Woods v R [2012] NTCCA 8

PARTIES:	**WOODS, Graham**
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 7 of 2011 (20912126)
DELIVERED:	17 April 2012
HEARING DATES:	2 April 2012
JUDGMENT OF:	RILEY CJ, KELLY AND BARR JJ
APPEALED FROM:	REEVES J

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – appellant found guilty of manslaughter – whether sentencing judge erred in not considering self-defence and defence of others – consideration of excessive self-defence not excluded by jury's verdict

CRIMINAL LAW – Sentencing principles – whether matter ought to be remitted to sentencing judge for further consideration – facts as to self-defence considered by appeal court – culpability of appellant not mitigated by defensive conduct – appeal dismissed

Criminal Code Act s 43BD, s 410(c), s 411(4)

Cheung v The Queen (2001) 209 CLR 1, followed
R v Oblach (2005) 65 NSWLR 75, considered

REPRESENTATION:

Counsel:

Appellant:	S Cox QC with R Goldflam
Respondent:	M McColm

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of Director of Public Prosecutions

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

Woods v R [2012] NTCCA 8
No. CCA 7 of 2011 (20912126)

BETWEEN:

GRAHAM WOODS
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, KELLY & BARR JJ

REASONS FOR JUDGMENT

(Delivered 17 April 2012)

The Court:

[1] The appellant was charged with the murder of Edward Hargrave but, following a 15 day trial, was found guilty by the jury of manslaughter.

[2] On 31 May 2011 the appellant was sentenced to imprisonment for a period of nine years and six months with a non-parole period of four years and nine months. He subsequently obtained leave to appeal against the sentence on the ground that:

> "The learned sentencing Judge erred in law in giving no, little or insufficient weight to self defence (albeit arguably excessive self defence)."

[3] The offending occurred in Alice Springs on the evening of 3 April 2009. The appellant was in the company of his cousin, Julian Williams, when Mr Williams taunted a man named Scott Lindsay McConnell. There was a physical altercation involving Mr McConnell, Julian Williams, the appellant and others. Julian Williams punched Mr McConnell. The appellant admitted that he also punched Mr McConnell. Mr McConnell was punched or pushed to the ground. Mr McConnell was then joined by a group of men and a further physical confrontation occurred as a result of which a member of the appellant's party was knocked to the ground unconscious. The appellant and Julian Williams left the scene and were pursued by a group of five men, including the deceased, over a distance of some 2 km. The appellant and Mr Williams took refuge in a unit occupied by the appellant's sister at the Keith Lawrie flats. The group of men approached the flats and there was contact between the group and three women who had left the unit to confront them. Words were exchanged and threats were made to the women by members of the group. The appellant then took a hockey stick and a kitchen knife and ran out of the unit in the direction of the deceased. His intention was to frighten the group away.

[4] Some members of the group began leaving and moving away from the flats. However the deceased stood his ground and confronted the appellant. In the course of a brief scuffle the appellant struck the deceased in the right shoulder with the knife. The wound resulted in immediate internal bleeding.

The deceased walked a few steps before collapsing. He died within a few minutes of receiving the injury.

Sentencing proceedings

[5] In written submissions, counsel for the appellant referred the learned sentencing judge to *Cheung v The Queen*[1] and contended that his Honour should find that the appellant had armed himself with the hockey stick and knife, and run out of the unit in which he had taken refuge, in order to frighten off his pursuers (of whom the deceased was one); that the appellant did so in the belief that it was necessary to defend himself and his family; and that, in engaging in the conduct which caused the death of the deceased, the appellant was acting defensively.[2]

[6] During the course of the sentencing proceedings, counsel for the appellant submitted to his Honour that the jury's rejection of self-defence as a ground for acquittal did not necessarily mean rejection of the claim of the appellant that he was motivated by self defence or defence of another. The *Criminal Code* requires not only that an accused believe that conduct in self-defence is necessary to defend himself or herself or another person, but that such conduct in self-defence must be "a reasonable response in the circumstances as he or she perceives them."[3] The appellant's counsel conceded that the

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1 *Cheung v The Queen* (2001) 209 CLR 1.
2 Appeal Book 487, page 2 of Outline of Submissions.
3 Self-defence is defined in s 43BD *Criminal Code* relevantly as follows:
"(2) A person carries out conduct in self-defence only if:
(a) the person believes that the conduct is necessary:
(i) to defend himself or another person; … and
(b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them."

appellant's conduct was not reasonable but submitted that the case was a "classic case of excessive self-defence".

[7] Counsel for the appellant made the following submission:

> …. the jury's rejection of the submissions of the accused that his actions were justified, completely justified for legal purposes, by self-defence can be explained most readily and should be explained as a rejection by the jury that his actions – his conduct was reasonable. One could speculate that the jury completely rejected the evidence, and there was, with respect, a great deal of evidence in this case, that the offender was very scared and wanted to stop himself having the shit beaten out him, as he put it in his record of interview, and also wanted to protect his family.
>
> But in my submission that would be speculation, that the jury completely rejected all of that. Far more likely, in my submission, on all of the evidence, is that they accepted that he was terrified. They accepted that he was trying to prevent himself and his family members being hurt, given what was happening in the immediate vicinity of the home, but that the action he took in running outside armed and then engaging in a confrontation with Mr Hargrave was – fell short of being reasonable, and that's why the defence failed.[4]

[8] It was thus submitted that his Honour should find that the accused was acting in self-defence, both to defend himself and his family members.

[9] In his sentencing remarks,[5] the judge dealt with the appellant's submissions as follows:

> Your counsel pointed to the circumstances when you arrived in Musgrave Street including the panic and distress you claimed to experience. You were witnessing female members of your family trying to ward off the pursuers. In your record of interview you expressed your belief that the pursuers would "beat the shit out of me" and would assault the women and children who were members of

[4] Appeal Book pp 459 - 460, transcript of proceedings on 31 May 2011.
[5] Appeal Book p 563.

your family. Based on those circumstances your counsel put this submission:

"Inside the unit he armed himself with a hockey stick and knife and ran out of the unit to frighten off his pursuers. He did so in the belief that it was necessary to defend himself and his family."

I reject this submission. I do so because I consider it necessarily follows from the fact of your conviction for manslaughter that the jury must have found beyond reasonable doubt that you did not act in self-defence or in defence of others.

You will recall that you relied upon self-defence and the defence of others, namely, your family members before the jury as a complete defence to the charge of both murder and manslaughter. Accordingly, in my summing up I told the jury that if they found that the Crown had not established beyond reasonable doubt that you were not acting in self-defence or in defence of the named members of your family, they must acquit you of both murder and manslaughter. In the end result the jury convicted you of manslaughter.

I do not therefore consider that you can now rely upon any circumstances going to self-defence or the defence of others to ameliorate the culpability of your crime of manslaughter.

Next, your counsel pointed to your movements and actions during the confrontation that occurred between you and the deceased immediately after you ran out of the unit armed with the hockey stick and the knife. Based on those, your counsel made this submission:

"The offender struck one blow with the knife and in engaging in this conduct the offender was acting defensively."

I also reject this submission on the same grounds as I did the immediately preceding one. I do not consider it is open on what necessarily flows from the fact that the jury must have rejected your reliance at trial on self defence and the defence of others.

Arguments on appeal

[10] The appellant submitted that excessive self-defence was not inconsistent with the jury's verdict and that his Honour fell into error when he constrained himself from considering any circumstances going to self-defence or defence of others as part of his consideration of the culpability of the appellant.

[11] We consider that the ground of appeal is made out. The possibility of excessive self-defence was neither expressly nor by necessary implication excluded by the jury's verdict. His Honour wrongly constrained himself from considering the evidence and submissions on the issue of excessive self-defence.

[12] It was necessary for the Crown to satisfy the jury beyond reasonable doubt *either* that the appellant did not believe that his conduct in self-defence was necessary to defend himself or another or others, *or* that his conduct in self-defence was not a reasonable response in the circumstances as he perceived them.

[13] The fact that the jury rejected self-defence, implicit in the guilty verdict, did not mean that the Crown had satisfied the jury beyond reasonable doubt as to both matters referred to in the previous paragraph. The jury may have been satisfied beyond reasonable doubt as to one, or the other, or both. Consistent with the verdict of guilty, and the implicit rejection of self-defence, the jury might not have been satisfied beyond reasonable doubt that

the appellant did not believe that his conduct was necessary to defend himself or others (indeed, might have even decided that the appellant believed that his conduct was necessary to defend himself or others), but were nonetheless satisfied beyond reasonable doubt that the appellant's conduct was not a reasonable response in the circumstances as he perceived them.

[14] The learned judge therefore wrongly concluded that all issues relating to self-defence for the purposes of sentencing had been necessarily determined by the jury's verdict. As a result, his Honour erred in the sentencing of the appellant by not considering the evidence and determining for himself the facts relating to the case put by the appellant's counsel that the appellant was acting in self-defence, albeit excessive self-defence.

[15] The appellant acknowledges that, notwithstanding this error, his Honour found a number of factual matters favourable to the appellant, which he held were implicit in the jury's verdict of not guilty to murder but guilty to manslaughter. These included findings that the appellant ran out of the unit with the two weapons in an attempt to frighten off his pursuers and not to fight them or to inflict harm on them, and that the appellant struck only one blow with the knife and not two separate blows.[6]

[6] Appellant's Outline of Submissions par 10, referring to the sentencing remarks at AB 564.

[16] The following passage from his Honour's sentencing remarks[7] demonstrates the error on his part in not considering the issue of self-defence but also sets out his Honour's findings of facts favourable to the appellant:

> … this set of facts shows that you embarked upon a deliberate course of conduct which began with you arming yourself in your sister's unit. This course of conduct which you knew may result in someone being hurt was a course of conduct which was not justified by self-defence or the defence of another. As I have already found, I consider this necessarily flows from the jury's rejection of your defence of self-defence or defence of others that your counsel put to them.
>
> There was therefore no pressing reason why you needed to embark upon this course of conduct. You could have remained in unit 6 with the other members of your family and called for police assistance as your sister in fact did. Instead this course of conduct was one that was born out of some sense of personal annoyance or grievance at being chased by these men.
>
> Then when the deceased turned and ran back towards you, you compounded the risk of injury to him at this stage by deliberately swinging the hockey stick at him. In other words you attacked him with one of the weapons you had armed yourself with. As I have said, you did not do this because you thought you were in danger at that point in time. Then when he acted in self-defence and grabbed you by the right arm you deliberately used your left arm, knowing you were holding a knife in it, to force the deceased off you.
>
> In short you deliberately and recklessly embarked upon a course of conduct that carried a significant risk from the outset of injury to someone and then compounded that significant risk by, firstly, attacking the deceased with the hockey stick, swinging it at him, and further compounded by using the knife in your left hand to protect yourself in the confrontation that was entirely of your own making. So from all this, I consider you bear a high degree of culpability for your crime and that must attract a significant level of punishment.

[7] Appeal Book p 568, transcript of sentencing remarks, 31 May 2011.

> I do take into account the following matters by way of amelioration of the culpability of your crime. The fatal blow was not struck as a part of a sustained attack on the deceased. Instead the confrontation was very brief. It happened in a flash … It involved a single blow, as I have found, and it did not involve any murderous intention on your part. While you were certainly armed with two weapons and you ran out of unit 6 with those weapons, I consider it is clear that you did that as part of an attempt to frighten your pursuers away and not as part of a pre-meditated plan to actually fight them or attack them.

[17] Given the Court's finding in par [11] above that the ground of appeal is made out, it is necessary to decide whether the matter should be remitted to the sentencing judge for further consideration. In *R v Oblach*,[8] the New South Wales Court of Criminal Appeal was faced with a similar situation. A jury had found the appellant guilty of importing a trafficable quantity of cocaine into Australia. The jury's finding of guilt carried with it the implicit rejection of the appellant's defence of duress. The sentencing judge erred in concluding that the evidence of the appellant as to threats made to him had been rejected by the jury and that no evidence of threats could be taken into account on sentencing. The appeal court held that the jury's verdict did not preclude the sentencing judge considering and making findings as to threats made to the appellant falling short of duress, and remitted the case to the trial judge to make findings and further consider the sentence.

[18] Ms Cox QC, senior counsel for the appellant, submits that this Court should consider the evidence and determine for itself the facts relating to the appellant's case as to excessive self-defence, rather than remit the matter to

[8] *R v Oblach* [2005] NSWCCA 440; 65 NSWLR 75, at [69] to [71] per Spigelman CJ.

the sentencing judge. Ms Cox acknowledges that, given the jury's verdict, the appellant would have the burden of satisfying this Court, on the balance of probabilities,[9] that the appellant believed that his conduct in self-defence was necessary to defend himself or another or others (although excessive in the sense that such conduct was not a reasonable response in the circumstances as the appellant perceived them).

[19] In considering whether the appellant's conduct was excessive self defence, we focus on the appellant's belief at the time of the fatal confrontation. Evidence of the appellant's belief at that time is contained in the statements he made to investigating police officers in his formal interview with police conducted on 6 April 2009.

[20] In his initial description of the incident to police,[10] the appellant described being chased some distance back to the Keith Lawrie flats, by which time he was exhausted from running. He said that he had picked up a stick, but he did not know what kind of stick it was. A "bloke" then came running towards him and tackled him. The appellant was trying to push the bloke away from himself. The appellant said that his cousin Julian had something which looked like a little pipe. He was pretty sure that Julian "must have hit" the bloke. The appellant then succeeded in getting the bloke off him. The appellant said that everything happened very quickly and added: "like I

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[9] Consistent with the decision in *R v Storey* [1998] 1 VR 359 at 369, per Winneke P, Brooking and Hayne JJA and Southwell A-JA, approved by the majority (Gleeson CJ, Gaudron, Hayne and Callinan JJ) in *R v Olbrich* [1999] HCA 54; (1999-2000) 199 CLR 270, at [27].

[10] Appeal Book 354, transcript of recorded interview.

was trying to defend myself, he was a strong bloke and couldn't move away and then - that's pretty much all I remember that night."

[21] In that initial description, the appellant did not mention going inside his sister's flat. He did not mention arming himself at the flat with a hockey stick and knife. Although he referred to picking up a stick, he did not mention it was a hockey stick and his account suggested that he may have simply picked a stick up off the ground on the spur of the moment. His account also suggested that his cousin Julian was involved in the fatal confrontation, that Julian was holding an implement which looked like a little pipe, and that Julian struck the deceased victim with that "little pipe".

[22] Later in his police interview,[11] the appellant was asked whether he stayed in the street or whether he went into any of the flats in the Keith Lawrie complex. He answered that he stayed "on the side", and claimed that he did not go into the unit. He said that he stayed in the street the whole time, trying to hide. He was then informed that somebody had made a statement saying that he, the appellant, had gone inside his sister's unit. He then said: "We were at the door part", before then admitting that he had actually entered the unit.[12]

[23] The appellant was then asked whether Julian Williams had gone into the unit, to which he replied: "He came and he walked back out still fighting". The appellant then claimed that he went back outside to Julian "to try and

[11] Appeal Book 389, transcript of recorded interview.
[12] Appeal Book 390, transcript of recorded interview.

get him", and "to tell Julian to get back in".[13] At that stage, there were three of the pursuing party across the road, some two or three car lengths from the unit. The appellant said that Julian Williams wanted to "keep going and fighting". Julian Williams would not listen to the appellant's urging to go back inside.

[24] In describing what then happened, the appellant said that he realised "the bloke" (the deceased victim) had come towards him and grabbed him. He speculated: "Maybe I picked up a stick but I don't know like what…".[14] He said that the stick was outside. He later said it was on the path. He was asked what type of stick but said he did not remember; he said that he had not taken much notice.[15] The interview continued:-

> "Yeah. I wasn't going to hit him [inaudible] I was going like that, saying 'fuck off' you know. Then next minute he grabbed me by the arm and he was tackling me."[16]

[25] The appellant was then asked whether he had taken anything from inside the unit back out with him. He replied twice that he was not too sure, but subsequently said that he "probably got the stick inside". He denied that he had taken anything else from inside.[17] He was then asked some further questions as to whether he had gone into the kitchen of the unit, and in reply

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[13] Appeal Book 390.6; 391.5, transcript of recorded interview.
[14] Appeal Book 393.6, transcript of recorded interview.
[15] Appeal Book 397.6, transcript of recorded interview.
[16] Appeal Book 399.6, transcript of recorded interview.
[17] Appeal Book 399.9-400.1, transcript of recorded interview.

he described having a drink of water. He was asked again if he had taken anything out of the kitchen and he replied: "I don't think so".[18]

[26] On further questioning, the appellant described taking the stick from inside the unit: "It was laying on the stair and just on the ground near the stairs."[19]

[27] The appellant was then referred to the fatal confrontation, and described how he was trying to push the man who had come towards them. When asked why the man had taken hold of him, the appellant replied: "He probably thought I was going to hit him with the stick."[20] When asked why the man had let go, the appellant said that he did not know. He then said that Julian Williams had hit the man on the side with a pole,[21] thereby suggesting that the deceased may have let go for that reason.

[28] Still later in his interview, the appellant said: "I panicked, see I don't even know if I had some other object in my hand or not". When asked what he thought he may have had, he replied: "Don't know. It probably would have been a knife or sharp – something sharp."[22] This was the first occasion on which he mentioned the possibility that he may have had a sharp object in one hand.

[29] The appellant said that when he felt blood on himself he thought that he had been stabbed and was bleeding. He explained that the deceased "… had

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[18] Appeal Book 402.9, transcript of recorded interview.
[19] Appeal Book 403.9, transcript of recorded interview.
[20] Appeal Book 408.6, transcript of recorded interview.
[21] Appeal Book 404.7, transcript of recorded interview.
[22] Appeal Book 409.2, transcript of recorded interview.

something sharp 'cause I sort of got a little bruise on my stomach."[23] He then said: "I got a little like something was trying to stab me with something". He was asked what sharp thing the victim had, but then said: "I don't know if he had something sharp himself". When pressed as to what he, the appellant, was holding in his hand, he agreed that it "could've, might've" been a knife, before then saying that it probably was a knife but that he didn't know. When asked, if he did have a knife, where he thought he may have got it from, he replied: "Probably inside the flat", and said that he must have got it when he was having a drink of water.[24]

[30] The appellant was subsequently shown a hockey stick and a knife. He identified them both. When identifying the knife, he said that he had got it from his sister's kitchen, specifically, from the sink.[25]

[31] The appellant's description of events appeared to constantly evolve in the course of his police interview. He initially denied going into his sister's flat, but then admitted going into his sister's flat, claiming he came out again to persuade Julian Williams to come back inside and not to continue the fight. He subsequently stated that he came back outside to frighten off his pursuers.

[32] The appellant initially admitted that he armed himself with a stick, which he could not describe but which he said he picked up outside his sister's flat.

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[23] Appeal Book 413.9, transcript of recorded interview.
[24] Appeal Book 414.5, transcript of recorded interview.
[25] Appeal Book 418.8, transcript of recorded interview.

He later described how he armed himself with a stick found inside his sister's flat, and then later admitted that that stick was a hockey stick. He initially denied that he had anything else in addition to the stick, but then described something sharp and even suggested that the victim may have had something sharp with which he, the victim, attempted to stab the appellant. He then (allegedly after the event) realised that he had had something sharp in his hand. He later conceded that he probably had a knife which he had probably obtained from inside his sister's flat and taken outside with him. Finally, and this was quite inconsistent with many of his earlier statements in his interview, the appellant claimed that, on the night, he had forgotten that he had a knife in his left hand; that it was only at the last minute he *realised* that he had a knife in his hand.[26]

[33] As to the appellant's motivation and state of mind, he initially claimed that he went outside his sister's flat again to persuade Julian Williams to come back inside, but then admitted that his intention had been to frighten off the pursuers and get them to go away. At one stage he said that he was "frightened if they might come any closer to one of the kids like".[27] He then immediately agreed that he did not go outside to protect himself. At a later stage of his interview, the appellant was asked whether he was in danger when the victim approached him in the fatal confrontation, and he replied "no".[28] He was later asked how he felt when the deceased grabbed his arm.

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[26] Appeal Book 437.3, transcript of recorded interview.
[27] Appeal Book 433.5, transcript of recorded interview.
[28] Appeal Book 436.8, transcript of recorded interview.

He said he felt scared, but clarified that by saying he felt scared "just after when he [*the deceased*] let go". He was then asked how he felt before the deceased let go and he said he felt frightened. The appellant's possible further explanation of that answer was transcribed as "inaudible". The appellant ultimately admitted, not necessarily inconsistently with his previous answers, that he was upset by "getting chased all the way like a dog".[29]

[34] The appellant was most reluctant to admit to police that he was armed with a knife at the time of the fatal confrontation. The appellant gave no explanation as to why he had armed himself with the knife as well as the hockey stick. At no stage in his interview did the appellant state clearly that he had armed himself inside his sister's flat with the knife, as well as the hockey stick, for the purpose of going outside and defending himself or his family against a perceived threat to him or them from the deceased or any other person.

[35] The statements made by the appellant in his formal interview with police, read separately and in the context of statements previously made in the course of the interview, fall far short of being positively persuasive. The narration and explanation of crucial events was incomplete and lacking in cohesion. Although some of the appellant's statements support the case that he was acting in self-defence, this Court is not satisfied on the balance of

[29] Appeal Book 437.1, transcript of recorded interview.

probabilities[30] that the appellant believed that his conduct in suggested self-defence was necessary to defend himself or another or others. In the circumstances, the Court is unable to make findings on the balance of probabilities which would enable us to accept the appellant's contention as to excessive self-defence.

[36] The position thus remains that the culpability of the appellant is not mitigated by defensive conduct, albeit not for the reasons stated by the sentencing judge.

[37] The Court has carefully considered the sentencing remarks of his Honour, noting in particular the detailed factual analysis, the discount allowed for the appellant's offer to plead guilty to manslaughter, the sentence itself and the fact that the non-parole period fixed was the minimum permissible under the *Sentencing Act*. Notwithstanding the identified error on the part of his Honour, the Court is of the opinion that no other, less severe, sentence to that imposed by his Honour was warranted in law or should have been passed. Accordingly, in accordance with s 411(4) *Criminal Code*, the appeal must be dismissed.

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[30] In *Sodeman v The King* (1936) 55 CLR 192, the High Court referred to the "preponderance of probability" at 200.10 per Latham CJ. Dixon J described the onus in these terms: "satisfied that there is a substantial, that is to say a clear preponderance of evidence."