Baxter v Conroy [2015] NTSC 26

PARTIES:	BAXTER Scott v CONROY Jason Alan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 85 of 14 (21436150)
DELIVERED:	15 May 2015
HEARING DATES:	17 April 2015
JUDGMENT OF:	HILEY J
APPEAL FROM:	J NEIL SM

CATCHWORDS:

APPEAL – Justices Appeal – criminal law – appeal against conviction – defensive conduct – *Criminal Code* (NT) s 29(2)(b) – application of second limb of test of defensive conduct – Magistrate correctly applied test to facts – appeal dismissed

APPEAL – Justices Appeal – sentencing – appeal against sentence – sentence not manifestly excessive – appeal dismissed

Crimes Act 1958 (Vic) s 322K(2)
Criminal Code (NT) ss 29, 43BD(2)(b), 188
Justices Act 1928 (NT) s 163(1)
Sentencing Act 1995 (NT) ss 78DI, 78DG

Burkhart v Bradley (2013) 33 NTLR 79; *Demur v The Queen* [2014] NTCCA 15; *R v Tait* (1979) 46 FLR 386, followed.

Azzopardi v R (2011) 35 VR 43; *Bird v Peach* (2006) 17 NTLR 230; *Crawford v R* [2008] NSWCCA 166; *Hampton v The Queen* [2008] NTCCA 5; *Hooton v The Queen* [2011] NTCCA 2; *Mason v Pryce* (1998) 53 NTR 1; *Oblach v R* (2005) 65 NSWLR 75; *Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241; *R v Katarzynski* [2002] NSWSC 613; *R v Mills* [1998] 4 VR 235; *R v Morse* (1979) 23 SASR 98; *R v Trevenna* [2004] NSWCCA 43; *Rose v Huddle* [2015] NTSC 14; *Salmon v Chute and Dredge* (1994) 94 NTR 1; *Sanderson v Rabuntja* 33 NTLR 205; *Semple v Williams* (1990) 156 LSJS 40, referred to.

REPRESENTATION:

Counsel:

Appellant:	T C Jackson
Respondent:	D Dalrymple

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	Hil1504
Number of pages:	14

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

Baxter v Conroy [2015] NTSC 26
No. JA 85 of 14 (21436150)

BETWEEN:

SCOTT BAXTER
Appellant

AND:

JASON ALAN CONROY
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 15 May 2015)

Introduction

[1] On 19 November 2014 the appellant was found guilty and convicted of unlawfully assaulting Amber Tipiloura contrary to s 188(1) of the *Criminal Code* (NT). The learned Magistrate sentenced him to one month's imprisonment suspended after nine days, which he had already served, and required him to be under supervision on conditions for an operational period of 12 months. The appellant has appealed pursuant to s 163(1) of the *Justices Act 1928* (NT) against both the finding of guilt and the sentence.

[2] The parties filed and exchanged written submissions. At the hearing the parties addressed the appeal against conviction and agreed that I should determine the appeal against sentence on the written submissions.

[3] The ground of appeal concerning the finding of guilt was that:

> His Honour erred in his determination of the test of defensive conduct and in his application of the test to the facts.

Relevant background

[4] The appellant was charged with three offences said to have been committed on 11 August 2014 at the Wurrumiyanga Community.

[5] His Honour heard evidence from the complainant, Amber Tipiloura, and Federal Agent Robert Hall who had been attending the Community on other business on the day when the events occurred and assisted police officers soon after.

[6] His Honour dismissed two of the charges but found the appellant guilty of the unlawful assault upon Amber Tipiloura.

[7] At pp 27-28 of the transcript of proceedings his Honour said:

> The evidence discloses at the maximum that the defendant grabbed Ms Tipiloura by the shirt, pulled her roughly away from the altercation she was involved with another woman, breaking her shirt, which I'll presume Ms Tipiloura meant to say tearing it, and that he punched her in the left cheek.

> Without further ado I can't be satisfied beyond reasonable doubt as to the punch.
>
> …
>
> That leaves the overall evidence as to grabbing Ms Tipiloura by the shirt in the manner that she described, 'He did it really rough', together with the evidence of tearing or breaking of the shirt and the evidence of the re-examination about (inaudible). It was rough contact between his chest as he was grabbing her shirt and her face at that time.[1]

[8] His Honour then referred to two submissions made by counsel for the appellant. The first related to the credibility of the complainant. The second related to self-defence.

[9] At pp 28-29 his Honour said:[2]

> [1] We then turn to the evidence under s 29(2)(a)(i) and also 29(2)(b) of the Criminal Code. The evidence is sufficient as Ms Parsons submitted to raise the possibility of the action of the defendant who wants to defend the victim or possibly the other woman in those circumstances. That being so the law requires that I be satisfied beyond reasonable doubt that that was not the case. I cannot be satisfied beyond reasonable doubt that it was not the case, but there's more, this is what contest (inaudible).
>
> [2] Once the evidence raises that possibility I do not need to have positive evidence before me as to the state of the defendant's belief that the conduct was necessary if the evidence raises that possibility in a way (inaudible) the evidence does raise that possibility in that way either in relation to the victim or in relation to the other woman. However there are two further steps required, these come under 29(2)(b).

---

[1] Transcript of Proceedings, Police and Scott James Baxter, (Northern Territory of Australia Court of Summary Jurisdiction, 21436150, Mr J. Neill, SM, 19 November 2014).
[2] For ease of reference I have given each paragraph a number. Paragraphs 3 and 4 are taken from a document agreed between counsel as correctly reflecting what his Honour said at that point of his reasons (Exhibit A in this appeal).

[3] I also have to before 29 operates as a defence here, I have to be satisfied that the conduct is a reasonable response and in the circumstances as a person reasonably perceives them. Now the reasonable perception of a person is a mixed test, and this might present more (inaudible) to the defence submission because it's a question of subjective and objective perception there.

[4] However on the evidence before me I cannot be satisfied beyond reasonable doubt that the subjective and objective circumstances do not apply. That leaves me with the conduct being a reasonable response on the evidence before me, and I say that I am not satisfied that the response on the evidence before me is a reasonable response.

[5] That evidence discloses that the victim was engaged in a fight, the details of which on the evidence were limited, it may have been more, but all we heard about was pushing and pulling between the two women, and no doubt verbal abuse. The evidence of the victim is that the defendant came up to her seized her by the shirt in a manner she described as really rough and dragged her away from the fight and I do not – I am satisfied that this is not a reasonable response in the circumstances as disclosed by the evidence before me.

[6] That being so I am not prepared to dismiss the evidence of the defendant – of the victim, sorry, solely because she was in a state of jealous anger with the defendant and solely because she conceded that she wanted him to get into trouble, she otherwise (inaudible) her evidence as to being pulled away and (inaudible) an altercation in these circumstances and in relation to those particular circumstances of being seized by the shirt and pulled away with such force that it tore or broken her shirt, contact being made with her face with the defendant's hand as he pulled her away and her describing that was really rough, on that basis I found the defendant guilty of an assault, I find that it was aggravated by the circumstances of male on female.

Appeal against conviction

[10] The appeal relates to his Honour's application of the provision in the *Criminal Code* (NT) relating to defensive conduct, and in particular s 29(2)(b), sometimes referred to as the "second limb" of the "defence."

[11] The relevant parts of s 29(2) provide as follows:

> (2) A person engages in defensive conduct only if:
>
> (a) the person believes that the conduct is necessary:
>
> (i) to defend himself or herself or another person;
>
> …
>
> (b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.

[12] There was no issue about what his Honour said in [1] of the reasons quoted in [9] above, namely that because the possibility of self-defence was properly raised, his Honour needed to "be satisfied beyond reasonable doubt that that was not the case."

[13] Nor was there any issue about his Honour's conclusion in the first sentence of [2] to the effect that the Crown could not prove beyond reasonable doubt that the appellant did not have a belief of the kind set out in s 29(2)(a). This is often referred to as a subjective element. The

Court of Appeal has described this as the first thing required for the defence of self-defence to be made out.[3] It may be referred to as the "first limb" of the "defence."[4]

[14] The appellant advanced two main arguments concerning his Honour's application of the second limb, namely s 29(2)(b). They concern the last sentence in [2] and the whole of [3] of the reasons quoted in [9] above:

(a) First, that in saying that he had to be "satisfied that the conduct is a reasonable response and in the circumstances as a person reasonably perceives them", his Honour reversed the onus of proof;

(b) Second, his Honour's reference to "two further steps required … under s 29(2)(b)" in [2] and to the "reasonable perception of a person" being a "mixed test" in the second sentence of [3], shows an erroneous understanding of s 29(2)(b).

[15] The appellant also complained about the way in which his Honour articulated his views from the last sentence in [1] through to [3]. Further, the appellant contended that his Honour did not provide adequate reasons for his conclusion at the end of [4] that he was

[3] *Burkhart v Bradley* (2013) 33 NTLR 79 at [23].
[4] See for example the Bench Notes regarding Statutory Self Defence at [8.9.3.1] of the Victorian Criminal Charge Book compiled by the Judicial College of Victoria.

satisfied that the response of the appellant was not a reasonable response in the circumstances.

[16] Contrary to the appellant's submissions I consider that s 29(2)(b) does involve the consideration of two matters – i.e. two steps. The first step requires consideration of "the circumstances as the person reasonably perceives them." The second step requires consideration as to whether "the conduct is a reasonable response in [those] circumstances." I see no reason why they should not be referred to respectively as subjective and objective requirements.

[17] The Bench Notes in the Victorian Criminal Charge Book include the following comment concerning s 322K(2) of the *Crimes Act 1958* (Vic):[5]

> The question of whether the conduct was a 'reasonable response' is an objective test. Although it is an objective test, the reasonableness of the response must be considered in light of the circumstances as subjectively [and reasonably] perceived by the accused. The relevant determination is whether there is a reasonable possibility that the accused's conduct was a reasonable response in the circumstances as he or she [reasonably] perceived them. [6]

The only relevant difference between s 29(2)(b) of the *Criminal Code* (NT) and s 322K(2) of the *Crimes Act 1958* (Vic) is that s 322K(2)

[5] Section 322K(2) of the *Crimes Act 1958* (Vic) states: "the conduct is a reasonable response in the circumstances as the person perceives them." It is virtually identical to 43BD(2)(b) of the *Criminal Code* (NT).

[6] Judicial College of Victoria, Victorian Criminal Charge Book, Statutory Self Defence at [52] of [8.9.3.1] citing *Presidential Security Services of Australia Pty Ltd v Brilley* (2008) 73 NSWLR 241; *R v Katarzynski* [2002] NSWSC 613; *R v Trevenna* [2004] NSWCCA 43; *Oblach v R* (2005) 65 NSWLR 75and *Crawford v R* [2008] NSWCCA 166.

does not include the word “reasonably” before “perceives them”. Accordingly I inserted the words in square brackets in this passage to reflect that difference.

[18] Further, it could be said that the first step, namely the consideration of “the circumstances as the person reasonably perceives them”, does involve a “mixed test”: partly subjective, concerning the person’s perception, and partly objective, as to whether such perception was reasonable.

[19] In the first sentence of [4] his Honour addressed the first step and held in effect, in the appellant’s favour, that he could not be satisfied beyond reasonable doubt that the appellant’s perception of the circumstances was not reasonable.

[20] That left his Honour to deal with the second step, namely whether the appellant’s conduct was a reasonable response. He did that in the second sentence of [4] and concluded that he was not satisfied that the appellant response was reasonable.

[21] Had his Honour stopped there, one might readily conclude that his Honour was wrongly placing an onus of proof upon the appellant. However the fact that his Honour then went on to refer back to the evidence before stating his conclusion that he was satisfied that it was not a reasonable response (in [5]) indicates that what his Honour had

said at the end of [4] was only part of his reasoning process and does not suggest that his Honour was applying the wrong onus of proof.

[22] Counsel for the appellant contended that because his Honour did not add the words "beyond reasonable doubt", for example after the words "I am satisfied", it should be inferred that his Honour was not applying that test.

[23] I reject this and the other contentions to the effect that his Honour did not apply the correct standard of proof. Apart from the fact that his Honour is an experienced magistrate most of whose work requires application of the beyond reasonable doubt standard of proof, his Honour expressly referred to that test at [1] in relation to the whole of the s 29 "defence" and again at [4] in relation to the first step involved in applying s 29(2)(b).

[24] The fact that his Honour did not repeat the words "beyond reasonable doubt" in [5] or somewhere else in his reasons does not lead to the inference that he was not applying that standard of proof. By way of analogy, counsel for the Crown referred to *Burkhart v Bradley*[7] and to the fact that the Court of Appeal did not make any adverse comment there about the fact that the magistrate had not repeatedly referred to

[7] (2013) 33 NTLR 79.

the beyond reasonable doubt test in his findings regarding defensive conduct.[8]

[25] I also reject the submissions which I referred to in [15] above. There were and remain within the six important paragraphs quoted in [9] above a significant number of words shown on the transcript as "inaudible" even after counsel carefully listened to the tapes for the purposes of this appeal. This is not unusual, particularly in bush courts, where there are difficulties for those preparing the transcript to hear and transcribe every word. Accordingly considerable care would have to be taken before inferring exactly what his Honour said in those passages where every word has not been accurately transcribed.

[26] Secondly, it is well recognised that a magistrate who is hearing and determining matters in a busy bush court cannot be expected to express him or herself as precisely as one might expect if judgment were reserved.[9]

[27] Thirdly, I do consider that his Honour gave reasons, sufficient in the circumstances, for reaching his opinion in the last two lines of [5] that the appellant's response was not a reasonable response in the circumstances. In addition to those brief reasons that appear in the passage immediately before that opinion, his Honour's views about the

[8] (2013) 33 NTLR 79.
[9] See for example *Sanderson v Rabuntja* 33 NTLR 205 per Riley CJ at [11] – [12]; *Semple v Williams* (1990) 156 LSJS 40 per Olsson J at [40]; *Rose v Huddle* [2015] NTSC 14 per Blokland J at [38]; *Bird v Peach* (2006) 17 NTLR 230 per Martin (BR) CJ at [9].

manner in which the appellant seized the complainant and dragged her away from the altercation would also have been informed by his observations elsewhere including in the following paragraph [6] and in his description of the evidence which I have quoted in [7] above.

[28] I dismiss the appeal against conviction.

Appeal against sentence

[29] The principles that apply to an appeal against sentence are well known and are conveniently summarised by the Full Court of the Federal Court in *R v Tait* (1979) 46 FLR 386 at 388.[10] The Court said:

> An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error.

[30] As a general rule there is a presumption that there is no error in a trial judge's exercise of his sentencing discretion.[11] In order to interfere with the sentencing magistrate's exercise of discretion, the court must be satisfied not just that the sentence was excessive but that it was manifestly excessive.[12] To determine whether a sentence is manifestly

[10] See too *Demur v The Queen* [2014] NTCCA 15 at [5].
[11] *Salmon v Chute and Dredge* (1994) 94 NTR 1 at 24 (Kearney J).
[12] *Hampton v The Queen* [2008] NTCCA 5 at [44]; *Hooton v The Queen* [2011] NTCCA 2 at [23].

excessive, it is necessary to review it in the perspective of the maximum sentence prescribed by law for the crime, the standards of sentencing customarily observed with respect to the crime, the place which the criminal conduct occupies in the scale of seriousness of crimes of that type and the personal circumstances of the offender.[13]

[31] I have read the written submissions regarding the appeal against sentence and his Honour's sentencing remarks.

[32] His Honour found that the appellant handled the complainant roughly by grabbing her by the shirt causing it to tear and making contact with her face and pulling her away from another person with whom she had been arguing. Although his fist made contact with her face his Honour found that this might have come about by virtue of his seizing the shirt. His Honour also found that the force involved was not reasonable defensive conduct.

[33] His Honour concluded that the offending was at the lower end of seriousness for this kind of offence. He took into account the fact that the appellant was only 18 years old and the importance of rehabilitation for young offenders. He found that the circumstances were such as to constitute exceptional circumstances for the purposes of s 78DI of the *Sentencing Act 1995* (NT). Consequently s 78DG required his Honour to record a conviction and sentence the appellant

[13] *R v Morse* (1979) 23 SASR 98 at 99.

to a term of imprisonment, and permitted him to partially suspend that term of imprisonment. Because the appellant had already spent nine days in prison on remand in relation to another matter his Honour was able to take that into account and suspend the appellant's sentence without requiring any further actual imprisonment.

[34] Counsel for the appellant relied on the fact that this offending was at the lower end of the objective seriousness for offences of this nature and the fact that the complainant suffered no physical harm. Counsel also contended that his Honour failed to give proper weight to the appellant's youth and placed too much emphasis on his prior offending.

[35] Counsel referred to and quoted from a number of decisions including *R v Mills*,[14] *Azzopardi v R*[15] and *Mason v Pryce*.[16] *Mills* identified three important principles to be taken into account when sentencing a youthful offender, namely particular consideration for a first offender, the importance of rehabilitation, and avoiding sending a youthful offender to an adult prison.

[36] The appellant was not a first offender. He had a number of previous convictions including for aggravated assault on his mother, aggravated assault of a child involving harm, assaulting a member of the police

[14] [1998] 4 VR 235.
[15] (2011) 35 VR 43.
[16] (1998) 53 NTR 1.

force while armed with an offensive weapon and aggravated entry of a building, damage to property and stealing.

[37] By backdating the sentence by nine days and suspending the remaining 21 days, his Honour avoided sending the appellant to prison.

His Honour did take rehabilitation into account and ordered and acted upon a report from the Department of Corrections and structured the sentence in such a way as to promote the appellant's rehabilitation under supervision and on conditions.

[38] I do not consider that the sentence was manifestly excessive.

[39] I dismiss the appeal against sentence.
