PARTIES:	CLARK, Damien Gerald
	v
	TRENERRY, Robin Laurence
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	ORIGINAL
FILE NO:	JA 12 of 1995
DELIVERED:	Darwin, 17 January 1996
HEARING DATES:	31 August 1995
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Criminal law and procedure - Particular offences - Objectionable words - Arrest - Whether police need to make charge known to person arrested -

Police Administration Act, ss123, 127.
Summary Offences Act, s53(7)(a).

Christie v Leachinsky [1947] 1 All ER 567, considered.

Criminal law and procedure - Appeal - Sentence - Assault police - Approach to sentencing -

M v The Queen (1994) 181 CLR 487, applied.
Kumantjara v Harris (1992) 109 FLR 400, referred to.
Robertson v Flood (1992) 111 FLR 117, referred to.

REPRESENTATION:

Counsel:

Appellant: Ms C Gibson
Respondent: Mr J Adams

Solicitors:

Appellant: NAALAS
Respondent: DPP

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. JA 12 of 1995

BETWEEN:

DAMIEN GERALD CLARK
Appellant

AND:

ROBIN LAURENCE TRENERRY
Complainant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 17 January 1996)

The appellant seeks to have set aside convictions for assaults upon two police officers arising in the course of, and after a series of incidents, which took place at about 4am on the morning of 5 August 1994 in a street adjacent to a nightclub in Darwin. He, and upwards of thirty others, were on the footpath on the street having just departed from the nightclub. Some of them, including the appellant, had obtained something to eat from a takeaway spot opposite the nightclub. The appellant, along with some of the others, but not all, were affected by alcohol. Mr Chan, the proprietor of the takeaway outlet, was not, and he was in a position to observe much of what transpired.

Constables Marinov and Rowe were on patrol in a police motor vehicle in the area, and had driven along the street on two or three occasions to check on the behaviour of those present. Just prior to the events giving rise to the charges, the police officers had stopped in that street and set about separating two women who were fighting and sending them upon their separate ways. There is evidence which his Worship accepted that the presence of the police and their action in respect of the two women excited some interest from others present and some none too complementary language was directed by some towards the police.

In brief, the police asserted that the appellant had used objectionable words, namely: "You fucking white cunts" in relation to them and that one of them, Constable Rowe, had been offended by that. The police purported to arrest the appellant, taking hold of him and moving towards the police car. He partially broke free, punched Constable Marinov in the face and quite a struggle ensued, but he was subdued, placed in the vehicle and driven in custody to the Berrimah Police Complex (as it was then known). He was charged with using objectionable words which caused substantial annoyance to another person (not offended another person) (s53(7)(a) *Summary Offences Act*), and for assaulting Constable Marinov in the execution of his duty (s158 *Police Administration Act*). Because Constable Marinov had suffered some injury in the fracas with the appellant, arrangements were made for him to

be transferred from that police vehicle to another and to be taken to the hospital for attention. Constable Rowe continued to the Berrimah Police Complex, the appellant secured in a cage on the back of the vehicle. On arrival, she alighted from the vehicle and alleges that the appellant then spat upon her from his position in the back of the vehicle. That constituted a further charge of assault upon her in the execution of her duty.

The appellant entered pleas of not guilty to all the charges. The learned Stipendiary Magistrate, constituting the Court of Summary Jurisdiction sitting in Darwin, found that the words alleged by the police had not been used by the appellant, but others, which he regarded as being objectionable, such as "stupid pigs", had been uttered by the appellant by his own admission. Nevertheless he held that the arrest of the appellant was lawful, and notwithstanding that the police had not informed him at the time of arrest of the offence, or the substance of the office, for which he was arrested (s127 *Police Administration Act*). His Worship held that that requirement did not apply in relation to the appellant because at the time of his arrest he ought, by reason of the circumstances in which he was arrested, to have known the substance of the offence for which he was arrested (s127(3)(a)). The appellant's case that police were not acting in the execution of their duty at the time that he admittedly punched Constable Marinov and struggled with him

therefore failed, and he was convicted of that assault. His Worship also expressed himself as satisfied beyond reasonable doubt that the appellant had spat upon Constable Rowe as alleged, and convicted him for that.

The appellant was sentenced to three months imprisonment for the assault upon Constable Marinov and two months imprisonment on the charge of assault upon Constable Rowe, to be served cumulatively.

The grounds of appeal are as follows:

"1. That the Learned Magistrate erred in law in holding that the words said by the defendant, namely "stupid pigs" were objectionable words.

1a. That, the magistrate erred in fact and in law in finding that the complainant was authorized to arrest the appellant without being satisfied that the complainant had a belief, on reasonable grounds that a person had been offended or substantial (sic) annoyed by words spoken by the appellant.

2. That the Learned Magistrate erred in fact and in law in finding that the complainants had reasonable grounds to believe that the defendant was committing an offence, namely Objectional Words.

3. That the Learned Magistrate erred in fact and in law in finding that the defendant had been lawfully arrested.

4. That the Learned magistrate erred in fact and in law in that on the whole of the evidence the conviction of the defendant were unsafe and unsatisfactory.

5. That the Learned Magistrate erred in fact and in law in that on the whole of evidence the conviction of the defendant were unsafe and unsatisfactory.

5a. The Magistrate erred in fact in finding that the appellant was still angry when he got to the police station.

5b. That the Learned Magistrate erred in fact and in law in that he failed to give any or sufficient weight to the presumption of innocence.

6. That the Learned Magistrate erred in imposing a sentence that in all the circumstances was manifestly excessive."

As to the words used by the appellant, his Worship expressed himself to be satisfied that although both Constables saw the defendant yelling something, he was not satisfied as to what it was they said they heard. He found that both police had heard abusive and objectionable language generally emanating from the group in the street, but he was not satisfied that the appellant used the words alleged. He was satisfied that he used the words which he admitted to using. In the course of his reasons on this aspect of the matter, his Worship said that the appellant: "used language which was, on an objective assessment, objectionable language. He'd called the police officers "stupid pigs"". Whether his Worship was correct in that is debatable, but irrelevant. What fell to be considered was whether on those findings the police lawfully arrested the appellant because it was believed on reasonable grounds that he had committed, or was committing, or about to commit, an offence (s123 *Police Administration Act*). His Worship concluded that the police had reasonable grounds for believing that at the time of the arrest the defendant was committing an offence, that is, that he was using objectionable words. I take his Worship to

simply be using that phrase as shorthand to cover the elements of the offence under s53(7)(a) of the *Summary Offences Act* that a person in a public place who by objectionable words offends or causes substantial annoyance to another person is guilty of an offence. His Worship found that although the appellant had not used the words alleged against him, it was distinctly possible that the words: "fucking white cunts" or "fucking pig cunts" or words involving that compilation of adjectives and other words were used or uttered by somebody in the crowd. The evidence of police was that they saw the appellant yelling out in their direction and that they had heard words such as were alleged used, and that he had said those words. Constable Rowe gave evidence that she was offended by the words which it was alleged were used, and there was no dispute that the place where the incident occurred was a public place. Neither police were cross-examined as to their belief at the time of the arrest. That his Worship was not satisfied beyond reasonable doubt that the appellant had used the words alleged does not deny that at the time of the arrest the police believed on reasonable grounds that the appellant had committed an offence.

As to the grounds of appeal set out in 1a, 2 and 3, for reasons already given, it is not to the point that it was found that the appellant used words other than those alleged, whether those words were objectionable or not. Constable Rowe, whom his Worship found generally to be a credible

witness, swore that she was offended by what she heard, and it having been found that she had a reasonable belief that it was the appellant who uttered those words, the arrest, even though based upon a mistake as to the words used by the appellant, was not thereby rendered unlawful. (There was no evidence at trial to substantiate the charge that the words caused substantial annoyance to anyone. Again, that does not alter the position, as it was at the time of the arrest).

Although not appearing expressly from the amended grounds of appeal, it was also argued, without objection, that the arrest was unlawful because the police failed to abide by the requirements of s127(1) of the *Police Administration Act* and advise the appellant at the time of the arrest or as soon as practicable thereafter of the offence for which he was arrested. Notwithstanding the evidence of Constable Rowe to the effect he had been told that at the time she took hold of him by quite express words, and that of Constable Marinov who said that he had informed the appellant of the reason for his arrest in response to questions asked by the appellant immediately afterwards, his Worship found, taking into account the whole of the evidence on this issue, including the evidence of the two defence witnesses to whom his Worship attached the most credibility, that he could not be satisfied beyond reasonable doubt that the police had complied with those provisions. It was necessary that his Worship apply that standard of proof since the charge was that the appellant

had assaulted Constable Marinov in the execution of his duty, and he could not have been executing his duty if he had not lawfully taken part in the arrest and detention of the appellant. His Worship went on to consider whether that deficiency in proof was remedied by the provisions of s127(3). He made particular reference to the word "substance" as it appears in the phrase: "substance of the offence for which he is arrested". His Worship proceeded as follows:

> "In my view, the defendant knew that he had yelled out language to the police which, on any view, was either abusive or objectionable or both. That is confining it, at this stage, to the language he conceded that he yelled. He knew when they approached him that he had yelled that. The evidence makes it clear that they approached him immediately after and I accept that they approached him immediately after the yelling of the words and that they went straight to him and even though I can't be satisfied that he used the precise definitive expression that they attribute to him, that doesn't of course erode the evidence they give that they went straight to him after whatever words he uttered were, in fact, uttered and on the evidence they did. I am satisfied that when they approached him and came up to him and put hands on him he knew the substance of the offence for which he was being arrested even if he did not utter the precise words which they ascribe and ascribed to him. And even if he did not know then, by reference to subsection (3), he ought to have known by reason of the circumstances in which he was being arrested. He ought to have known the substance of the offence for which he was being arrested, the substance of the offence being in respect of the word uttered. The framing of the subsection clearly calls for the application of an objective test because it is couched by reference to the circumstances in which the person was arrested and I am satisfied here that, given what he had yelled, the direction in which he had yelled it - on his own account he yelled it to the police - the distance away from him at which they were, the fact that they then directly and immediately approached him and endeavoured to

> effect an arrest, I am satisfied that by reason of the combination of circumstances he must have known the substance of the offence. In other words the substance and the reason for their arrest of him at that point in time."

His Worship was not in error in proceeding that way. There was ample evidence to support the findings of primary fact as to the circumstances in which the appellant was arrested and his knowledge of the circumstances. The subsection does not require that the appellant should have known the precise offence for which he was arrested, and in all the circumstances as found, his Worship was not wrong in his findings and conclusions.

Section 127 of the *Police Administration Act* reflects the common law to be found in *Christie and Another v Leachinsky* [1947] 1 All ER 567, especially at pp572 and 573. Had the police accurately heard what he had said, then, as already indicated, it might be arguable as to whether or not the words "stupid pigs" or the like, uttered in the circumstances then prevailing, could constitute an element of the offence. The appellant did not know the police reckoned that they had heard him utter the words alleged in the complaint, but there is no obligation upon the police to inform him of the particulars at the time of the arrest. Subsection (2) of s127 permits the police to inform the person of the substance of the offence for which he is arrested as a minimum, and it is not necessary for them to do so in language

of a precise or technical nature. Again, subs(3) only speaks of the person being in a position where he ought to know the substance of the offence. The appellant gave evidence that when arrested he enquired of the police: "What did I do?" but that he heard no answer. He protested that he did not know what the police were "getting me for and that", and that is what led him to hit out at Constable Marinov. Even if that evidence was accepted, and it is not clear whether it was or not, the fact that a person arrested may enquire as to the reason for the arrest does not deny that he or she ought to have known the substance of the offence.

As to the appeal in relation to the spitting charge, his Worship erred in a finding of fact which he regarded as being important in coming to the view which he did. His Worship said:

> "The circumstances within which this charge be analysed, in my view, are that on his own evidence by the time that the police van got to the police station the defendant was very angry."

There was evidence that when he was first in the back of the police van the appellant had been angry and that he had directed abuse at, and made threats to Constable Marinov. His Worship put that down to the fact that he was affected by liquor, that he believed he had been given an unfair beating by Constable Marinov by his baton during the

fracas, and because he was in custody and did not like it. His Worship concluded: "I infer that he was very angry and that anger subsisted for the duration of the passage to the police station". His Worship did not deal with the evidence of the appellant in cross-examination denying that when he got to the police station he was: "still pretty angry". He said:

> "... by then, I'd calmed down and that. Like I was normal by the time I got back there ... I was just sitting there just waiting for everything to happen, get taken to the charge room".

It was put to him that he was still very angry and that he spat at Constable Rowe and he answered: "No, I never spat at her at all".

The oversight in respect of that evidence was compounded during the course of his Worship's reasoning in that having found that Constable Rowe was a credible witness he said that the particularity she gave in relation to the spitting gave it credibility. His Worship said that Constable Rowe was no way discredited as to what had occurred, and drew upon the particularity of her evidence in support of that finding:

> "There is sufficient particularity, in my assessment, about her evidence to give it credibility and there is sufficient, in my view, motivation for the defendant to, at that point in time, have been so angry with both police officers

> that it becomes more probable than not that the account she gives is a true one, but I am not assessing it on the balance of probabilities. I am assessing it on the standard beyond reasonable doubt".

Apart from his overlooking the evidence given by the appellant that he was not angry when they got to the police station, his Worship also paid no regard to the uncontroverted evidence of the appellant that he knew nothing of the charge relating to the spitting until he was informed about it the following morning.

> "... I only knew that when I was on my charge sheet when they got me out of the cell and that you know it was like after - like they put you in the cell and that. When I come out I was looking up on the board and that and I was wondering why I had two assault charges and that. And they told me, 'You supposed to have done this' and that. I just couldn't believe it."

He swore that he then protested that he had not done it. He was thus not questioned by any police about the incident, and there is no evidence that Constable Rowe remonstrated with him or in any way took up with him the alleged spitting upon her person. His Worship did not pay sufficient regard to the whole of the evidence in relation to the spitting charge.

Having reviewed the evidence, and taking into account the lack of evidence in respect of some matters where

one would expect to find it, I have doubt as to the guilt of the appellant in respect of that charge. In those circumstances his Worship's advantage in seeing and hearing the evidence does not resolve the doubt which arises in my mind and I am thus unable to conclude that no miscarriage of justice occurred. There is the significant possibility that the appellant was wrongly convicted in respect of that charge (*M v The Queen* (1994) 181 CLR 487). The conviction and sentence thereon is set aside.

I now turn to consider the sentence of three months imprisonment in respect of the assault upon Constable Marinov. His Worship reminded himself that conviction upon such a charge carries a maximum of six months imprisonment. He held that the accused had shown no remorse or general sorrow for what had occurred. He noted that that kind of offence was prevalent in the environment which prevailed at the time of the commission of the offence. His Worship said that police who go into that environment to do a job have no choice but to go there, they must go when called or when there is any type of incident. There is an atmosphere, on some occasions, of extreme violence on the streets just outside a nightclub at or about the time of closing, and police must try and do their job when there is on some occasions "a nasty mob element of many people who are heavily intoxicated". In such a situation police could well be anxious and have a legitimate and understandable fear and expectation of violence being

inflicted either on other people or on themselves. His Worship came to those views based not only upon newspaper reports, but as well from his experience of sitting and hearing a number of cases dealing with incidents in that particular area of Darwin. His Worship acknowledged that the group of five or six people of which the appellant formed part was not in the particular category, meaning, I think, a nasty mob, but said that the appellant had distinguished himself by calling out to the police in the way he did, which was an objectionable expression to police officers doing their job and confirmed his view that it was a legitimate reaction by the police to seek to place the appellant under arrest. His Worship said that even if the appellant believed the arrest was unfair, he had no right to react in the way he did, which his Worship described as a "gross over reaction", in no way constituting a reasonable level of resistance to an arrest that the appellant may have considered to be unfair or even unlawful. Reference was made to photographs of the injuries to Constable Marinov showing damage to his lower lip and chin and he noted the assault continued by the appellant "flailing at him with your right arm as you held onto his shirt with your left". His Worship took account of the fact that the appellant had been drinking and was clearly affected by liquor, the effect being to give release to what appeared to his Worship to be an angry disposition directed towards police, a disposition:

> "... which seems to suggest that when you are disinhibited by alcohol and there is the slightest incident which may trigger you off you really lose your temper quickly and badly. In other words there is a severe display of bad tempered, dangerous violent, reactive behaviour and that's what occurred this night."

His Worship accepted that one reason why the appellant reacted as he did was a fear of going into the police van and back to prison, this incident having occurred about three weeks after he had been released from custody and being his first night out with friends since that release.

His Worship spoke of the appellant's continuing anger after being in the fracas with Constable Marinov, being beaten with the baton and placed in the back of the van, but in the context of the alleged assault upon Constable Rowe at the police centre. He noted that he had suffered a number of blows from the baton, not less than ten or twelve, on the evidence which he had accepted (as opposed to the three or four deposed to by Constable Marinov), and that he had suffered some injury though not serious. As a consequence his Worship took that into account as some form of immediate punishment, although not administered for the purposes of punishment. Notice was taken of the accused's convictions only during the period of approximately twelve months prior to the date of sentencing on this occasion. In February 1994 the accused was convicted on three separate counts of assault police, disorderly behaviour in a police station and of

hindering police. On that occasion he was sentenced to perform community service and fined. A few days later, he was convicted of causing a substantial annoyance for which he was fined, but in May 1994 he was back before the Court and convicted and sentenced to five months imprisonment on each of two charges for assault and aggravated assault and fined for disorderly behaviour. It would appear that he had not performed as required under the Community Service Order and those Orders were reviewed and he was re-sentenced to 22 days imprisonment in respect of that. Doing the best I can on the bare details available on the record presented to his Worship, it would appear that the effective sentence on that occasion was for imprisonment for a period of five months and twenty two days. His Worship said:

> "... your recent record in relation to assaults is disastrous, all of this occurring within the space of some seven or eight months .... you were involved in three very serious matters involving assault."

Included in that remark were the matters with which he was then concerned. He said that the past sentence of imprisonment upon the appellant had achieved absolutely nothing in terms of deterring him from doing the same thing again, and that that caused great concern, but whether a sentence of imprisonment would achieve much in the way of personal deterrence or change in behaviour on that occasion simply remained to be seen. His Worship then paid regard to

the issue of general deterrence, and said he had to not only try and make the appellant change his behaviour, but impose a sentence which sends a message to other people that if they engage in conduct like that engaged in by the appellant, there would be a sentence which reflects the seriousness of that conduct and the community's concern about it which, as he had previously said, was prevalent "in other words, its happening commonly and frequently". He proceeded to reject a submission that the accused be sentenced to a period of home detention on the basis that that would be insufficient to meet the seriousness of the offence, particularly having regard to his prior convictions. He said that the only fact which seemed to weigh in the appellant's favour on sentencing was the price he paid for his conduct on the night, upon being hit so many times with the baton. He then imposed the sentence, equal to half the maximum.

Although his Worship did not expressly refer to it, he had been informed by counsel for the appellant, that he was then aged 21 and resided at home with his mother in Darwin. He had completed year 11 at secondary school, and since leaving had had some casual work but had not held a full time job. He wanted to undertake further study, but he had not done anything about that in view of the pending charges. As a result of bail conditions imposed in relation to these matters, he had been required to report to the police three times a week and remain at home between the hours of 10pm and

7am and not be on licensed premises, and thus had had significant restrictions placed on his liberty extending over a period of six months. His Worship, having made further enquiry as to the nature of the assaults for which the accused was sentenced in May 1994, was informed just prior to proceeding to sentence that they appeared to have been assaults contrary to s188 of the *Criminal Code* under which an unlawful assault carried a maximum term of imprisonment of one year and if, as appears to have been the case that on one count the appellant used an offensive weapon, the maximum penalty is five years imprisonment, or upon summary conviction, to imprisonment to two years.

In passing, I note that the offence of assaulting police in the execution of the officer's duty is now to be found in s189A of the *Criminal Code*. The maximum penalty is five years imprisonment, or upon summary conviction, imprisonment for two years, but if the officer suffers bodily harm the offender is liable to imprisonment for seven years or upon summary conviction, to imprisonment for three years. If the officer suffers grievous harm the offender is liable to imprisonment for 16 years. (That came into operation on 1 December 1994, not long after these events).

The prior convictions for assault, especially those for assaulting police in the execution of their duty, indicate that the appellant is more morally culpable for what he did on

that night than someone without any prior history of such offending. The fact that he was influenced by alcohol, and that he was released from prison for sentences imposed after crimes of violence only a short time prior to committing these offences, point strongly for the need for personal deterrence. He is not to be treated as a youthful offender, nor is there anything put that would indicate that the special considerations giving rise to leniency towards Aboriginal offenders who are disadvantaged because of the membership of a deprived section of the community apply to him. Given that the principle role of sentencing is the protection of the community, the Courts would be lacking in their responsibility in that regard if they failed to do as much as is in their legitimate power to protect the police, who have a more direct and vulnerable role in achieving that same objective. That protection can be given, in part, by consistently imposing condign punishment upon those who assault police in the execution of their duty. The Court of Summary Jurisdiction and this Court have indicated that assaulting a police officer in those circumstances invites a gaol sentence and the legislature has since these events also recognised that need as evidenced by the amendments to which reference has been made. It is to be expected, in the light of those amendments, that penalties imposed by way of prison sentences upon conviction for offences such as these will increase substantially, taking into account the much higher maximum penalties. In this case, the appellant would have stood to

have been sentenced up to a maximum penalty of seven years. I bear in mind, however, that the maximum penalty available in this case was six months imprisonment.

It is a circumstance of aggravation that this assault took place in a situation where the police were particularly vulnerable, bearing in mind the numbers of people present, many of whom were behaving in an outrageous manner likely to inflame others. There is thus a need for general deterrence. The major assault perpetrated upon Constable Marinov was not of a minor kind. It continued to a lesser degree whilst the officer endeavoured to restrain the appeallant.

As to observations by Judges of this Court in relation to assaults upon police, see for example, Kearney J., *Kumantjara v Harris* (1992) 109 FLR 400, and Mildren J., *Robertson v Flood* (1992) 111 FLR 177.

No error has been demonstrated in relation to his Worship's approach to the sentencing of the appellant in relation to the assault upon Constable Marinov, and the sentence of three months imprisonment was within the bounds of a properly exercised judicial discretion. The appeal against sentence is dismissed.