Cintana v Burgoyne [2003] NTSC 106

PARTIES:	CAROLYN CINTANA
	v
	ROBERT ROLAND BURGOYNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA No. 65 of 2002 (20103024)
DELIVERED:	4 NOVEMBER 2003
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JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal – Appeal against conviction – whether police acted in "execution of duty" – whether appellant acted in self defence – whether appellant was a "trespasser" – whether an offence was committed

Statutes:

Criminal Code ss 26, 27, 29, 189A
Police Administration Act s 158
Summary Offences Act s 53(7)(a)
Trespass Act ss 5, 10

Cases:

Ali v SA Police (Supreme Court of South Australia, per Cox J, 13/7/95, unreported BC9503705, at 3-4), referred to
Chief Constable of the Devon and Cornwall Constabulary; Ex parte Central Electricity Generating Board [1981] 3 WLR 967 at 975-976, referred to
Gardiner v Marinov and Northern territory of Australia (1998) 7 NTLR 181 at 190, referred to
Innes v Weate (1984) 12 A Crim R 45 at 52, referred to
Julius v Bishop of Oxford (1880) 5 App Cas 214 at 222-223, applied
Panos v Hayes (1987) 44 SASR 148 at 155, referred to
R v Grimley (1994) 121 FLR 236 at 253, referred to
R v Howell [1982] 1 QB 416, referred to

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	S Geary

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

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

Cintana v Burgoyne [2003] NTSC 106
JA No. 65 of 2002 (20103024)

BETWEEN:

CAROLYN CINTANA
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 4 November 2003)

[1] This is an appeal against conviction from the Court of Summary Jurisdiction. The appellant was convicted of three offences: (1) assaulting a police officer whilst in the execution of his duty, contrary to s 189A of the Criminal Code; (2) resisting a member of the police force in the execution of his duty, contrary to s 158 of the Police Administration Act; and (3) being in a public place, namely, Piggly Wiggly Supermarket, used objectionable words which offended or caused substantial annoyance to another person, contrary to s 53(7)(a) of the Summary Offences Act. She was acquitted of a count of disorderly behaviour.

The convictions for assaulting a police officer in the execution of his duty and for resisting a police officer in the execution of his duty

[2] It was submitted that the appellant was unlawfully assaulted by the police officers, that the police officers' actions in taking hold of the appellant were not done in the execution of their duty or with lawful authority, and that it had not been shown, therefore, that the appellant was not acting in self-defence.

[3] The facts as found by the learned magistrate are not in dispute. On 28 February 2001, the appellant attended at the Piggly Wiggly Supermarket, Alice Springs, and ordered some food. Whilst waiting for the food, she apparently fell ill and began to exhibit unusual behaviour, including rubbing herself in an unusual fashion and pulling up her dress. As a result, she was asked to leave by one of the staff. Shortly thereafterwards, she fell to the floor. She appeared to be shaking or having convulsions. A staff member from the store called an ambulance. When the ambulance officers arrived, the officers approached the appellant closely. The appellant swung her fist, causing the officers to stand back. Their experience with the appellant in the past caused them to believe it to have been unwise to approach her again, so they called the police and stood back and watched the appellant, who continued to shake every 30 seconds or so.

[4] The ambulance officers' observations of the appellant were that she was conscious, her airways were free, and there did not appear to be anything else wrong with her other than the convulsive behaviour, and the fact that

she continued to remain on the floor and failed to respond to their requests to allow them to assist her. When the police arrived, they received no response from the appellant. Consequently, they lifted her up and carried her from the store. The learned Chief Magistrate then observed that, whilst this was happening, the appellant was led "to resist the arrest violently and to swear at the police, and to, in the final event, bite a police officer shortly prior to being put inside the cage." Later his Worship observed:

> "... I find that the officers came upon a scene that needed some form of resolution. It is inescapable that the defendant was no longer wanted on the premises. They were told that ... The ambulance officers had sought to assist. There being no response the police officers asked her to leave while she was on the ground ... She appeared to be conscious and (to) know what was happening ... I find therefore that the police officers were requested to remove the defendant from Piggly Wigglys as she was obviously a distraction to the ongoing business of the store. I find that the officers were acting lawfully. I further find that they were acting in the course of their duty."

After she was taken outside the store, the appellant was placed in the cage of a police vehicle and informed that she was under arrest for assaulting and resisting police, and for disorderly behaviour.

[5] Despite the apparent finding of his Worship that the appellant was arrested in the store, it was common ground before me that no lawful arrest took place inside the store. His Worship found that "no specific offences had been committed by the defendant (appellant) simply lying on the floor." Both police officers gave evidence that their intention was to "help" the appellant to leave the store, and that no arrest had taken place until after the appellant was outside the store. She was then told that she had been arrested

for disorderly behaviour, resisting arrest and assaulting a police officer. This disorderly behaviour charge certainly related to the lying on the floor and lifting up her dress, etc. Nevertheless, it is clear that the decision to effect an arrest was not made at the time the appellant was lifted up by the police in order to carry her from the store, and must have occurred at some time afterwards.

[6] The appellant submitted that the police exceeded their powers in picking up the appellant and removing her from the store. Mr Goldflam, for the appellant, referred to the dictum of Kearney J in *R v Grimley* (1994) 121 FLR 236 at 253 when his Honour said:

> "It is a basic obligation of a police officer to be fully aware of the limitations on his power to arrest, since the citizen's right to personal liberty under the law is 'the most elementary and important of all common law rights': see *Trobridge v Hardy* (1955) 94 CLR 147 at 152 per Fullagar J."

[7] Consequently, Mr Goldflam submitted that the appellant was assaulted by the police, and her actions in resisting the police or assaulting the police were justified by her defensive conduct (see s 29 of the Code). Alternatively, it was put that the police were not acting in the execution of their duty because they had no lawful authority to pick up the appellant and remove her.

[8] Counsel for the respondent, Mr Geary, submitted that the police were authorised by s 26 of the Code because the appellant, once she had been asked to leave the premises and did not do so, became a trespasser, and the

police were empowered to remove her by s 10 of the Trespass Act which provides as follows:

> "Where a person fails or refuses to leave a place after having been directed to do so under section 7 ..., a member of the Police Force may warn that person of the consequences of not leaving the place forthwith and the person fails to leave forthwith -
>
> (a) arrest the person without warrant to be further dealt with according to law; or
>
> (b) without arrest but by force if necessary, remove the person and the person's property (if any) from that place."

[9] There was no finding by the learned magistrate that the police warned the appellant of the consequences of not leaving the place forthwith, and there was no evidence that any such warning was given. Counsel for the appellant submitted that the exercise of the power depended upon the warning having been given, and as no warning had been given, the respondent could not rely on s 10. Counsel for the respondent submitted that, because the section uses the word "may", it was not necessary for such a warning to be given. No authorities were cited directly in point by either party, and according to my own researches, the point has not previously been considered by this Court.

[10] I am of the opinion that Mr Goldflam is plainly correct. The word "may", in this context, confers a power: see the well-known dictum of Earl Cairns LC in *Julius v Bishop of Oxford* (1880) 5 App Cas 214 at 222-223. The power to either arrest or remove a person under s 10 depends, inter alia, upon the relevant warning having been given. As this did not occur, the removal of the appellant was not authorised by s 10 of the Trespass Act.

[11] Alternatively, Mr Geary submitted that the police had the power to remove the appellant at common law because the appellant was causing a breach of the peace. In *Gardiner v Marinov and Northern Territory of Australia* (1998) 7 NTLR 181 at 190, B F Martin CJ held that the powers at common law included those "necessarily incident to the discharge of a constable's functions as a peace officer or conservator of the peace." Mr Goldflam submitted that the powers were limited to restraining or preventing injury to persons or damage to property: *Panos v Hayes* (1987) 44 SASR 148 at 155 per Legoe J. Further, it was submitted that there was no evidence of a breach of the peace at the relevant time because there was no harm actually done, or likely to be done, to any person or to the property of any person; nor was any person put in fear of being harmed by an assault, an affray, a riot, an unlawful assembly or by any other disturbance: see Watkins LJ in *R v Howell* [1982] 1 QB 416.

[12] The starting point is s 27 of the Criminal Code which provides as follows:

> "In the 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.
>
> (a) to lawfully execute any sentence, process or warrant or make any arrest;
>
> (b) [not relevant];
>
> (c) to prevent the continuance of a breach of the peace or a renewal of it and to detain any person who is committing or about to join in or to renew the breach of the peace for such time as may be reasonably necessary in order to give him into the custody of a police officer;

(d) to (r) [not relevant]."

[13] There is no definition of the words "breach of the peace". I consider that they were intended to convey the same meaning as at common law.

[14] Section 27(c) of the Code supports the conclusion of B F Martin CJ in *Gardiner v Marinov and the Northern Territory of Australia*, supra, and I consider that his Honour was correct in concluding that a police officer qua police officer has the power to take action to prevent a breach of the peace. I also accept that a police officer's powers have been accurately stated by Watkins LJ in *R v Howell*, supra, although the list of circumstances which his Lordship held could give rise to a breach of the peace are not exhaustive: see *Innes v Weate* (1984) 12 A Crim R 45 at 52 per Cosgrove J. However, there is conflicting authority on whether or not police may intervene to prevent a civil trespass to land where no offence has been committed. In *Chief Constable of the Devon and Cornwall Constabulary; Ex parte Central Electricity Generating Board* [1981] 3 WLR 967, Lord Denning MR, at 975-976, observed that it was likely, in the circumstances of that case (which involved demonstrators who chained themselves to a rig to prevent contractors from carrying out a survey of land to see if it was suitable for an atomic power station), that the workers would resort to self-help by removing the obstructers by force. This, his Lordship held, was a breach of the peace:

> "... in deciding whether there is a breach of the peace or the apprehension of it, the law does not go into the rights or wrongs of the matter – or whether it is justified by self-help or not.

> Suffice it that the peace is broken or is likely to be broken by one or another of those present. With the result that any citizen – and certainly any police officer – can intervene to stop the breach."

[15] However, in *Innes v Weate,* supra, at 52, Cosgrove J held that:

> "The assertion that when a citizen, entitled to rely on self-help against a threatened civil trespass, calls for police assistance, the police may themselves prevent that trespass, is incorrect, unless the trespass is in itself an offence."

[16] In *Chief Constable of Devon and Cornwall Constabulary,* supra, the trespass was in fact an offence. That may be a ground for distinction, but the question is really one of fact. As Cosgrove J said in *Innes v Weate*, supra, at 52:

> "The existence of the remedy of self-help is an indicator of circumstances which could cause a situation where a breach of the peace is imminent. Its existence alone may call for police presence. But police action is not called for or justified until a breach of the peace is imminent."

[17] There are a number of difficulties with the respondent's argument. First, in view of s 10 of the Trespass Act, it may be said that the position is governed by that section rather than the powers of a constable to prevent a breach of the peace. It is not necessary to reach a conclusion about this because, secondly, there is no evidence that a breach of the peace was imminent. So far as the power of self-help is concerned, ss 29(2)(a)(r) and (vi) of the Code apply where a trespasser enters on or remains on land with intent to commit an offence, or in circumstances where the entry on to or the remaining on the land constitutes an offence: see s 29(4). There was no finding that the

appellant had committed an offence (although one might have thought that, having been told to leave the premises by a staff member of the shop, an offence against s 5 of the Trespass Act had been committed). On the contrary, there was a finding that no offence had been committed by the appellant. Regardless of this, there is simply no evidence, and there were no findings that the owners or occupants of the store were about to use self-help or were imminently likely to use self-help, so that a breach of the peace was imminent.

[18] In *Panos v Hayes* (1987) 44 SASR 148 at 154-155, Legoe J, after reviewing the relevant authorities, concluded that police are acting within the execution of their duty when entering private premises to investigate the nature of a dispute. His Honour went on to observe that, "where the police reasonably apprehend a breach of the peace, albeit within private premises, [they] are entitled to exercise their power to restrain or prevent injury to persons or damage to property..." If by "damage to property" his Honour meant to refer to mere trespass to land, I do not agree, unless the trespass is an offence.

[19] Finally, I should add that neither police officer gave evidence that he apprehended a breach of the peace unless he acted in the way he did. In *Innes v Weate*, supra, at 51, Cosgrove J said that:

> "The existence and nature of the duty [to prevent a breach of the peace] often depends upon a reasonable assessment by the constable of any given situation. That assessment may be examined in the courts and held to be right or wrong..."

(See also *Ali v SA Police* (Supreme Court of South Australia, per Cox J, 13/7/95, unreported, BC9503705 at 3-4.))

[20] In the circumstances, I do not consider that it was proven beyond reasonable doubt that the police officers were acting in the execution of their duty at the relevant times. This being so, there is no necessity to consider whether or not the arrest was unlawful or whether or not the appellant was acting in self-defence. The appeal must be allowed and the convictions on counts 1 and 2 set aside.

The conviction for using objectionable words

[21] The elements of this offence are that:

(a) at the relevant time and place, the appellant was in a public place; and

(b) whilst in that place, the appellant used objectionable words; and

(c) by the use of such words, the appellant offended or caused substantial annoyance to another person.

[22] There was a finding that the words used were objectionable. That is not now contested. However, there was no finding by the learned magistrate as to (a) or (c). On appeal to this Court, the appellant takes no point as to (a), but says that in the absence of a finding as to (c) the offence is not proven. Further, it was submitted that no evidence was led on the point. Certainly neither police officer said that he was offended or annoyed by the

appellant's language. I note, also, that when told she was arrested, the police did not say she was arrested for using objectionable words, although she was told she was arrested for disorderly behaviour, resisting arrest and assaulting a police officer. There being no finding (and no evidence) on the point, the conviction cannot stand.

Conclusions

[23] I have considered whether to order a retrial, but I do not consider that this is warranted, because of the lack of evidence in the case to warrant convictions.

[24] The appeal is allowed, the convictions quashed and verdicts of not guilty entered on each count.

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