

PARTIES:

TRINDALL Darren

v

EATON Donald

TITLE OF COURT:

SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION:

SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION

FILE NO:

JA 27 of 2010 (20940130)

DELIVERED:

5 JULY 2011

HEARING DATES:

26-27 May 2011

JUDGMENT OF:

MARTIN (BR) J

APPEAL FROM:

MR BIRCH SM

CATCHWORDS:

APPEAL AGAINST CONVICTION – onus of proof – burden of proof not correctly applied – appeal allowed.

Criminal Code, s 188.

REPRESENTATION:

Counsel:

Appellant: J Tapueluelu
Respondent: R Micairan

Solicitors:

Appellant: Central Australian Aboriginal Legal Aid Service
Respondent: Director of Public Prosecutions

Judgment category classification:

B

Judgment ID Number:

Mar1101

Number of pages:

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

Trindall v Eaton [2011] NTSC 54
No. JA 27 of 2010 (20840130)

BETWEEN:

DARREN TRINDALL
Appellant

AND:

DONALD JOHN EATON
Respondent

CORAM: MARTIN (BR) J

REASONS FOR JUDGMENT

(Delivered 5 July 2011)

- [1] This is an appeal against a conviction following a trial before Mr Birch SM for unlawful assault contrary to s 188(1) of the *Criminal Code*. The assault involved the circumstances of aggravation that the female complainant suffered harm and that the complainant was female and the appellant a male.
- [2] The grounds of appeal complain that the learned Magistrate erred “in law” by giving undue weight to the evidence of two police officers and that his Honour misdirected himself as to the burden of proof. A further ground asserts that the finding of guilt was, “unsafe and unsatisfactory and against the weight of the evidence”, but this ground is essentially a catch-all ground which relies upon the matters raised in respect of the two principal grounds.

[3] For the reasons that follow, the appeal is allowed.

Evidence

[4] Much of the evidence was not in dispute. The appellant and the complainant, his partner, engaged in a significant verbal argument. As to the critical events, the complainant said that the appellant struck her four times in the area of her cheekbone and ear. These punches were the essence of the charge of assault. The complainant also said that subsequently the appellant pushed her on to a couch after which he grabbed both of her arms and pinned them to her stomach. While he was on top of her he began punching her again and put his hand over her mouth and nose.

[5] As to the critical events the appellant gave a starkly contrasting version. He described the complainant as verbally and physically violent to him and said that she was yelling that she wanted him to hit her. According to the appellant the complainant began striking him while he was holding their son and to protect the child he threw a punch which he felt connect. He said that subsequently the complainant began hitting him again. He held her hands and put her on the couch where he held her down.

[6] Police were called and officers gave evidence of observing bruising and swelling to the complainant's left eye and a bruise. The complainant was examined by a medical practitioner at hospital who observed bruising all around the area of the left eye and recorded a complaint as to pain in the left back of the complainant's neck. The doctor gave evidence that the injury to

the eye was consistent with a blow or more than one blow to the region by a blunt object.

- [7] The appellant's first complaint that the learned Magistrate erred in law by giving undue weight to the evidence of the police officers is without substance. In view of my decision that the appeal should be allowed for different reasons, it is unnecessary to canvass in detail the evidence or findings of the Magistrate. The issue addressed in submissions centred on whether the appellant was asked or given an opportunity to give his version to the police when they attended at the premises. It was a peripheral issue and there is nothing in the reasons of the Magistrate to suggest that he used his findings as a basis for drawing any inference adverse to the appellant. To the extent that there might have been an error by the Magistrate in making a specific finding that the appellant was "asked for his version", the error was not of any significance.
- [8] To a large degree this case was a typical case of the oath of a complainant against the oath of the appellant. It is in this area that the appellant complains that the Magistrate misdirected himself as to the burden of proof.
- [9] The written submission of the appellant complains that the Magistrate erred when determining the credibility of the principal witness "by looking at the evidence of the Crown witnesses". There was no error by his Honour in this regard. Although the primary contest was between the evidence of the complainant and that of the appellant, his Honour was bound to have regard

to all of the evidence and to take it into account to the extent that is supported or contradicted the evidence of the principal witnesses.

[10] In support of this ground counsel also criticised the remarks of the Magistrate concerning the evidence of a medical practitioner and a finding that the injury to the complainant's eye was consistent with the assault described by her. There is no substance in this complaint.

[11] In my opinion, however, the appeal must succeed because of errors made by the Magistrate with respect to the burden of proof. His Honour was alert to the need in the case of oath against oath for the prosecution to prove its case and that it was not enough to merely prefer the evidence of the complainant to that of the appellant. After referring to relevant decisions in this regard, in what I regard as a slip of the tongue his Honour said, "Clearly it's not enough for me to say I prefer the evidence of the defendant over the evidence of the complainant". I am satisfied that his Honour meant to say that it was not sufficient merely to prefer the evidence of the complainant over that of the appellant.

[12] Accepting that this statement was a slip of the tongue, there are two further passages of concern. First in discussing the conflict between the appellant and the evidence of a police officer as to whether the appellant asked the officer if the officer wanted him to give his story, his Honour said, "I don't accept the defendant's evidence that he asked them if they wanted him to give his story". The critical question was not whether his Honour accepted

the evidence of the appellant. It was whether the version of the appellant was a reasonable possibility or whether his Honour was satisfied to reject it.

- [13] Further, and significantly, in the following passage his Honour disclosed an underlying approach which incorrectly places burden of proof on the appellant:

“For the reasons that I have just stated, I do not accept the defendant’s evidence where it is in conflict to the evidence of [the complainant]. I am not satisfied that [the complainant] was hitting him whilst he held [the child] or that he struck out in self-defence. Even on the defendant’s evidence, I am not satisfied that defensive conduct (inaudible) has been raised.”

- [14] In a case in which the prosecution essentially relies upon the evidence of one witness whose evidence is contradicted by the evidence of a charged person given on oath, and hence the court is faced with oath against oath, it is of critical importance that a clear and accurate approach to the evidence in accordance with the burden of proof is taken. It is always essential that the burden of proof is correctly applied, but in a case of oath against oath it is particularly important that there be no doubt from the reasons given by a Magistrate that correct application of the burden of proof has occurred. Far from making it clear that the burden of proof was correctly applied, the reasons of the Magistrate in this matter convey a clear impression that the burden of proof was not correctly applied and that his Honour slipped into the incorrect line of reasoning with respect to the appellant’s version.

[15] For these reasons the appeal is allowed and the matter is remitted for further hearing in the Court of Summary Jurisdiction before a different magistrate.
