Ashley v Nalder [2007] NTSC 23

PARTIES:	ASHLEY, Charlton
	v
	NALDER, Stephen
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 43 of 2006 (20617827)
DELIVERED:	16 March 2007
HEARING DATES:	16 March 2007
EX TEMPORE JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	COURT OF SUMMARY JURISDICTION, 20617827, 14 August 2006

CATCHWORDS:

CRIMINAL LAW
Criminal Law - Appeal – Justices Appeal – appeal against conviction – whether it was open to the Magistrate to find the possibility of accident was excluded by the evidence – appeal dismissed.

Tracy Village Sports and Social Club v Walker (1992) 111 FLR 32; *Semple v Williams* (1990) 156 LSJS 40; *Dempsey v Coombe* (unreported Judgment No 8273 delivered 26 June 1985); *SS Hontestroom v SS Sagaporack* [1927] AC 37, applied.

M v The Queen (1994) 181 CLR 487; *Brunskill & Anor v Sovereign Marine & General Insurance Co Ltd & Ors* (1985) 62 ALR 53, followed.

REPRESENTATION:

Counsel:

Appellant:	T Opie
Respondent:	K Sharafeldin

Solicitors:

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

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

Ashley v Nalder [2007] NTSC 23
No. JA 43 of 2006 (20617827)

BETWEEN:

CHARLTON ASHLEY
Appellant

AND:

STEPHEN NALDER
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 16 March 2007)

[1] On 14 August 2006 the appellant was found guilty by a Magistrate of aggravated assault and of breaching a restraining order under the Domestic Violence Act. The learned Magistrate was satisfied that the appellant deliberately tipped a bucket of boiling water on the victim. The appellant appeals against both convictions on the basis that the findings were unreasonable and not supported by the evidence.

[2] The essential issue for determination in the appeal is whether it was open to the Magistrate to find that the possibility of accident was excluded by the prosecution evidence and to find beyond reasonable doubt that the appellant intentionally poured the boiling water on the victim.

[3] The principles to be applied on an appeal from a decision of a Magistrate are not in doubt. The question whether there is any evidence to support the findings of the Magistrate that the appellant intentionally poured the boiling water on the victim and, by inference, that the hypothesis of accident had been excluded, is a question of law: *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32. When an appellate court is asked to conclude that a finding by a Magistrate is unreasonable and not supported by the evidence, the question for the court is whether it is of the view "that upon the whole of the evidence it was open to the [Magistrate] to be satisfied beyond reasonable doubt that the [appellant] was guilty": *M v The Queen* (1994) 181 CLR 487 at 493. In determining this question, if the appellate court is of the view that there is a significant possibility that an innocent person has been convicted, the court is required to set aside the conviction.

[4] In cases of the type under consideration where a Magistrate has heard witnesses describing an event from which the Magistrate has drawn a conclusion that the actions of the appellant were deliberate as opposed to accidental, necessarily the appellate court is in a position of disadvantage as against the Magistrate. As the High Court pointed out in *Brunskill & Anor v Sovereign Marine & General Insurance Co Ltd & Ors* (1985) 62 ALR 53, a clear distinction must be drawn between an appeal involving questions of fact which depend upon a view taken of conflicting evidence and an appeal which depends on inferences from clearly proven facts. The Court approved the following well known passage from the judgement of Lord Sumner in *SS*

Hontestroom v SS Sagaporack [1927] AC 37 at 47 as applicable when the appeal concerns findings of fact made in the context of conflicting evidence:

> "… not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that [the trial judge] has failed to use or has palpably misused [the trial judge's] advantage, the higher Court ought not to take the responsibility of reversing conclusion so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

[5] In addition, the following remarks of Olsson J in *Dempsey v Coombe* (unreported judgment No 8273 delivered 26 June 1985) are apposite:

> "… it must always be borne in mind that, in a case such as that at bar the ultimate conclusions of fact arrived at are necessarily the product of an evaluation and weighing of the net impact which the conflicting testimony of a series of witnesses made upon the learned magistrate at the close of the hearing. It is this intangible aspect constituting the "atmosphere" of the case which is extremely important in the fact finding process and is denied an appellate court … "

[6] As Olsson J pointed out in *Semple v Williams* (1990) 156 LSJS 40 at 42, these considerations demonstrate that an appellant who seeks to overturn a finding of fact based upon the impact made by witnesses upon the Magistrate "necessarily bears a very heavy onus of demonstrating manifest error on the part of the magistrate".

[7] The learned Magistrate gave the following reasons for decision:

> "The defendant pleaded not guilty to an aggravated assault on [the victim]. The assault was by way of a weapon, being a bucket containing hot water. The Crown alleged that the defendant tipped a bucket of hot water on the victim who had been sitting near a fire in a bush camp called Wallaby Camp. The bucket or large billycan had been on the fire with a wallaby cooking within it. There's no doubt

that as a result of the incident that the victim in the matter suffered bodily harm. Photos were tendered which showed a badly burnt and blistered back and there was a medical report tendered which showed an injury consistent with burning – a burn by boiling water, which clearly amounts to bodily harm.

There's no doubt that the defendant picked up the bucket and caused the water to land on the victim's back. There's no doubt the defendant had, before this incident, appeared angry at the victim, telling her to shut up because she was talking too much. The only real issue is whether the water was deliberately tipped over the victim or was an accident. On the facts of this case, unless the court can be satisfied beyond reasonable doubt that the scalding water was deliberately poured or tipped onto the victim, then the court must acquit.

The victim's evidence in this regard is not particularly helpful. She states that at the time of the incident she was facing away from the fire talking to Jerry Ashley. She did not see how the water came to land on her. She obviously felt it because she was in pain and ran off pretty well straight away after the incident. I'm unsure as to whether she was a reluctant witness or because she was heavily intoxicated at the time of the incident she just didn't have a very good memory of the incident and the times surrounding it. But, as I say, her evidence didn't go a great way.

The next person to give evidence was Rena Ashley. She gave evidence that the defendant was telling [the victim] to be quiet because he didn't want her to be talking. He then, in her words, chucked hot water on [the victim's] back. She was cross-examined and admitted to having been drunk and to smoking ganga. She says [the victim] was talking loudly and the defendant told her, [the victim], to be quiet. She agreed in cross examination that the – by counsel for the defendant, that it was possible it might have been an accident. She says she had a clear view of the incident.

The next witness was Michelle Ashley. She gave evidence that the defendant grabbed a bucket and tipped it on [the victim]. She denied smoking ganga. She stated the defendant was standing drunk. She maintained that she saw the defendant tip the water. She doesn't know if it could have been an accident. It was basically non committal on that point.

Next there was Charmaine Ashley. She saw [the victim] and Jerry arguing, the defendant telling [the victim] to shut up, to be quiet. She was sober, she was also the defendant's older sister. She didn't really go into detail as to what she saw in terms of how the water came to be on [the victim] and she proffered the opinion 'spill it by accident' immediately in her evidence.

The next witness was Micky Hall and he gives evidence of the defendant talking to his wife. As he saw the defendant pick up a billycan half full of water and tip it on his wife. He gives evidence to the defendant running off. I think it's clear the defendant did run off shortly after the incident, from all accounts and that Rena Ashley called the police. Micky Hall says he was not smoking ganga, he was drinking but was not drunk at the time of this incident. He states he has a clear view and described the defendant picking up the container, lifting it about a metre off the ground and tipping the water – he demonstrated a tipping action where he held the bucket and twisted one arm over the other, as you would ordinarily do in a pouring type of action.

The next witness was Jerry Ashley and he was the defendant's uncle. He gave evidence of the defendant asking [the victim] to stop talking but he didn't see the incident and stated he's gone to bed, which seemed at odds with statements by the other witnesses. The defendant gave a record of interview where he denied deliberately pouring the water. He admits to handling the item but says he was trying to put it on the ground and he spilt it and he says he was intoxicated and he didn't do it on purpose.

Of the eye witnesses' accounts, Rena, Michelle and Micky clearly described a deliberate tipping of the bucket or billycan. A photo was tendered of the item and I saw photos of the scene. I got the impression that Rena and Michelle appeared somewhat reluctant witnesses but their evidence was generally consistent. They had a good view, there was some consistency to the lead up of what happened before the incident and that's certainly my view of their evidence, that what they described was an apparently deliberate act.

Rena made a concession to counsel in cross-examination that possibly – when put to her was it possible it was an accident, she said 'yes'. However, she didn't appear to really, it would seem, hold that belief. Certainly her actions at the time were consistent with reporting a deliberate act and it seems to me that her evidence was clearly one of a deliberate act. Certainly the same with Michelle and

> certainly the same with Micky Hall. Micky Hall was cross examined about his drinking and in some senses it may have been a little confusing about what he says but on the question of the bucket and how it was used, he was very clear and consistent.
>
> Charmaine didn't really describe what had happened. I took the view of her evidence that she was a partial witness as I believe was Jerry Ashley, who, it seems to me, probably saw more than he was prepared to say in court, maybe because of his close family relationship. But certainly the surrounding behaviour seemed to me that people at the time accepted it was a deliberate incident.
>
> The defendant ran off, possibly out of panic. So I cannot use his running off as a consciousness of guilt but even without that factor of running off and despite his denial in the record of interview, I do accept the evidence of Rena, Michelle and Micky Hall. I think it was strong evidence that was consistent and I think it was clear that what they saw was the defendant getting angry at his wife who didn't shut up when he told her to and he's picked up the bucket and deliberately tipped it on her back causing an injury.
>
> As a result I find beyond reasonable doubt that he's guilty of the assault as alleged."

[8] In essence, counsel for the appellant advanced three primary factors in support of her contention that the possibility of accident had not been excluded. First, when confronted by police with a statement of the victim, the appellant's immediate response was to tell the police that the bucket slipped. The appellant said:

> "I was going to pick it up and put it on the ground but I slipped; my finger; and it burned [the victim] … I lifted the thing up and tried to put it on the ground but it slipped on my hand and spilled on [the victim]. I was trying to put the thing on the ground, off the fire."

[9] Secondly, two witnesses gave evidence that the incident could have been an accident. Ms Rena Ashley agreed it was possible that the appellant dropped

the bucket by mistake. There is a significant question as to whether she was referring to the dropping of the bucket, as opposed to the spilling of the water. However, that difference is not of significance in reaching my ultimate conclusion. Ms Charmaine Ashley volunteered that the appellant picked up the bucket and spilt it by accident.

[10] Thirdly, the circumstances surrounding the incident supported the possibility of an accident. In the context of the appellant telling police that he was trying to serve himself food at the time he accidentally tipped water over the victim, the evidence established that food in the bucket was cooked and others had already taken food from the bucket. The victim was in close proximity to both the fire and the appellant. Prosecution witnesses described the appellant as drunk, swaying and staggering about.

[11] In addition to the evidentiary matters mentioned, counsel submitted that there were errors in the approach of the Magistrate to the evidence of witnesses at the scene, particularly bearing in mind that a number of witnesses were drunk or under the influence of cannabis.

[12] The Magistrate correctly directed himself as to the essential issue and the burden of proof. His Honour considered the evidence of each witness who could assist in determining whether the Crown had proved that the appellant deliberately tipped the boiling water on the victim.

[13] I am unable to discern any error in the approach of the Magistrate or in his Honour's assessment of the witnesses. There were undoubtedly areas of

conflict between the witnesses and features of the evidence of individual witnesses and their sobriety or otherwise that left room for forensic debate as to the reliability of evidence given by those witnesses. However, it does not necessarily follow from the existence of such inconsistencies or the lack of sobriety of witnesses that the Magistrate could not safely reach a conclusion that accident was negatived. There is nothing in the reasons to suggest that the Magistrate was not alert to these matters.

[14] This was a case in which the advantage of the Magistrate in seeing and hearing the witnesses should not be underestimated. In particular, this Court is at a significant disadvantage in assessing the significance of the descriptions given by the witnesses of the actions of the appellant at the time the bucket tipped and boiling water fell on the victim.

[15] It is unnecessary for me to refer to the individual aspects of the evidence to which counsel drew my attention. The Magistrate described the evidence of three witnesses as “strong” and “consistent”. His Honour found that they saw the appellant getting angry with his wife who did not shut up as instructed by the appellant, following which the appellant picked up the bucket and deliberately tipped water on the victim. Having regard to the evidence, and to the criticisms and conflicts advanced by counsel for the appellant, I am left in no doubt that these conclusions were reasonably open to the Magistrate.

[16] The appeal is dismissed.