

*Gordon v Gurruwiwi* [2012] NTSC 88

PARTIES: GORDON, Robert Karena

v

GURRUWIWI, Bernadette Yarramatji

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING APPELLATE  
JURISDICTION

FILE NO: JA 66 of 2012 (21208863)

DELIVERED: 12 November 2012

HEARING DATES: 12 November 2012

JUDGMENT OF: RILEY CJ

APPEAL FROM: MR G SMITH SM

**REPRESENTATION:**

*Counsel:*

Appellant: Mr R Coates

Respondent: Mr G O'Brien-Hartcher

*Solicitors:*

Appellant: Office of the Director of Public  
Prosecutions

Respondent: North Australian Aboriginal Justice  
Agency

Judgment category classification: C

Judgment ID Number: Ril1217

Number of pages: 11

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

*Gordon v Gurruwiwi* [2012] NTSC 88  
No. JA 66 of 2012 (21208863)

BETWEEN:

**ROBERT KARENA GORDON**  
Appellant

AND:

**BERNADETTE YARRAMATJI  
GURRUWIWI**  
Respondent

CORAM: RILEY CJ

EX TEMPORE  
REASONS FOR JUDGMENT

(Delivered 12 November 2012)

- [1] This is a Crown appeal against the decision of the Court of Summary Jurisdiction to dismiss a charge of assault occasioning harm against the respondent. The trial was conducted over two days and, at the conclusion of the second day, the learned magistrate dismissed the charge on the basis that the prosecution had not established that the respondent did not engage in defensive conduct at the time.

**The facts**

- [2] The alleged offending arose out of an incident which occurred near Nhulunbuy on 10 February 2012. On that night the respondent, whilst in an intoxicated state, suffered a deep laceration to her left arm. She reported the

injury to be the result of her cutting herself with a broken bottle in response to "humberging" by her husband. Police and ambulance personnel responded to the call. The respondent voluntarily entered the rear of the attending ambulance and consented to a paramedic treating her injury and taking her vital signs.

[3] In the course of treatment the respondent expressed a desire to be transported to the Gove District Hospital and she enquired whether her husband could accompany her in the rear of the ambulance. She was advised by the paramedic that her husband would have to make his own way to the hospital as he was intoxicated and had been identified by the respondent as the reason for her self-harming. At a time when the ambulance door had been closed and the vehicle was reversing the respondent called out "my husband, my husband". She then removed her seat belt, stood up, looked at the paramedic and punched him with a closed fist to his mouth causing a small laceration to the inside of his lip. The respondent then opened the rear door of the ambulance and ran into the nearby bush.

[4] In a record of interview, which was received into evidence, the respondent denied punching the paramedic claiming that she pushed him with two hands as she thought she had heard on the radio that she was going to be taken by ambulance to another camp and dropped there. Apart from what was said by the respondent the only evidence in this regard was that a radio call may have been received by a police officer regarding an unrelated incident at the

other camp. There was no basis in fact for the expressed belief of the respondent.

- [5] The reasons for decision made it plain that the magistrate accepted that the respondent struck the paramedic and caused him harm. His Honour said:

The issue, however in law is that (the) onus falls upon the prosecution to prove beyond reasonable doubt, not only that the ambulance officer was assaulted, and I have no doubt that he was assaulted, but it also falls upon the Crown to prove beyond reasonable doubt that the defendant did not act in self defence according to law.

- [6] His Honour went on to say in ex tempore reasons for decision:<sup>1</sup>

The sole issue that I have to deal with is whether the defendant believed her conduct was necessary to prevent or terminate an unlawful deprivation of her personal liberty. And for that, whether the conduct that she used was a reasonable response in the circumstances as she reasonably perceived them to be.

This case is certainly one which sits right on the margins.

It seems to me I must take into account the very particular circumstances of this defendant. As I expressed during the course of submissions being made, had the person that the ambulance officer was treating have been a person who was able to speak clearly in the English language, I would be completely satisfied that her conduct was not reasonable in the circumstances. However it seems to me that there are some special characteristics applicable to this defendant.

Although her conduct was carried out after it's apparent she had been drinking, and that by itself would not assist her, it seems to me of greater importance that this conduct was committed after a situation arising where she felt the need to self-harm. The evidence I have received from the ambulance officers suggests that she has some history of self-harm.

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<sup>1</sup> Transcript of 4 July 2012 at 31

She was in a circumstance when all those around her were white males, and it seems to me that her concerns about being in a locked vehicle must have caused her some particular fears and anxieties.

The evidence is not such that I am able to make any concrete findings about what was exactly going on in her mind.

But given the tests that I am required to apply and the burden that falls on the prosecution, it seems that I am left with the realistic possibility, and certainly a possibility which has not been contradicted beyond reasonable doubt, that the defendant thought that she was to be taken to a place that she did not wish to go to and she did not wish to go anywhere including that place or the hospital without her husband present.

And that she found herself in a position, once the door had closed of the ambulance and the ambulance had begun to move as it did in (the paramedic's) evidence. On somehow having to express in a language foreign to her, that she wished to get out of the vehicle, and would have to do it in a hurry.

The further difficulty is that she would have had to express that wish in circumstances where it appears she had already been told that her husband could not come with her.

The issue about the self defence and unlawful deprivation is in this case a difficult one. There is certainly nothing before me that would suggest that the ambulance officer did anything which could leave him open to being accused of unlawfully depriving this defendant.

The issue only arises in this way, at the moment the defendant decided that she wished to withdraw her consent to being taken, any effort, had it been made, would have resulted in unlawful deprivation. There is no evidence that that was done but it seems to me that the proper interpretation of self defence in those circumstances is that, if the defendant thinks that she is being stopped from leaving the vehicle, then some action by her to get out of that vehicle would be justified.

The final issue to deal with then is whether the conduct is a reasonable response in the circumstances as she reasonably perceived them to be.

The evidence which has tipped me over in terms of not being satisfied beyond a reasonable doubt that she was not acting in circumstances reasonable, as she perceived them to be, was the evidence of (the other ambulance officer), which left me uncertain as to whether there had been some attempt by this defendant to say things beyond, 'my husband, my husband' at the point where the vehicle was moving. And that it may have been that (the paramedic) was focussed on his work and not responding immediately to the defendant.

Accordingly I am left in some doubt as to those circumstances and weighing up all of those matters that I have already referred to concerning this young woman's vulnerability, being the terms that's being used in this case.

I am not satisfied beyond reasonable doubt that her conduct was not a reasonable response in the circumstances, as she reasonably perceived them to be, given her particular circumstances.

### **The grounds of appeal**

- [7] The appellant complained: (a) that "the magistrate misdirected himself as to the law on self defence and its application to the facts of this matter"; and (b) asserted that "on any reasonable interpretation of the recorded evidence and the inferences that patently arose from the whole of the evidence the learned magistrate's decision to dismiss the charge is plainly wrong".

### **The law**

- [8] The right of appeal in these proceedings is provided in s163 of the *Justices Act* which permits an appeal on grounds that involve an error or mistake on the part of the magistrate on a matter or question of law alone or a matter or question of both fact and law.

[9] The principles applicable to a prosecution appeal against an acquittal by a magistrate have been set out in detail in *Peach v Bird*.<sup>2</sup> The power to allow an appeal against acquittal is an exceptional discretionary power vested in the court. In the present case it is to be borne in mind that the ex tempore reasons provided by the magistrate were delivered in circumstances where the magistrate was working under considerable pressure and without significant opportunity for reflection or preparation. Such reasons should not be subjected to "hypercritical analysis".

[10] The issue for determination was whether the prosecution had established the respondent was not engaged in "defensive conduct" as provided for in s 29 of the *Criminal Code*. That section is in the following terms:

(1) Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.

(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;

(ii) to prevent or terminate the unlawful deprivation of his or her or another person's personal liberty;

(iii) to protect property in the person's possession or control from unlawful appropriation, destruction, damage or interference;

(iv) to prevent trespass to land or premises occupied by or in the control of the person;

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<sup>2</sup> (2006) 17 NTLR 230 at [9].

(v) to remove a trespasser from land or premises occupied by or in the control of the person; or

(vi) to assist a person in possession or control of property to protect that property or to assist a person occupying or in control of land or premises to prevent trespass to or remove a trespasser from that land or premises; and

(b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.

[11] It is apparent that, for present purposes, s 29(2) of the *Criminal Code* has two limbs which operate cumulatively. The first, found in s 29(2)(a), provides for a subjective test and the second, found in s 29(2)(b), provides both a subjective and an objective component.

[12] In relation to the issue of defensive conduct the magistrate was required to consider whether the prosecution had established that when she punched the paramedic the respondent:

- a) did not believe that her conduct was necessary to prevent or terminate the unlawful deprivation of her liberty; or
- b) the conduct of punching the paramedic to the face was not a reasonable response in the circumstances as the respondent reasonably perceived them.

[13] In relation to the first limb the magistrate referred to the respondent having "concerns about being in a locked vehicle" which "must have caused some particular fears and anxieties". His Honour stated that it was a "realistic



possibility" that, as the ambulance began to move, the respondent thought she was to be taken to a place that she did not wish to go. The respondent had, possibly, decided she wished to withdraw her consent to being taken anywhere. His Honour then said:

It seems to me that the proper interpretation of self defence in those circumstances is that, if the defendant thinks that she is being stopped from leaving the vehicle, then some action by her to get out of that vehicle would be justified".

[14] The appellant submitted that it was never asserted by the respondent that she assaulted the paramedic in order to prevent or terminate the unlawful deprivation of her liberty. There was simply no evidence that the paramedic, or indeed anyone, prevented the respondent from leaving the ambulance nor that she believed it was necessary to assault the paramedic in order to facilitate her escape. There was nothing to suggest that she thought she was being prevented from leaving the vehicle or that her action in assaulting the paramedic was in any way related to her desire to leave the vehicle.

[15] It was submitted on behalf of the respondent that the answers provided by her in her record of interview raised the possibility that she assaulted the paramedic to prevent the unlawful deprivation of liberty. However reference to that material does not support the submission.

[16] In relation to the second limb of section 29 the appellant submitted that, having found that the respondent had punched the paramedic in the face the magistrate did not go on to consider whether her conduct in so doing was a

reasonable response to the circumstances as she reasonably perceived them. The evidence before his Honour was that the respondent was voluntarily in the ambulance having requested assistance in relation to her self-inflicted injury. She requested to be taken to hospital. She then became agitated possibly because her husband could not come with her in the rear of the ambulance. She did not, so far as the evidence reveals, express by words or action a desire to get out of the ambulance prior to punching the paramedic. She did not try to get out of the ambulance without using force. She punched the paramedic in the face and then left the ambulance. There is nothing in the evidence to suggest that she was in any way restrained or that there was any basis for a belief that she would not be permitted to leave the ambulance if she so desired.

[17] In addressing this issue the magistrate said:

Hence the Crown must first convince me beyond reasonable doubt that the defendant did not believe her conduct was necessary to terminate an unlawful deprivation of liberty and it must also prove to me that was not a reasonable response in the circumstances as she reasonably perceived them to be.

[18] On behalf of the respondent it was submitted that the respondent was in circumstances which required her to proceed quickly. The ambulance was moving and she was being taken to a place she did not wish to go. She was in a confined space and she called out something about "her husband". However, with respect, that evidence does not address the issue of whether the respondent believed her conduct was necessary to prevent or terminate

what she believed to be an unlawful deprivation of her personal liberty. No evidence was identified that could give rise to a conclusion that the respondent believed that she may be deprived of her liberty or that she believed her conduct was necessary to prevent or terminate an unlawful deprivation of her liberty. This issue was not addressed by his Honour.

[19] Further his Honour did not address the issue of whether or not punching the paramedic was a reasonable response in the circumstances as she reasonably perceived them. The punching of the paramedic may or may not have had anything to do with her desire to leave the vehicle. How punching the paramedic could be related to her desire to leave the vehicle was not discussed. Why she could not leave the vehicle without first punching the paramedic was not explained. If the punch was somehow related to her desire to leave the vehicle the issue of whether that was a "reasonable response" to the situation was not addressed. The test for defensive conduct was not applied to the circumstances of the case.

[20] In all the circumstances, and bearing in mind the fact that this decision was delivered ex tempore in the circumstances I have described, it seems to me the learned magistrate failed to address the relevant questions and failed to provide adequate reasons for the conclusions. Error has been demonstrated. The appeal should be allowed.

[21] It was submitted that I should quash the order and substitute a finding of guilt for the charge. However, in my view, it is appropriate that the matter

be remitted to the Court of Summary Jurisdiction for re- hearing before another magistrate pursuant to the provisions of s 177 of the *Justices Act*.

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