

*Ashley v Marinov* [2007] NTCA 01

PARTIES: ASHLEY, ROY

v

MARINOV, IVAN

TITLE OF COURT: COURT OF APPEAL OF THE  
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME  
COURT EXERCISING TERRITORY  
JURISDICTION

FILE NO: AP 10 of 2006 (20526378)

DELIVERED: 4 May 2007

HEARING DATES: 20 April 2007

JUDGMENT OF: MARTIN (BR) CJ, ANGEL &  
MILDREN JJ

APPEAL FROM: Supreme Court of the Northern Territory  
*Ashley v Marinov* [2006] NTSC 62

**CATCHWORDS:**

CRIMINAL LAW – similar offences – Criminal Code s 18 – whether charge of aggravated assault and an offence against a domestic violence order arising from the same circumstances are similar offences – double jeopardy – appeal allowed

**Statutes:**

*Domestic Violence Act*, s 10

*Criminal Code*, s 17, s 18, s 34(1), s 188(2)

**Citations:**

***Applied:***

*R v Hofschuster* (1994) 4 NTLR 179

***Referred to:***

*Haywood v Dodd* (Thomas J, unreported 24 October 1997)

*R v Carroll* (2002) 213 CLR 635

**REPRESENTATION:**

*Counsel:*

|             |                          |
|-------------|--------------------------|
| Appellant:  | D Ross QC with C McGorey |
| Respondent: | A Elliott                |

*Solicitors:*

|             |   |
|-------------|---|
| Appellant:  | North Australian Aboriginal Justice Agency    |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B        |
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IN THE COURT OF APPEAL  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Ashley v Marinov* [2007] NTCA 01  
No. AP 10 of 2006 (20526378)

BETWEEN:

**ROY ASHLEY**  
Appellant

AND:

**IVAN MARINOV**  
Respondent

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

REASONS FOR JUDGMENT

(Delivered 4 May 2007)

**The Court:**

- [1] The appellant in this matter was charged in the Court of Summary Jurisdiction with two charges, the first being that he failed to comply with the terms of a domestic violence order contrary to s 10 of the Domestic Violence Act and the second being that he unlawfully assaulted Monita Wilfred with circumstances of aggravation contrary to s 188(2) of the Criminal Code.
- [2] The facts alleged in relation to both counts were the same. The learned Magistrate found that the appellant had struck Ms Wilfred to the head causing a small cut and some bleeding. However, because the defence of

provocation had not been rebutted by the prosecution beyond reasonable doubt, a verdict of acquittal was entered in relation to the assault charge.

- [3] The terms of the domestic violence order relevant to the charge of breaching the order was that the defendant was “restrained and ... must not assault, cause or threaten to cause personal injury to Monita Wilfred”.
- [4] Notwithstanding that the same facts constituting the assault had resulted in an acquittal, the learned Magistrate found that the terms of the domestic violence order had been breached because the appellant had assaulted Monita Wilfred and proceeded to convict the appellant.
- [5] On appeal the learned Judge rejected the appeal. Although argument was addressed to the learned Judge in the court below and to the learned Magistrate on the provisions of s 18 of the Criminal Code neither court considered those provisions. A previous decision of this Court and of the Supreme Court which bear upon that matter were not referred to by counsel in the courts below.
- [6] Section 18 of the Code provides:

**“18. Defence of previous finding of guilt or acquittal**

Subject to sections 19 and 20, it is a defence to a charge of any offence to show that the accused person has already been found guilty or acquitted of –

- (a) the same offence;

- (b) a similar offence;
- (c) an offence of which he might be found guilty upon the trial of the offence charged; or
- (d) an offence upon the trial of which he could have been found guilty of the offence charged.”

[7] Section 17 defines ‘similar offence’ to mean “an offence in which the conduct therein impugned is substantially the same as or includes the conduct impugned in the offence to which it is said to be similar”.

[8] Section 19 and s 20 are not relevant in the circumstances of this case.

[9] Counsel for the respondent conceded that the conviction for the breach of the domestic violence order could not in the circumstances of this case be sustained because the appellant had already been acquitted of a similar offence.

[10] After hearing submissions from the parties, the Court allowed the appeal and set aside the finding of guilt in relation to the offence of failing to comply with the domestic violence order and quashed the conviction with reasons to be provided at a later date. These are those reasons.

[11] In *R v Hofschuster* (1994) 4 NTLR 179 Gray AJ (with whom Kearney and Angel JJ agreed) said at 183:

“In my view, the construction of s 18 and the s 17 definition do not give rise to any ambiguity and I feel no impulse to turn to dictionary meanings of the words used. Section 18 and the definition of “similar offence” appear to me to substantially reproduce the

common law doctrine as laid down in the judgment of Lord Morris of Borth-y-Gest in *Connelly v DPP* [1964] AC 1254 at pp 1305-1306. The fundamental principle is that a person is not to be prosecuted twice for the same criminal conduct.”

[12] At the same page his Honour said:

“The “conduct therein impugned” can only mean the conduct which gives rise to the criminal liability. In this case, that means the acts of the accused and the accompanying states of mind which constitute the elements of the offence.”

[13] The way the matter proceeded in the Court of Summary Jurisdiction, the breach of the domestic violence order that the learned Magistrate found proved was that the appellant assaulted Monita Wilfred. The learned Magistrate found that this allegation had been proven because provocation was not a defence to a regulatory offence and a breach of the domestic violence order is a regulatory offence whereas the offence of assault with the circumstances of aggravation alleged in this case is a crime. Consequently, s 34(1) of the Criminal Code which provided that the defence of provocation was open in relation to the crime of assault did not apply to the regulatory offence of breaching the domestic violence order. The learned Magistrate did not base his decision on whether or not the appellant had “caused personal injury to Monita Wilfred”.

[14] In our opinion, the offence of breaching the domestic violence order was in the circumstances of this case a similar offence to the offence of aggravated assault because the conduct impugned is substantially the same or includes the conduct impugned in the offence of aggravated assault.

- [15] The same conclusion was reached in the case of *Haywood v Dodd* (Thomas J, unreported 24 October 1997). On that occasion, the Court of Summary Jurisdiction reserved a question of law for the Court's consideration as to whether a conviction for aggravated assault raises a defence pursuant to s 18 of the Criminal Code in respect of a subsequent prosecution for failure to comply with a domestic violence order where the same conduct founded both charges and the domestic violence order restrained the respondent from "causing or threatening to cause personal injury to the applicant". In that case the respondent was convicted of the charge of aggravated assault in the Supreme Court but the learned Magistrate dismissed the complaint relating to the breach of the domestic violence order holding that s 18 applied to the circumstances of the case. Thomas J held that because the conduct alleging a breach of the domestic violence order was the same conduct as constituted the aggravated assault the provisions of s 18 applied.
- [16] The only real point of distinction between the present case and *Haywood v Dodd* is that in that case the defendant was convicted of the charge of aggravated assault whereas in the present case the appellant was acquitted of that charge. The distinction is of no legal significance because the defence of s 18 is available to accused persons who have been found guilty or acquitted of a similar offence.
- [17] The conclusion we have reached in this case does not necessarily mean that a person dealt with for an assault cannot be convicted also of an offence of

breaching the terms of a domestic violence order. Much will depend on the precise terms of the order said to be breached, the facts relied upon to constitute the breach and whether or not, even if a defence under s 18 is not open, the court should nevertheless stay the prosecution as an abuse of process: see for example *R v Carroll* (2002) 213 CLR 635.

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