Simpson v The Queen [2006] NTCCA 14

PARTIES:	SIMPSON, MARK ANDREW
	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:	CA 30 OF 2005
DELIVERED:	18 JULY 2006
HEARING DATES:	5, 6 JULY 2006
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ
APPEAL FROM:	JUDGE AND JURY IN PROCEEDINGS SCC No. 20327073

CATCHWORDS:

CRIMINAL LAW– APPEAL – DIRECTIONS TO JURY

Whether Judge erred in law in directions to jury on common purpose – section 8 – Criminal Code Act (1983) (NT) – held – Judge correct in view expressed to jury – view based on evidence of witnesses – no miscarriage of justice – appeal dismissed.

CRIMINAL LAW – APPEAL – ALTERNATIVE CHARGE

Whether common assault available as alternative charge to unlawfully causing grievous harm – section 188 – section 181 – Criminal Code Act (1983) (NT) – held – not an alternative – section 320 inapplicable – common assault by striking or touching not an offence of which causing an event is

an element – section 330 inapplicable – section only applies to charges available pursuant to Division 3 of Part IX of Criminal Code – appeal dismissed.

Criminal Code Act (NT) – s 1, s 8, s 181, s 187, s 188, s 320, s 330

R v Campbell (1990) 99 FLR 107 – applied.
Davis v Bennett (2003) 175 FLR 78 – applied.

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC
Respondent:	J Adams

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	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

Simpson v The Queen [2006] NTCCA 14
No. CA 30 of 2005

BETWEEN:

MARK ANDREW SIMPSON
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 18 July 2006)

THE COURT:

[1] On 24 November 2005 the appellant was found guilty by a jury of unlawfully causing grievous harm contrary to s 181 Criminal Code (NT). The appellant, by leave granted on 4 January 2006, appealed from his conviction on two grounds, first, that the learned trial judge erred in law in his directions to the jury on common purpose pursuant to s 8 Criminal Code Act (1983)(NT), and secondly, that the learned trial judge failed to leave to the jury for decision an alternative count of common assault contrary to s 188 Criminal Code (NT).

[2] At the conclusion of submissions on 6 July 2006 we dismissed the appeal. What follows are our reasons for doing so.

[3] The charge of unlawfully causing grievous harm arose out of an altercation that occurred in the early hours of the morning of 19 November 2003 outside the Vic Hotel in Smith Street Mall, Darwin. The victim sustained grievous harm when he was struck to the ground. Before the jury it was conceded by the Crown and acknowledged by the trial judge that the appellant was probably not the person who struck the victim such as to cause him permanent injury. In the course of his summing up the trial judge said:

> "Now, the real issue in this case, as I understand it, is whether Mr Simpson is responsible for the injury in a criminal sense.
>
> [Counsel for the Crown], quite properly, conceded that the likelihood is that the broken jaw was caused by a big punch from a big man who is not Mr Simpson, it was the other fellow. I will call him "the big fellow" just to distinguish him. So the big fellow hit [the victim] immediately after Mr Simpson had hit him and in such a way that it was more forceful than Mr Simpson's blow and caused the fracture of the jaw. That would seem to be the likelihood.
>
> Now if you find that Mr Simpson was there, that he struck [the victim] and then was part of the striking of [the victim] by the big fellow, then is he responsible? Is he to be found guilty himself of causing grievous harm even though he did not actually do it himself?"

[4] The learned trial judge then instructed the jury concerning offences committed in prosecution of a common purpose and s 8 Criminal Code (NT).

[5] In the course of those directions the learned trial judge said:

" … Mr Simpson by his mere presence and encouragement of the big fellow, by his involvement in it, may be guilty of the offence himself. So he can be equally guilty regardless of the fact that it was not him that struck the blow. And that is the way the Crown presents its case here.

If he is there to encourage the other participant, the big fellow, then that is sufficient in what the Crown says to you is, 'Well, look at the circumstances surrounding this case, they came out of the hotel together, they had emerged at about the same time, they approached [the victim] together, [the victim] sat down.'

This of course depends on what evidence you accept but this is the version the Crown would put to you, '[the victim] sat down, the big fellow pulled his hair', or pulled his ear or both according to one witness, Mr Simpson at the same time or at approximately the same time spat on him.

There was then a confrontation. There was some chesting between Mr Simpson and [the victim]. Then shortly thereafter there were blows delivered to [the victim] in quick succession, within seconds according to one of the witnesses. So you might assume from that, it is a matter for you, but you might assume from that that Mr Simpson hit him and immediately after the big fellow hit him. They were very close together.

So you take all of that and then you look at the facts that there was no evidence of any surprise on the part of Mr Simpson, there was no suggestion of 'What are you doing?', there was a blow by him and on one version of events, he then stepped back to enable the other blow to come through, the other punch to come through.

So no evidence of surprise, no suggestion that Mr Simpson got down to help the man who has just been felled, 'What are you doing? This is wrong. Help him out'. There is no remonstrating by Mr Simpson with the big fellow for doing something that was inappropriate in the circumstances. The only evidence there is is that they walked off together back into the hotel.

So the Crown says to you put all that together and you have got a common purpose, these people may not have discussed it but they were working to the one end and Mr Simpson is therefore equally

> responsible with the big fellow for the fact that [the victim] ended up with a fractured jaw.
>
> So that is how the Crown puts it to you and as I said to you before, [counsel for the appellant] would put it to you differently. She would say, "Well, yes, they did come out of the hotel together and there was some evidence of them talking together, but no suggestion that they were talking about [the victim] at all'. She would say to you 'The only thing you have is that [the victim] was hit twice, once by Mr Simpson and once by the big fellow, but the big fellow was said to be behind Mr Simpson at various stages and he may have just stepped in and hit [the victim] without any knowledge (on) the part of Mr Simpson, without him even having any idea that the big fellow was going to come in and strike this blow.
>
> So she would say to you 'Well there is room for reasonable doubt in there and Mr Simpson should get the benefit of that doubt.'
>
> Those, as I perceive it, are the competing arguments that are put to you and I think that is what you really need to think about.".

[6] Under the first ground of appeal the principal complaints are that the learned trial judge was incorrect in saying that the *only* evidence was that the appellant and 'the big fellow' walked off together back into the hotel, and that when the jury asked for redirections on common purpose the learned trial judge erred in saying

> "And of course … the Crown would say to you that the big fellow and Mr Simpson then walked back into the hotel together. Mission accomplished, the Crown would say to you."

[7] The appellant particularly complained that the learned trial judge made no reference to the evidence of the witness Shawcross which was said to contradict what the learned trial judge put to the jury. However we think the learned trial judge was essentially correct when he said the evidence was the

two assailants walked off together back into the hotel. This was certainly the evidence of a number of witnesses.

[8] The evidence of the witness Balcombe included the following: "So you didn't see them saying 'get inside or move away' or anything like that right after the hit happened? – – No." The witness Hughes gave evidence: "Adam hit his head on the concrete and then the two big fellows turned around and walked back into the pub." Under cross–examination Hughes said: "… the two fellows just walked back inside." When asked "And who called them back inside? Hughes said "They just went back inside themselves." The witness Crane said "Just all turned around and walked straight back into the Vic."

[9] The particular evidence of the witness Shawcross relied upon was as follows:

> "Where did those men go then, that is the two men? – – I believe the whole, Mark's whole group moved away, moved like back to the end – the bank end of the Mall.
>
> Did you … ? But I'm – sorry, did you see them go back into the hotel later then? – – "Actually yes, I think, we separated them and put them in the hotel so we could get rid of the other group.
>
> And then did you go and assist the man that was on the ground? – – No, his friends assisted him in getting him up and they moved off towards McDonalds.
>
> So at the time you heard – or just after you heard the crack do you remember seeing Mr Grainger there? Yes, I believe he was with me at that stage.

> Do you remember if it was one of you two that asked – that moved Mr Simpson back into the hotel? – – : I honestly don't recall. I'm not sure.

[10] In our view the omission of the learned trial judge to refer to this evidence of Shawcross did not give rise to a miscarriage of justice. The three eyewitnesses Balcombe, Hughes and Crane gave evidence which clearly supported what the learned trial judge said to the jury. It is apparent from the transcript that Shawcross was unable to give clear evidence that either he or his companion had directed the two assailants back into the hotel. In our view there is no substance in this ground of appeal.

[11] As to the second ground of appeal we are of the opinion that the learned trial judge was correct in not leaving as an alternative charge common assault contrary to s 188 Criminal Code (NT). In our opinion, in agreement with the ruling in *Campbell* (1990) 99 FLR 107 at 108, common assault contrary to s 188 Criminal Code (NT) is not available as an alternative charge to that of unlawfully causing grievous harm contrary to s 181 Criminal Code (NT).

[12] The question of an alternative charge of common assault was discussed before the learned trial judge. Counsel for the Crown eschewed reliance on the punch delivered by the appellant personally. Counsel for the appellant at the trial submitted that no alternative charge to that contained in the indictment should be left to the jury. Given the evidence of the punch delivered by the appellant and the Crown's reliance on the punch of the 'big fellow' and common purpose to secure a conviction, there were tactical

reasons for the course the appellant's counsel took. There is no suggestion counsel acted without instructions.

[13] Whilst counsel's course at trial would not necessarily, of itself, be fatal to the submission before this Court that the alternative charge of common assault should have been left to the jury, in the circumstances, even if common assault were available as an alternative charge, in our view there has been no miscarriage of justice. In any event we do not think common assault is available as an alternative charge in the present case.

[14] Counsel before us put the appellant's case on two bases:

1. that common assault was an available alternative to unlawfully causing grievous harm pursuant to s 320 Criminal Code (NT);

2. alternatively, it was available as an alternative charge pursuant to s 330 Criminal Code (NT).

[15] Those sections which are part of Division 3 Part IX headed "Effect of Indictment: Alternative Verdicts" relevantly provide as follows:

> "320. Charge of causing event, &c.
>
> (1) Upon an indictment charging a person with a crime of which causing an event is an element he may be found guilty alternatively of any offence of which causing an event of a similar, but less injurious, nature is an element.
>
> ……
>
> 330. Court to determine availability of alternative charge

It is the duty of the court to determine at the conclusion of the evidence whether or not, upon the evidence, any other charge is in fact available for the consideration of the jury."

[16] Sections 187 and 188 Criminal Code (NT) relevantly provide as follows:

"187. Definition

In this Code 'assault' means –

(a) the direct or indirect application of force to a person without his consent …

188. Common Assault

(i) any person who unlawfully assaults another is guilty of an offence … ."

[17] "Application of force" is defined in s 1 Criminal Code (NT) as follows:

"application of force" and like terms include striking, touching, moving and the application of heat, light, noise, electrical or other energy, gas, odour or any other substance or thing if applied to such a degree as to cause injury or personal discomfort;"

[18] It was submitted that common assault was an available alternative to unlawfully causing grievous harm because just as unlawfully causing grievous harm was a crime of which causing an event, namely grievous harm, was an element, so common assault was an offence of which causing an event, namely injury or personal discomfort, was an element, because of the definition of "application of force". Therefore, it was submitted,

applying s 320 Criminal Code (NT), common assault was an available alternative.

[19] This submission was contrary to *Davis v Bennett* (2003) 175 FLR 78 in which this Court held that the words "if applied to such a degree as to cause injury or personal discomfort" in the definition of "application of force" qualified the words "heat, light, noise, electrical or other energy, gas, odour or any other substance or thing" but not the words "striking, touching, moving". We were invited to overrule that decision. Having considered the matter for ourselves, we are of the opinion that as a matter of construction the words "striking, touching, moving" comprise "application of force" regardless of whether injury or personal discomfort ensues. In our view "applied" in the definition refers back to "the application of heat, light … " but not "striking, touching, moving." The definition includes two distinct categories of case, those which constitute "battery" in the old parlance and those which do not. It follows that common assault constituted by striking or touching is not an offence of which causing an event is an element and that therefore s 320 Criminal Code (NT) has no application to the present case.

[20] The appellant alternatively relied upon s 330 Criminal Code (NT). It was submitted that s 330, in referring to "any other charge" literally meant that and was not confined to the alternatives available by reason of the preceding sections in Division 3 of Part IX Criminal Code (NT). We do not accept this argument.

[21] In our view, s 330 Criminal Code (NT) is not an enabling provision but rather a directive that trial judges at the conclusion of the evidence are to determine what alternative charges under the Criminal Code (NT) are available, if any, having regard to the provisions of Division 3 of Part IX. Counsel for the appellant went so far as to submit that s 330, construed broadly, required a trial judge in a case concerning a charge under the Criminal Code (NT) to determine whether alternative charges for offences under other legislation were open on the evidence. Thus, for example, upon a charge of aggravated dangerous act contrary to s 154 Criminal Code (NT) where the substance of the charge alleged was constituted by, say, inappropriate driving a motor vehicle whilst under the influence of alcohol, a trial judge would be required to consider leaving to the jury Traffic Act offences such as driving without due care. This would not only be inappropriate and burdensome for both judge and jury but contrary to what we regard as the whole scheme of the Criminal Code (NT). In our view s 330 is confined to offences under the Criminal Code (NT) and more particularly to the alternative charges available in virtue of ss 315 to 329 inclusive.

[22] Common assault (s 188) was not in the present case an available alternative to a charge of unlawfully causing grievous harm (s 181).
