Lewin v Bradley and Raymond v Bradley [2011] NTSC 28

PARTIES:	Lewin, Jonas Eveness Ralph
	v
	Bradley, Sandi-Lee
AND:	Raymond, Gilbert
	v
	Bradley, Sandi-Lee
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 58 of 2010 (21022680) and JA 59 of 2010 (21022795)
DELIVERED:	1 April 2011
HEARING DATES:	16 March 2011
JUDGMENT OF:	KELLY J
APPEAL FROM:	T Fong Lim SM

CATCHWORDS:

Criminal Code, s 8, 12

REPRESENTATION:

Counsel:

Appellant:	P Bellach
Respondent:	M Nathan

Solicitors:

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

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lewin v Bradley and Raymond v Bradley [2011] NTSC 28
No. JA 58 of 2010 (21022680) and
JA 59 of 2010 (21022795)
2011

BETWEEN:

JONAS EVENESS RALPH LEWIN
Appellant

AND:

SANDI-LEE BRADLEY
Respondent

AND BETWEEN:

GILBERT RAYMOND
Appellant

AND:

SANDI-LEE BRADLEY
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 1 April 2011)

[1] Early in the morning on 5 June 2010 six men including the appellants Jonas Lewin and Gilbert Raymond assaulted Mr M at Discovery Nightclub in Darwin. During that assault, which was captured on CCTV, Mr M was punched, kicked and stomped on. He suffered multiple facial bruising and swelling, tenderness around the abdomen and ribs, and a haematoma over the right eye. He required two stitches under his right eye and was still

suffering after affects of the eye injury at the time of the trial of the two appellants for assault some five months later.

[2] The appellants were charged with aggravated assault on Mr M, the circumstances of aggravation being first, that Mr M was unable to defend himself, and secondly, that he suffered harm.

[3] At the trial it was agreed that Mr M had suffered harm as a result of the attack upon him. However, the Crown was unable to attribute the harm to any particular kick or blow inflicted upon him by any particular individual. For that reason, at the trial, the Crown based its case in relation to causing harm on s 8 of the *Criminal Code* ("the Code") alleging that each of the appellants had formed a common intention with the other attackers of Mr M to assault Mr M and were therefore each liable for the offences committed by each of the others, including the causing of harm.

[4] During submissions the learned Magistrate raised with both counsel whether or not s 12 of the Code was applicable – that is to say whether or not each of the appellants could be found guilty of aiding, counselling or procuring the assaults on Mr M, causing harm, apart from any common intention. Counsel for each of the appellants objected to that course on the ground that the Crown case had always been based on common intention, under s 8.

[5] The learned Magistrate found the appellants guilty of assaulting Mr M and of both circumstances of aggravation, namely that Mr M was unable to defend himself and that he suffered harm.

[6] The appellants accept that it was open to the learned Magistrate to find them guilty of assault and of the circumstance of aggravation that the victim was unable to defend himself. They have brought this appeal against the finding of guilt on the circumstance of aggravation that the victim suffered harm.

Grounds of Appeal

[7] In her reasons for decision in relation to the finding of guilt on the question of harm, the learned Magistrate did not rely on s 8 of the *Criminal Code* (common intention) but rather on s 12 (aiding, counselling or procuring).

[8] The learned Magistrate held that s 8 of the *Criminal Code* could not apply in the circumstances. She held that for s 8 to apply it was not only necessary for two or more persons to form a common intention to prosecute an unlawful purpose, it was also necessary for another offence (i.e. an offence different from that comprised by the unlawful purpose) to be committed while prosecuting that unlawful purpose. In this case she found that there had been a common intention to commit an assault on Mr M but that s 8 could not apply as none of the attackers had committed <u>another</u> offence besides the assault.

[9] Ground 3 of the amended notice of appeal claims that the learned Magistrate erred in this interpretation of s 8.

[10] The respondent concedes that this ground of appeal must succeed. This interpretation of s 8 of the *Criminal Code* is plainly wrong. In fact a case like the instant one, in which a group of people form a common intention to

assault a person, and the prosecution cannot prove which of them caused the harm ultimately suffered by the victim, is a classic case for the application of s 8. In those circumstances s 8 provides that each of the persons who formed the common intention to commit the assault, is presumed to have aided or procured whichever of one or more of the others caused the harm to commit the offence causing harm, and so is guilty of causing that harm.[1]

[11] Ground 3 of the amended notice of appeal is therefore made out. However, it remains to determine what consequence, if any, that has for the disposition of the appeal.

[12] Ground 1 of the amended notice of appeal claims that the learned Magistrate erred by introducing s 12 of the *Criminal Code* as a basis for the complicit liability of the appellants, when the prosecution only ever relied upon common purpose under s 8 as the basis of complicity. It is complained that this created unfairness to the accused and resulted in a miscarriage of justice.

[13] I am of the view that the error complained of in Ground 1 has also been established. It appears from the transcript of proceedings before the learned Magistrate that the issue of s 12 was raised by her Honour during the final address by the prosecutor, after all the evidence had been heard and the witnesses cross examined. Counsel for both appellants protested at the time that it was not open to the learned Magistrate to rely on s 12, and although

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[1] There was no suggestion in this case that an assault causing harm was not a foreseeable consequence of the common intention to commit an assault; it was not an issue at the trial.

both made some fairly cursory submissions directed at liability under s 12, introducing it at that late stage did, in my opinion, result in unfairness to the appellants.

[14] The appellants were only on notice of a case being made against them based on common purpose. Had they been aware that they had to meet a case that they were liable for the harm done to the victim by reason of aiding, counselling or procuring another to assault him so as to cause that harm, the appellants may well have conducted their defences differently.

[15] Counsel for the appellants has pointed out that the appellant Lewin gave evidence at the trial. Had he been aware that a case was to be made against him pursuant to s 12 he may have led evidence in relation to his state of mind relevant to the s 12 issues. Alternatively, his counsel submitted, he may have pleaded guilty, which would have had implications for sentencing.

[16] The appellant Raymond did not give evidence. Had he been aware that a case was to be made against him pursuant to s 12 he may have given evidence on those issues.

[17] Counsel for the appellants also submitted that defence counsel at the trial would probably have cross-examined the prosecution witnesses differently had they been on notice of a potential case pursuant to s 12. For example, the security guard and possibly the victim would have been cross-examined on issues relevant to s 12.

[18] I accept those submissions. It seems to me that in those circumstances, raising s 12 at the last minute as the learned Magistrate did, created unfairness to the accused. As with Ground 3, it remains to be determined what effect, if any, this should have on the ultimate disposition of the appeal.

[19] Ground 2 of the amended notice of appeal is that the evidence did not support a finding of guilt on the circumstance of aggravation that the victim suffered harm, on the basis of liability under s 12 of the Code. In light of my finding that Ground 1 must be made out, it is not necessary for me to consider Ground 2. Regardless of the state of the evidence at the trial, it was not open to the learned Magistrate to find the appellants guilty on the basis of liability under s 12 of the Code.

Disposition of the appeal

[20] In her reasons for decision the learned Magistrate made the following findings:

> "25. If there was any agreement Raymond, Davern-Raymond, Lewin and Daly Raymond [sic] that agreement can only be found to have occurred at the time of the assaults and implied from the circumstances, that is they were all of the same mind to assault M and that they were all going to assault him at the same time. The very strong implication from the circumstances and the actions of each of those individuals as shown in the footage is that each offender was intending to assault M and that each of them knew of the other's [sic] assault because of their proximity to one another. There was, by implication, a common intention to assault M. There can be no other reasonable explanation for the behaviour of the defendants.

> 26. I am satisfied beyond a reasonable doubt that there had been an implicit agreement to assault M however as there is no ancillary offence committed beside the actual assault therefore section 8 has no application in these circumstances."

[21] If these two paragraphs amount to a finding of fact by the learned Magistrate that there was an implicit agreement to assault Mr M amongst all six people shown in the CCTV footage, then, on the correct interpretation of s 8, the learned Magistrate ought to have found the appellants guilty of the circumstance of aggravation of causing harm on the basis alleged by the prosecution, namely common intention, and the errors of law the subject of Grounds 1 and 3 did not led to a miscarriage of justice. In that case the appeal against conviction must be dismissed.

[22] If, on the other hand, the finding of fact by the learned Magistrate in paragraphs 25 and 26 was that there was an implicit agreement to assault Mr M by Raymond, Davern-Raymond, Lewin and Daly Raymond only, and not by those persons and the other two people shown in the CCTV footage assaulting Mr M, then that would not be sufficient to found a guilty verdict of the circumstance of aggravation of causing harm, because the prosecution is unable to say whether it was one of those named individuals who caused that harm, or whether it might have been one of the others shown in the CCTV footage.

[23] Counsel for the appellants submitted that the finding of an implicit agreement related only to the individuals named in the first sentence of

paragraph 25 - Raymond, Davern-Raymond, Lewin and Daly Raymond. He relied on the phrase "those individuals" in the following sentence:

> "… The very strong implication from the circumstances and the actions of each of those individuals as shown in the footage is that each offender was intending to assault M and that each of them knew of the other's assault because of their proximity to one another". [emphasis added]

[24] He also pointed out that elsewhere in the judgment there are references to the fact that the four named individuals knew each other and were related. Counsel submitted that I should draw the inference that this formed part of her Honour's reasoning process in coming to the conclusion that there had been an implicit agreement to assault Mr M although he could not point to any specific references in the reasons for decision which manifested that reasoning process.

[25] Counsel for the respondent submitted that the finding of an implicit agreement related to all six attackers. He relied on the fact that there are strong indications in paragraph 25 that the basis for her Honour's finding of an implicit agreement to attack Mr M was the material on the CCTV footage. In particular he relied on the following sentences from paragraph 25:

> "… The very strong implication from the circumstances and the actions of each of those individuals as shown in the footage is that each offender was intending to assault Mr M and that each of them knew of the other's assault because of their proximity to one another. There was, by implication, a common intention to assault Mr M. There can be no other reasonable explanation for the behaviour of the defendants." [emphasis added]

[26] He submitted therefore that the finding that there had been an implicit agreement to attack Mr M must relate to all six attackers. If the conclusion was formed as a result of what was shown on the CCTV footage, there can be no logical basis for concluding that the implicit agreement was formed amongst the four named individuals only, rather than all six who appear in that footage.

[27] Although it seems to me that her Honour's finding was probably that there was an implicit agreement amongst all six attackers, it is not clear from her reasons for decision that this is the case. In those circumstances, I am unable to say that her Honour's findings of fact were such that she ought to have found the appellants guilty of the circumstance of aggravation of causing harm on the basis of s 8 of the Code. Nor am I able to say that her Honour's findings of fact did not support such a conclusion.

[28] Accordingly, the only practical course of action open to me is to allow the appeal, set aside the conviction on the second circumstance of aggravation, and the sentence, and refer the matter back to the learned Magistrate.

[29] The learned Magistrate should make a decision as to whether she finds the appellants guilty or not guilty of the circumstance of aggravation of causing harm, on the basis of the evidence and the submissions put before her at the trial, and applying the following principles.

(1) It is not open to her Honour to make a finding based on s 12 of the Code.

(2) If her Honour is satisfied beyond reasonable doubt that there was an implicit agreement to assault Mr M among all six attackers shown on the CCTV footage, then her Honour should find the appellants guilty of the circumstance of aggravation of causing harm.

(3) If her Honour is not satisfied of that beyond reasonable doubt: – ie she is only satisfied that there was an implicit agreement to assault Mr M amongst the individuals named in paragraph 25 of her Reasons for Decision (ie Raymond, Davern-Raymond, Lewin and Daly Raymond), and not among all six attackers - then her Honour should find the appellants not guilty of the circumstance of aggravation of causing harm.

(4) If, on the application of the above principles, the learned Magistrate finds the appellants not guilty of the circumstance of aggravation of causing harm, she should re-sentence the appellants on the basis that they are guilty of the assault and the first circumstance of aggravation, but not guilty of the second circumstance of aggravation.

(5) If, on the application of the above principles, the learned Magistrate finds the appellants guilty of the circumstance of aggravation of causing harm, there is no reason why the original sentence should not be re-imposed.