied that the force applied by the appellant was unnecessary in that an ordinary person similarly circumstanced would regard her level of force as unnecessary or disproportionate to the occasion (see s27 and the definition

of 'unnecessary force' in the *Criminal Code*). He found that Mr Adamson was trying to push the appellant out of his flat, that she got wild and struck out in anger at him, not in self defence, but in anger. As to provocation, he found beyond reasonable doubt that the force used by the appellant was not reasonably necessary to prevent repetition of a wrongful act or insult by Mr Adamson such as to constitute provocation to her. He went on to observe that even if he had found that the force was reasonably necessary, he was satisfied beyond reasonable doubt that the application of force in the manner and to the extent that the appellant applied it was unreasonable and that an ordinary person similarly circumstanced would not have acted in the same or a similar manner. "At the time of the application of force all the victim was doing was trying to evict the defendant from his flat. The response by the defendant was disproportionate to the situation and excessive. ... I am satisfied beyond reasonable doubt that the defendant has directly applied force to the victim ...".

His Worship also expressed himself satisfied beyond reasonable doubt that Mr Adamson suffered bodily harm in that the injury did interfere with his health (see definition of 'bodily harm' s4 of the *Code*).

The task that befalls this Court sitting on appeal from a Magistrate in a Court of Summary Jurisdiction has recently been reaffirmed in the High Court (*Devries and*

Another v Australian National Railways Commission and Another (1992 - 1993) 177 CLR 472. At p479 Brennan, Gaudron and McHugh JJ said:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against - even strongly against - that finding of fact (see *Brunskill* (1985), 59 ALJR 842, 62 ALR 53; *Jones v Hyde* (1989), 63 ALJR 349; 85 ALR 23; *Abalos v Australian Postal Commission* (1990), 171 CLR 167). If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his advantage" (*SS Hontestroom v SS Sagaporack*, [1927] AC 37, at p47) or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable" (*Brunskill* (1985), 59 ALJR, at p844; 62 ALR, at p57).

His Worship's findings arose from his view of the credibility of the witnesses. There were any number of discrepancies in the evidence both viva voce and through the record of the interview between the appellant and the police

to which attention can be directed. His Worship carefully examined it all, he took into account the condition of the witnesses at the time the incident occurred, and he made his findings of fact. They are not shown to have been wrong, and it is not shown that his Worship failed to use, or that he has palpably misused, his advantage of seeing and hearing the three people involved. Further, having read all of the evidence for myself, it was open to his Worship to be satisfied beyond reasonable doubt that the appellant was guilty. The appeal as against conviction is dismissed.

As to the appeal against sentence, which was based on the ground that the sentence was manifestly excessive, there is no substance in it and it is also dismissed.