JARDINE V O'BRIEN

Supreme Court of the Northern Territory.

Kearney J.

21 July; 5 August 1987, at Darwin.

Appeal - Justices - function of court on appeal from conviction by magistrate - appeal heard on evidence taken below - conflict of testimony - approach to conviction based on credibility of witnesses whose testimony conflicts, distinguished from approach to conviction based on inferences from uncontroverted facts.

Criminal Law - elements of defence of self-defence under Criminal Code.

Cases applied:

Messel v Davern (1981) 9 NTR 21
Seears v McNulty, unreported, 24 July 1987 (applied in part)
Paterson v Paterson (1953) 89 CLR 212
Uranerz (Aust) Pty Ltd v Hale (1980) 54 ALJR 378
Warren v Combes (1979) 142 CLR 531
Brunskill v Sovereign Marine & General Insurance Co. Ltd (1985) 62 ALR 53

Cases referred to:

Zecevic v D.P.P. (Victoria), unreported decision of the High Court of Australia, 1 July 1987
Davern v Messel (1983) 45 ALR 667

Statutes:

Criminal Code, ss.23, 25 and 27(g)

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Solicitors for Respondent	:	Solicitor for the Northern Territory

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No.215 of 1987

IN THE MATTER OF
the Justices Act

AND IN THE MATTER OF
an appeal from a decision
of the Court of Summary
Jurisdiction at Darwin

BETWEEN:

TONY ALLEN JARDINE

Appellant

AND:

PATRICK JOHN O'BRIEN

Respondent

CORAM: Kearney J.

REASONS FOR DECISION

(delivered 5 August 1987)

The appellant was convicted by the Court of Summary Jurisdiction at Darwin of the crime of unlawfully assaulting one Richard McDowell, who thereby suffered bodily harm. The appellant appeals against that conviction. He contends that it was against the evidence and the weight of evidence, and that the Court erred in law in not holding that the respondent had failed to prove that the appellant had not acted in self-defence.

A person is justified in using force to defend himself provided that the force he uses is neither unnecessary nor such as is likely to cause death or grievous harm, and that he does not intend to cause death or grievous harm; see s.27(g) of the Criminal Code. The use of force justified under s.27(g) is lawful, and a person who uses such force is not guilty of any offence which the use of that force would otherwise constitute; see ss 25 and 23 of the Criminal Code. The onus is on the prosecution to prove beyond reasonable doubt that what a defendant did was not by way of self-defence, where the evidence discloses a possible "defence" of self-defence; see generally Zecevic v D.P.P. (Victoria), unreported decision of the High Court, 1 July 1987.

The learned Magistrate summarized the cases which the respondent and the appellant respectively sought to make before him, as follows:-

> "The case for the prosecution [i.e. the respondent] put shortly is that McDowell was at a night-club establishment in town [Fannies]. That the defendant approached him, insults were exchanged, an incident occurred that necessitated the intervention of the security officer [Mr Hall] to prevent the defendant possibly punching McDowell inside the bar area. It's the case for the prosecution that McDowell left the night-club and shortly after was followed by the defendant and his brother ... It's the case for the prosecution that the defendant approached McDowell and that an assault took place and that at the time

of the assault and immediately before it the defendant was under no belief that McDowell was armed in any way and that the assault was unprovoked and was not excused by way of self-defence.

It's the case for the defendant [i.e. the appellant] that he had seen McDowell and another in the bar acting in a way which annoyed him. He [that is, McDowell] appeared to him to be a homosexual. That insults were exchanged. That ... a spitting incident took place, which was interrupted by the security [Mr Hall]. That he, the defendant, left and after turning the corner from Edmund Street into Smith Street he saw McDowell. That McDowell was with this other man. He [that is, the other man] removed his motor cycle helmet and held it in a way ... [such that] he thought the man might be possibly going to assault him, and that McDowell came at him then and that at the time he [the defendant] ... believed that he [McDowell] was armed with a knife. He [McDowell] struck him on the shoulder but he [the defendant] believed he'd been stabbed. He [McDowell] continued to flail at him and his [the defendant's] force was necessary to defend himself from attack by a person he believed was armed with a knife."

His Worship then turned to the evidence and summarized it as follows:-

"I have not heard from McDowell as far as the assault is concerned because McDowell remembers little of what occurred that night and about the only useful piece of evidence that he could give was that he does not carry a comb, is not in the habit of carrying a comb and did not carry a comb that night. I've not heard from McDowell's associate. Apparently he's been unable to be located. The evidence for the prosecution rests almost entirely upon the one useful piece of evidence given by McDowell and the

> various accounts given by the defendant. Accounts firstly given to his brother [Michael Jardine] ... the accounts given to Paul, [sic - this should read 'Hall', the security officer] then Delaney [a senior constable of Police] and subsequently given to Jones [a detective senior constable]. In effect, I'm asked to find the offence proven on the basis of the inconsistencies in those accounts, that I should not believe him [the defendant]."

His Worship then noted that for reasons which he stated -

> "I accept McDowell as a witness of the truth. I accept that he tells me that he does not carry a comb and I accept that to the best of his knowledge he did not on that night carry a comb."

His Worship found Mr Hall to be -

> "... a very convincing straightforward witness ... whose evidence I have confidence in ... It flows from finding that witness a witness of credit and a trustworthy and accurate witness that there are some areas of the evidence of the defendant which become suspect."

His Worship then discussed 2 "suspect" areas of the defendant's evidence.

The first related to the appellant's account that McDowell had threatened him in Fannies; the second related

to the appellant's differing accounts on 16 and 25 November that in Edmund Street McDowell had attacked him with what he believed first to be a knife and later a comb. I deal first with the incident in Fannies.

The defendant testified that while in Fannies he had seen the victim and another man "kissing each other and rubbing their legs up and down each other"; that he had initiated an exchange of insults with McDowell which culminated in their spitting at each other, and that McDowell then -

> "... came towards me with his hands out ... like as if he was going to put them around my throat sort of. Then one of the bouncers [Mr Hall] jumped over the bar and stood between us."

Because McDowell was coming at him in the threatening way described above, the appellant says he raised his arm. Mr Hall testified that he had asked the appellant and McDowell to desist from their altercation and they appeared to do so, but that he had then seen that the appellant had raised his fist and was about to punch McDowell; he grabbed the appellant's arm and prevented him from doing so. The magistrate, accepting Mr Hall's account, held that if McDowell had acted

> "... in this threatening way, Hall would have been able to see it. Hall says that

> he did not see any such manner or action of McDowell."

It is clear that his Worship did not accept the appellant's account that McDowell had threatened him in Fannies.

The second "suspect" area related to the appellant's differing accounts of what McDowell had held in his hand during the incident in Edmund Street. Mr Hall testified that he had gone to the end of Edmund Street and had there seen McDowell lying unconscious and bleeding. He arranged for the ambulance service and the Police to be notified and drove off in the direction he had been told the appellant had taken. He located the appellant and his brother walking along a street and asked the appellant why he had hit McDowell. The appellant told him several times it was because McDowell had had a knife. Then Constable Grant and Senior Constable Delaney arrived. According to Constable Grant, whose evidence was not challenged in this respect, the appellant told the Police -

> "Yes, I hit him but he tried to get me with a knife."

He said McDowell had held the knife in his right hand, but he could not describe it further, saying -

> "I saw the knife but I don't know what it looked like... I grabbed him [McDowell]

> by the wrist with the knife in it and we fell on the ground. He was on top of me at first but then I got on top of him and punched him until he let go of the knife."

The appellant said that at no time had he seen the knife properly. His brother told the Police he had not seen a knife. The Police went back to the scene of the fight but could not find a knife.

The incident occurred on 16 November 1986. Detective Senior Constable Jones spoke to the appellant on 25 November. The appellant told him -

> "... it started in Fannies and ended up in Smith Street. He pulled a knife on me."

The appellant was then taken to a Police Station and interviewed for about 2½ hours. He said that, following an exchange in Smith Street, McDowell had -

> "... reached into his back pocket and pulled something out ... and started waving it about. I think it was a flick knife or something ... I called out as loud as I could 'The c---'s got a knife' hoping somebody would hear it ... He walked towards me with his hand raised over his head. I walked backwards and tripped over and went down on to the ground ... He then came down on top of me. I grabbed his arm with what I thought was the knife ... He then managed to bring the hand down with the knife in it on my right shoulder, I thought he had cut me as I felt it hit."

The appellant then described how he had knocked out McDowell and continued -

> "When I hopped up off him, his hands were laying spread out, he was flat on his back. I noticed in the hand that I thought he had the knife in, was the end a (sic) a hair comb. I could see some of the teeth."

The appellant said he had not removed the comb from McDowell's hand. Then occurred the following questions and answers -

> "Q.76 Did you at any time see a knife on this person that you punched in the face?
>
> A. No I did not actually see a knife.
>
> Q.86 Do you feel you had a reasonable excuse in punching him [in] the face several times?
>
> A. Yeah, at the time I thought he was going to stab me with a knife.
>
> Q.87 Do you feel that your actions were justified?
>
> A. Yeah, I thought it was self-defence."

The learned magistrate reached his conclusions as follows -

"Grant's evidence seems to me to be significant in that right throughout - and there are repeated questions in relation to the knife - the defendant has maintained a knife and not even remotely suggested that it was a comb. The defendant before me said that he'd mixed it up in the sense that he still regards it as a knife in many ways because that is what he believed at the time the assault occurred but he was quite able, when dealing with Jones after the initial claim that it was a knife, to make the distinction. If it had just been one question and answer I might have been prepared to accept that as an explanation but there were repeated questions, one of which seems to me to be ... quite a compelling question and that was that the defendant said that when he was on top of McDowell, that he had punched him until McDowell let go of the knife. He was asked where he'd punched him and he said in the head and he was clearly, in the most clear terms, telling the constable that the punching occurred until the knife was let go of.

Before me the defendant in fact denied that that would have been an accurate statement because he didn't desist because McDowell let go of anything and he says, in effect, that would never have been said by him. Well, that's his evidence. However, as I repeat, Grant's evidence was not the subject of any cross-examination that I can recall, as to the conversation in any way which challenged the accuracy of Grant's evidence on what was said. I don't accept that throughout the number of questions and answers in the conversation between Delaney and Grant and then Delaney and the defendant's brother and returning again to the defendant, that the defendant wouldn't have said, 'Look, hold on. I've been referring to it as a knife but in actual fact it wasn't. I only thought it was a knife. What it was was in fact a comb.'

There are, I suppose, other possibilities other than the fact that the defendant is lying. There is the

possibility that, as the defendant puts it, he just simply thought about it as being a knife when he knew all along it wasn't, it was a comb, by the time he was talking to Hall or Delaney or Jones but I don't accept that as a real possibility. It is a fanciful proposition put to me by the defendant in an attempt to explain why it was that he'd told Hall and Delaney and, initially, Jones, things that were obviously quite different to what he was telling Jones later on and telling me here.

One might ask why would the defendant tell untruths about whether it was a comb or a knife? He says that - he was, I suppose, frank to this extent, that he admitted that he initially put the story of the knife because he thought it might be more favourable to him. The effect of that, of course, is that it is an admission that he was prepared to lie both to Hall and, more importantly, to the police in a way which he thought might be favourable and he says, 'I told Jones the truth ultimately and now I'm telling you the truth.' I don't accept that either. In fact, I'm quite satisfied that these versions of what he has put forward are nothing more nor less than that, versions of a story.

I am satisfied, and beyond reasonable doubt, that there was never any knife, that there was never any belief in the mind of the defendant that there was a knife or, indeed, any other weapon and that his attack upon McDowell was an attack sparked off by the events that had earlier occurred in the bar and perhaps later aggravated by the exchange that took place outside. I reject self-defence and find that the defendant was not acting in self-defence."

His Worship then considered and rejected the defence of provocation though it had not been specifically raised; that finding was not challenged. His Worship

concluded there had been an unlawful assault and found the offence proved.

It is common ground that the function of this Court on an appeal under Part VI of the Justices Act is as laid down by the Full Court in Messel v Davern (1981) 9 NTR 21 at 27, namely -

> "... to provide for such a judgment to be given ... as ought to be given if the case came at that time before the court of first instance."

As O'Leary C.J. pointed out in Seears v McNulty (unreported, 24 July 1987) at pp.15-16, the approach to judgment necessarily depends on the form that the hearing of the appeal takes. If, as here, the appeal is heard only on the evidence tendered in the court below -

> "... the court ... will only interfere in accordance with the well recognized principles according to which an appellate court acts on an appeal by way of rehearing from a lower court."

In adopting his Honour's approach, I am not to be taken as concurring in the distinction which his Honour draws between the jurisdiction exercised by the Court when fresh evidence is received and that when the only evidence is the evidence tendered below. The Full Court of the Federal Court

considered no distinction should be drawn between such cases, though recognizing that necessarily they entailed differing approaches to the findings of primary fact of the court below; see Davern v Messel (1983) 45 ALR 667 at 685.

Where, as is usually the case, the appeal is heard only on the evidence taken below, as a general rule this Court will not reverse the magistrate's decision, if it is based solely or largely on his assessment of the credibility of the witnesses he has seen and heard; see Paterson v Paterson (1953) 89 CLR 212 at 218-225 and Uranerz (Aust) Pty Ltd v Hale (1980) 54 ALJR 378 at 381. A different general approach is taken when the question is as to the proper inference to be drawn from facts undisputed or found by the magistrate - see Warren v Combes (1979) 142 CLR 531 at 551; or when fresh evidence is called on the appeal - see Davern v Messel (supra) at 685. Thus there is a clear distinction between the approach to an appeal on a question of fact which depends upon the view taken by the court below of conflicting testimony, and one which depends on inferences from uncontroverted facts; see Brunskill v Sovereign Marine & General Insurance Co. Ltd (1985) 62 ALR 53.

Mr White, for the appellant, has argued the appeal strenuously. He points to the possibility that a comb or knife could have been removed before the Police arrived at

the scene. He points to parts of the evidence as warranting a conclusion that the appellant is an open and frank person, and had not concocted a story; he submits that the learned magistrate should not have concluded that the appellant was not a credible witness.

The learned magistrate's decision turned upon his assessment of the credibility of the witnesses. He did not accept the appellant as a witness of truth. I have carefully weighed and considered his judgment. I am sensible of the great advantage he had in seeing and hearing the witnesses. There is nothing in the evidence to warrant my differing from him on questions of fact which turn upon the credibility of witnesses I have not seen. There is nothing to suggest some patent error in his approach. His decision is not clearly wrong on any other grounds and cannot be said to be inconsistent with facts incontrovertibly established by the evidence he accepted. There was ample evidence to warrant the learned magistrate's conclusion that the appellant had not acted in self-defence and was guilty of the offence charged. The grounds of appeal are not made out. The appeal is dismissed and the conviction affirmed.
