Zijlstra v Northern Territory of Australia [2011] NTSC 46

PARTIES:	JON JOHAN JAMES ZIJLSTRA v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No 1 of 2009 (20834298)
DELIVERED:	24 JUNE 2011
HEARING DATES:	16 MAY 2011
JUDGMENT OF:	MILDREN J
APPEAL FROM:	MR D J BAMBER SM

CATCHWORDS:

APPEAL AND NEW TRIAL – Appeal from Local Court on question of law – error shown – whether error vitiated decision of Local Court – new argument not raised in Local Court – whether error of law established – whether facts and inferences drawn by Local Court open to review as errors of law – appeal dismissed

Crimes (Victims Assistance) Act, s 4(1), s 5(1), s 17(1), s 17(6)
Criminal Code, s 1, s 26, s 26(1)(c), s 26(3), s 31, s 32, s 181, s 186 , s 187(a), s 188(1)
Prisons (Correctional Services) Act, s 62, s 62(2), s 62(3)

Briginshaw v Briginshaw (1938) 60 CLR 336; *Jones v Dunkel* (1959) 101 CLR 298; *R v LB* (2011) 246 FLR 466; *Roncevich v Repatriation Commission* (2005) 222 CLR 115; *Strong v The Queen* (2005) 79 ALJR 1171*; Wilson v Lowery* (1993) 4 NTLR 79; applied

Lergesner v Carroll [1991] 1 Qd R 206; *R v Raabe* [1985] 1 Qd R 115; followed

Pinkstone v The Queen (2004) 219 CLR 444; *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481; *Water Board v Moustakas* (1988) 180 CLR 491; *White v Ridley* (1978) 140 CLR 342; referred to

REPRESENTATION:

Counsel:

Appellant:	T Anderson
Respondent:	R Jobson

Solicitors:

Appellant:	Povey Stirk
Respondent:	Solicitor for the Northern Territory

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

Zijlstra v Northern Territory of Australia [2011] NTSC 46
No 1 of 2009 (20834298)

BETWEEN:

JON JOHAN JAMES ZIJLSTRA
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 24 June 2011)

[1] This is an appeal from the Local Court which had dismissed an appeal from a decision of a Judicial Registrar who dismissed an application for the issue of assistance certificate under the *Crimes (Victims Assistance) Act*, now repealed.

[2] The circumstances of this case are somewhat unusual. In summary, the appellant was working as a prison officer at the Alice Springs Correctional Centre when he participated in a training exercise on 15 August 2003. The exercise involved a mock siege in a block at the prison during which a prison officer was taken hostage by a group of prison officers playing the

role of prisoners. A large number of other prison officers were tasked to resolve the situation. Most of them were unaware, for most of the time at least, that a training exercise was taking place rather than a real siege.

[3] By the end of the training exercise, the appellant had been punched or struck with a baton to the head a number of times, exposed to CS gas, knocked to the ground twice and had his shoulder dislocated.

[4] In order to establish that the appellant was entitled to an assistance certificate under the Act, the appellant needed to show that he was injured as the result of the commission of an offence by another person.[1]

[5] The word "offence" was defined to mean an offence whether indictable or not committed by one or more persons which results in injury to another person.

[6] The definition of "injury" included bodily harm and mental injury, but did not include damage arising from loss of or damage to property.[2]

[7] The Court of Summary Jurisdiction found that the actions of the officers who caused the injuries to the appellant were authorised by s 62(2) and s 62(3) of the *Prisons (Correctional Services) Act* ("the *Prisons Act*") and that therefore no offence had been committed.

Grounds of Appeal

[8] The amended Notice of Appeal sets out four grounds as follows:

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1 See s 5(1) and the definition of "victim" in s 4(1).
2 See s 4(1).

1. The Learned Magistrate erred has a matter of law, in deciding to dismiss the appeal before the Local Court because s 62 of the *Prisons (Correctional Services) Act* ("the Act") applied to authorise the actions of persons in what would have otherwise amounted to an offence for the purposes of the *Crimes (Victims Assistance) Act* (NT) thereby entitling the appellant to the grant of an Assistance Certificate under that Act.

2. Section 62(2) of the Act does not authorise the use of force against prisoners or anyone else. Section 62(3) limited the use of any reasonable physical force and restraint to a prisoner for the purposes of the Act.

3. The appellant was not a prisoner pursuant to the definition provided by the Act.

4. A number of the officers involved in the commission of the offences against the appellant did not have a mistaken belief the appellant was a prisoner and could not rely on s 32 of the *Criminal Code* to activate any authorisation s 62 of the Act may have provided.

5. Excessive force was used against the appellant, whether the officers involved believed the appellant was a prisoner or not, negativing any authorisation provided by s 62 of the Act. The officers who were aware the appellant was not a prisoner knew it was unnecessary for any force to be used against the appellant to maintain security and good order in the prison.

The Alleged Offences

[9] On the hearing of the appeal, counsel for the appellant submitted that the following offences were committed:

1. The appellant was subjected to CS gas released by SPO Sizeland on the instructions of CPO Carroll. It was alleged that the offence committed was that of unlawfully causing bodily harm contrary to s 186 of the *Criminal Code* or alternatively common assault.

2. The appellant was struck, pushed and then pinned to the ground and had his legs jumped on whilst in the block by PO Neil, PO Ryan and PO White. It was alleged that this amounted to common assault.

3. After having been removed from the block, the appellant was jumped on and taken to the ground by PO White and PO Neil and then wrenched back onto his feet from behind by the arms whilst handcuffed, with sufficient force to dislocate his shoulder. It was submitted that officers White and Neil and Superintendent Williams were guilty of the offence of unlawfully causing grievous harm contrary to s 181 of the *Criminal Code*. Alternatively, it was submitted that the same persons committed the offence of common assault contrary to s 188(1) of the *Criminal Code*.

Procedure in the Local Court

[10] It is necessary to observe that the burden of proof lay upon the appellant in the proceedings below on the balance of probabilities.[3] All of the evidence led by the parties was given by affidavit and, in addition, a medical report was filed by a professor of psychiatry, Professor Whiteford, in relation to a claim that the appellant sustained a post traumatic stress disorder. Section 17(6) of the Act provides that a deponent of an affidavit or a person who made a medical report may be cross-examined but only with the leave of the Court. In this case, none of the deponents were cross-examined, nor was Professor Whiteford. An affidavit was filed by the appellant. A number of statements in the form of statutory declarations by various prison officers

[3] *Crimes (Victims Assistance) Act* s 17(1).

including Chief Prison Officer Carroll and Superintendent Williams were also filed on behalf of the respondent. No statements by Prison Officers White, Neil and Ryan were filed by the respondent.

The Facts

[11] The evidence of the appellant was that on Monday 11 August 2003 he was rostered on duty and asked to attend Mr Carroll's office. He attended at the office. The only persons present were Mr Carroll and himself. He says that Mr Carroll asked him to play the role of a prisoner in a hostage negotiation exercise to be held on Friday 15 August 2003. He was told that there would be other officers role playing, but he was not told who they were. He was told that only one of them would be "slightly gassed as part of the exercise". He says that he asked Carroll who would be gassed and was told that "we could work that out between ourselves". He was told that on the morning of the exercise he would go into H Block where he would be provided with clothing. He was to play the role of a prisoner, take a hostage and after that, negotiations would take place following which the hostage would be released. Once the hostage was released, they were to release the "prisoners" from the building. The appellant understood that his role was to stand inside the block and be a "prisoner". He was not told that the exercise would involve the use of force in that role; nor was he told that he would be restrained or gassed. His understanding was that it was a simulated exercise, the emphasis being on hostage negotiation skills. Nothing was provided to him in writing. This was the only information given to him. He

was not provided with any written instructions. He believed from what Carroll said that in his role as a "prisoner" some degree of resistance would be required.

[12] On the morning of Friday 18 August 2003, he was approached by Carroll sometime during the morning who instructed him to go to H Block at 11:40 am to prepare for the exercise. He did so. When he arrived at H Block, there were four other prison officers present, namely PO Usher, PO Anderson, PO Coulson and PO Donald. They were already dressed as prisoners.

[13] The appellant changed out of his uniform and into the prison issued clothing that had been provided. After a little while, another prison officer named Ozimo arrived and he also changed into prisoner's clothing.

[14] After this occurred, a discussion took place amongst the men as to who was going to volunteer to be gassed. The appellant assumed that CS gas was going to be used, as there was no OC spray in the Alice Springs Correctional Centre at that time. During the course of that conversation, he became aware that the process was that one of the "prisoners" was going to be locked in the laundry inside H Block. That "prisoner" would be gassed when the prison officers attended and gained entry through the rear door. It was at this time that he learnt that the "prisoners" were to obtain the keys from a prison officer when taken as a hostage.

[15] The appellant says that he chose not to volunteer to be gassed. PO Donald volunteered.

[16] The “prisoners” remained in H Block until advised by cell phone that PO Robinson was about to arrive. They saw PO Robinson unlock the main entry door and step inside. He was then “taken hostage” by one of the “prisoners” who placed him in a bear hug.

[17] Once it was explained to Robinson that it was an exercise, he was released and his keys and radio were removed.

[18] The exercise proceeded from there when PO Thompson approached H Block. At this stage, “prisoner” Usher held PO Robinson in a neck lock and held a piece of wood approximately six inches long to Robinson’s right. As PO Thompson was about halfway down the path, Robinson called out to get the superintendent and to get help. PO Thompson yelled into his radio, “Officer down, officer down, assistance required in H Block”.

[19] By this time, the “prisoners” had moved away from the doorway and PO Thompson tried to open the door. Shortly after that, the sirens in the gaol were activated and PO Thompson departed.

[20] After that, the appellant and all of the other “prisoners” went into the dormitory on the right hand side of H Block and were listening to radio transmissions from the radio taken from Robinson. Shortly after that, a telephone in the block rang and was answered by “prisoner” Coulson. He

was heard to say, using an Aboriginal accent, “You go fuck yourself you white screw cunt” and then hung up on the phone.

[21] Later the phone rang again. This time it was answered by “prisoner” Usher who was heard to say, “Keep all officers away, or the hostage cops it”. He then hung up. A number of other phone calls were made and answered abusively by various “prisoners”.

[22] At one stage, the appellant went outside H Block to a cabinet which holds a fire hose. He turned the hose on at the main, but left the valve on the end of the hose closed and returned with the hose back inside H Block.

[23] He later saw Superintendent Williams and Deputy Superintendent Rainbird who walked to the door. Williams asked how things were going and if the “hostage” was all right. He threatened Williams with the hose, but did not in fact turn it on. Thereafter he got a bar of soap from the bathroom and after mixing it with water, soaped the floor to the entrance to the block.

[24] After that, he saw dog handlers with their dogs arriving and three prison officers walking around the outside of H Block in the direction of the rear of the building. He took the fire hose through the hallway, through to the toilet, raised it to the window and turned on the nozzle in an attempt to spray PO Piarani with water.

[25] Whilst he was in the toilet, the riot team arrived. The “prisoner” Coulson released the “hostage” Robinson. When this happened “prisoner” Coulson

was apprehended by a couple of prison officers and led away. Whilst this was happening, “prisoner” Anderson and some other prison officers ran out from H Block with some off cuts of wood and threw them in direction of the riot squad. The riot squad were kitted up with gas masks, helmets, leg pads, shields and batons. Subsequently, the appellant had second thoughts about the soap on the floor and washed it off using the hose. After this occurred, the riot squad started moving towards H Block. The appellant held the hose up and turned it on full blast in the direction of the riot squad as they approached H Block. The members of the riot squad using their polycarb shields in front of them, advanced towards the block and the appellant retreated to the doorway of a dormitory. As he was standing there, he smelt gas. This caused him to have difficulty breathing and his eyes started to water. He tried spraying water on his face until the hose was turned off by someone else. He says at that stage he could not see because of the gas which had affected his eyes, nose and breathing. He could hear a deafening noise with a lot of yelling and screaming and the sounds of shields colliding. Someone grabbed him by his arms forcefully. He was swung around and struck in the back of the head by something, which felt like a clenched fist. He felt three hard, fast punches to the middle or centre of the back of his head. At that stage, he was still focussed on getting oxygen as he was having difficulty breathing. He was then taken to the ground by someone and landed on his stomach, face down.

[26] He felt someone holding him down by applying pressure to the back of his neck. He also felt that his ankles had been held and his felt someone apparently jumping on the back of his lower legs. He was in pain, but could not speak. The next thing the appellant remembers was kneeling on the grass outside of H Block on all fours with mucus coming out of his nose, and his eyes stinging. He felt someone place the palm of a hand against his back and say, “Holy fuck, it’s Zilly”. The appellant went to walk away and someone grabbed his left arm. The appellant said, “Fuck off” pulling his left arm away, believing that the exercise was all over.

[27] The next thing the appellant says occurred was that he was jumped upon and taken to the ground. He did not resist. He heard PO Ryan and PO White say, “Get your hands behind your back”. He complied and when that occurred, he was handcuffed from behind. After that, he was lifted up by someone holding the swivel links of the handcuffs into a horizontal position. He felt pain in his right shoulder.

[28] After he got his breath back, he demanded to be let go. Whoever was holding the handcuffs let go, but he was then grabbed on either side under his biceps and lifted by persons who placed their hands underneath his shoulders and back up in front of his collarbone. He stood to his feet and was marched down to separate confinement. As he was marched, his hands were cuffed behind his back with a prison officer placing a hand on each of his shoulders as he walked with them. He was taken to G Block and instructed to kneel down facing the cell window. He placed his head on the

floor and pushed his legs out so that he was lying flat on his stomach. At this stage, the handcuffs were removed.

[29] PO Ryan and PO White then left the cell, locking him in the cell as they did so. He was left in the cell for about five minutes and then after the cell door was unlocked he made his way back to H Block to change out of the prison issue clothing.

[30] At about 3:00 pm the exercise concluded following which a debriefing was conducted by CPO Carroll and Superintendent Williams. At this time, the appellant's pain in his right arm was increasing. He made no comments during the debriefing and decided not to tell anyone about his injury. After the debriefing he got panadol from the medical cabinet and tried to continue through to the end of his shift. He told PO Sizeland that something was wrong with his arm. Arrangements were then made to transport him to the hospital. Eventually, in February 2004 he was flown to Adelaide for surgery to correct the dislocation of his shoulder.

Statement of CPO Carroll

[31] CPO Carroll in his statutory declaration confirmed that he was in charge of the planning and implementation of the exercise. Initially he approached PO Usher whom he states was "involved in the planning process some two weeks prior to the exercise being conducted when we discussed options in relation to scenarios".

[32] He confirms also that he then approached the other prison officers who were to be asked to play the role of prisoners and spoke to them individually during the week before the exercise was to be conducted. According to his statement, he explained to each officer what was proposed and asked whether they would participate. He said that he provided each of them with "an overview" of the exercise, but it is reasonably clear that the details of the exercise were not fully explained at that stage. He stated that he asked for two of the officers to volunteer to be directly exposed to CS gas and OC spray and that the two officers who volunteered were Donald and Coulson. So far as CS gas exposure was concerned, Donald was to be exposed to the gas in the laundry of H Block. "He was to knock three times and then he would (be) extracted from the laundry by the safety officer and provided after care and the decontamination process would start."

[33] The OC spray was to be administered outside the confines of H Block at the front of the block.

[34] He stated that he "briefly went over that the exercise would conclude when they were restrained and that then they would be removed from the building". He also stated that he made it clear that each of the officers would be briefed prior to the exercise commencing. There was no discussion involving injuries during the initial briefing because "if the officers followed the requirements of the briefing there would have been no injuries. An appreciation had been conducted and the process had implemented safeguards through adherence to the briefing document".

[35] On the day of the exercise, off cut woods were provided to be used to throw at the riot formation. When Usher arrived, he was provided with a document entitled “Prisoner Briefing” which provided an operational briefing for the officers participating in the exercise. The briefing was to be conducted by Usher outlining the requirements. Usher was responsible for briefing the other officers and Carroll would brief the responding officers once the exercise commenced.

[36] The briefing document provides:

> Throughout the training you are to exercise extreme caution in your actions and be aware of your peers at all times. You are to also consider your own safety and wellbeing during any application (of) force. Continuous struggling or your own retaliation toward an officer will undermine the effectiveness of the training itself.

[37] So far as gas is concerned, the briefing provides that:

> Once the group is near the fence, the prisoner and hostage will move towards the group. He will stop about five to 10 metres from the group formation and then let the hostage go. He will be asked to surrender himself. He will act aggressively and pull out a weapon of sorts. This prisoner will then be subjected to OC spray. The remaining prisoners will start to throw objects at the group from the front of the block. The dog squad with then conduct a run through and charge at the remaining prisoners. Once the dogs get close, the prisoners will then retreat into the block and barricade the door. When you re-enter the block one prisoner is to locate themselves (sic) in the laundry, two in the left side and two in the right of the block. The prisoner in the laundry will be subjected to CS gas. When the gas takes effect, he is to RAP HARD on the door. The officers will open and remove him ASAP. When the assault team enter the Block, they will divide into two groups and assault each side area. Once they enter, you may throw several objects at the group. DO not assault them and before they get close to you drop to the floor hands on heads and face down. You will be moved to separate locations and the exercise will finish.

[38] The staff-briefing document which outlined the course of the exercise to be taken by the responding staff was provided to the responding staff by Carroll after the exercise had started. The instructions required that Group C was to ensure the rear of the block was not used as an escape route. Group C were instructed to open the rear door and administer CS gas and to resecure once that had been done. Both Groups A and B would be supported by gas operators, but would only administer CS gas "if the prisoner presents a weapon. The prisoners are to be handcuffed prior to being removed from the block and although as expediently as possible only one at a time (sic)".

[39] The statement of "prisoner" Usher essentially confirmed the statements of both Carroll and Zijlstra except that he claims that at the time of the briefing shortly before the exercise on 15 August, Carroll handed to him his mobile phone, a portable radio and handed to all of the "prisoners" a one page document with a list of parameters of how they would behave during the exercise.

[40] In fact, the "prisoner" briefing document is a two-page document. The appellant did not say he saw it.

[41] According to Usher, the "prisoners" did not have time to lie down before the officers entered the block. He saw an officer give an overhand baton strike to "prisoner" Anderson which appeared to strike him on the head. Anderson was taken to the ground and secured by two officers. He thought that they were using training batons. Three officers then turned on him. One stuck

him on his upper body with his hand. He put his arms up to protect his head and it connected with his left forearm. It was then that he realised that the other officers were not using training batons. He received a number of strikes to the back of his right leg, one across his lower back and one across his buttocks. As an officer was striking him, two other officers grabbed one of his arms each and forced him to the ground and it was at this point that he yelled out that he was an officer and that it was Usher. He says that he felt the grip securing his arms begin to loosen. He was then handcuffed with zip ties and taken outside by at least two officers. It was at this point that shirts covering their faces were removed.

[42] This differs somewhat from some of the other evidence which is to the effect that the shirts covering the "prisoner's" faces were removed inside H Block. In any event, according to Usher, Superintendent Williams looked at him and said words to the effect of "Is that it? Keep going". He says he looked at him, he was gesturing with his hands, and he said words to the effect, "Come on, is that it?"

[43] His evidence was that "by this time, all role players were standing and still cuffed. I lunged at the nearest officer. I was taken to the ground. I also saw Zijlstra lunge at an officer and was taken to the ground also. I was picked up by two officers, using my upper arms and taken to G Block to the maximum security section. We were placed in separate cells. I had my cuffs removed and the scenario was ended".

[44] He said that during the exercise CS gas was deployed only in the laundry as pre-determined and that he suffered from minor secondary exposure as it travelled through the block.

The Relevant Legal Principles

[45] Section 62 of the *Prisons Act* provides in sub-sections (2) and (3):

> (2) An officer may possess and use in a prison or police prison such firearms, weapons and articles of restraint as are approved by the Director as necessary to maintain the security and good order of a prisoner or a prison or police prison.
>
> (3) An officer may use such reasonable physical force and restraint against a prisoner as he or she considers necessary to maintain the security and good order of a prisoner or a prison or police prison.

[46] It was submitted that the learned Magistrate found that the actions of the officers who caused the injuries to the appellant were authorised by s 62(2) and s 62(3) of the *Prisons Act* and that therefore no offence had been committed. However, the learned Magistrate did not so find as "prisoner" has a defined meaning which does not include a prison officer playing the role of a prisoner. What his Honour found was that, in this case, the officers had an honest and reasonable, albeit mistaken, belief that they were restraining a prisoner. He found that the force used was reasonable physical force and the restraint was by inference considered necessary by the officers concerned to maintain the security of the prison and that therefore their actions were authorised pursuant to s 62(2) and s 62(3) of the *Prisons Act*.

[47] In order to establish that any of the officers were guilty of an assault, it was necessary for the appellant to prove on the balance of probabilities that there was an application of force to his person without his consent (see the definition of "assault" in s 187(a) of the *Criminal Code*) and that he was assaulted "unlawfully". In this context, "unlawfully" means without authorisation, justification or excuse.

[48] There are two considerations involved in the concept of "unlawfully" which are relevant here. The first is whether the acts committed upon the appellant were authorised under s 26 of the *Criminal Code*.

[49] According to the appellant, he did not authorise the use of CS gas or weapons such as batons to be used against his person. Clearly, he must have authorised some kind of physical restraint as he well knew, according to Usher that after releasing the hostage they were to return to their designated positions in the block, lay face down on the floor and "wait for the duty officers to enter and secure us". However, where consent is an issue it is necessary to ask what it was to which the appellant had consented. If the degrees of violence used in an assault exceeded that to which consent had been given, the appellant will have discharged the onus of showing that he did not consent to the assault.[4] The evidence is all one way that the appellant did not consent to the extent of the force used against him insofar

[4] See *R v Raabe* [1985] 1 Qd R 115 at 121; at 124-125; *Lergesner v Carroll* [1991] 1 Qd R 206 at 211-212.

as he was gassed, struck, stomped on the legs and wrenched into an upright position with such force as to dislocate his shoulder.

[50] The second possibility is that the assaults by the prisoner officers were authorised "in obedience to the order of a competent authority whom the person doing, making or causing is bound to obey, unless the order is manifestly unlawful".[5]

[51] The notes of the staff briefing clearly indicate that CS gas would be used by Group C to ensure the rear of the block was not used as an escape route and that it could be administered if "the prisoner presents a weapon". Also the prison officers were authorised to handcuff each of the "prisoners" prior to being removed from the block and obviously this would include using such force as was necessary to achieve that end.

[52] Of course, if the prisoner officers knew that the "prisoners" were not consenting and were not in fact prisoners, the orders that were given were manifestly unlawful. Nevertheless, under s 32 of the Code the prison officers carrying out the assaults were entitled to rely upon an honest and reasonable but mistaken belief in the existence of a state of facts which would have authorised the use of force and would not be criminally responsible for it to any greater extent than if the real state of things had been such as they believed to exist.

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[5] See s 26(1)(c) of the *Criminal Code*.

[53] Up until the moment of time when the t-shirts masking the "prisoners'" faces were removed whilst still in H Block, the prisoner officers taking part in the exercise were not told that this was only an exercise. On the balance of probabilities, the appropriate inference to be drawn is that they each held and honest and reasonable belief, at least to that point, that the scenario was real. To this extent, they could rely upon the instructions given to them and to their powers under s 62 of the *Prisons Act*.

[54] Mistake of fact having been raised on the evidence it was necessary for the appellant to establish on the balance of probabilities that there was no such mistake or alternatively that any mistake did not justify the extent of the use of force which had been applied.

[55] In drawing inferences from the evidence, the standard, although it is the civil standard, requires the clarity of proof referred to by the High Court in *Briginshaw v Briginshaw*.[6]

Conclusions

[56] In relation to the alleged assaults committed by the prison officers in respect of the incidents which occurred inside of H Block, I am not satisfied that the learned Magistrate erred in law. It is only if the Court had drawn an inference which cannot reasonably be drawn that the Court has erred in point of law such that its decision can be reviewed.[7]

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6 (1938) 60 CLR 336.
7 *Wilson v Lowery* (1993) 4 NTLR 79 at 85.

[57] The circumstances surrounding the handcuffing of the appellant and being lifted up onto his feet after he had been removed from H Block fall into a different category. On the appellant's account, so far as he was concerned, the exercise was over and he was no longer consenting to the use of any force on his person. The prisoner officers who were involved in this stage of the so-called exercise were PO Ryan and PO White. The respondent did not tender any statements from Ryan and White who had declined to be interviewed when the matter was investigated by the police. Counsel for the appellant, Mr Anderson, said that a *Jones v Dunkel*[8] inference should be drawn against those officers. The conditions under which such an inference should be drawn were discussed in *R v LB*.[9] I consider those conditions to exist in this case and therefore an inference may be drawn that the evidence of those officers would not have supported the respondent's case. Nevertheless, the whole of the circumstances need to be considered to see if, notwithstanding that finding, the appellant has failed to prove that neither of those officers were operating under a mistake of fact which would provide them with an excuse under s 32 of the *Criminal Code*. Looked at objectively and considering that there is evidence from Williams that he had instructed both the appellant and Usher "to play up" so that they would have be restrained and taken to G Block to complete the exercise and the evidence that Usher confirmed that Williams gave the instruction to keep going, and that he saw the appellant lunge at an officer before he was taken to the

[8] (1959) 101 CLR 298.
[9] (2011) 246 FLR 466 at [42]-[43].

ground, there is evidence from an inference might be drawn that White and Ryan were operating on the instructions of the Superintendent of the prison and held an honest and reasonable belief that this was all still part of the exercise.

[58] The learned Magistrate in his reasons did not deal with this problem, but decided the matter on the basis that the officers had an honest and reasonable, albeit mistaken, belief that they were restraining a prisoner. Clearly, they could not have held that belief because by then they knew that the appellant was not a prisoner. In my opinion, that was an error by the learned Magistrate which is an error of law because there were no facts upon which he could have so found.[10] However, unless the error vitiates the results, the proper course is to dismiss that ground of appeal. In this case, I am satisfied that the conclusion was a correct one, albeit the basis for it is different from that expressed by the learned Magistrate. At that stage of the exercise, the evidence supports the conclusion that they believed that the appellant was consenting to the use of the force which they applied to him. The evidence also suggests that any such belief was a reasonable one, and the force used was not excessive.

[59] Mr Anderson further submitted that mistake did not operate in circumstances relating to the seizure of the appellant outside of the grounds of H Block because the appellant was incapable of consenting to grievous harm being caused upon him.

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[10] See *Wilson v Lowrey* (1993) 4 NTLR 79 at 84.

[60] Section 26(3) of the *Criminal Code*, as it existed at the time, provided that a person cannot authorise or permit another to kill him or, except in the case of medical treatment, to cause him grievous harm. The offence of causing grievous harm was set out in s 181 of the *Criminal Code* which then provided:

> Any person who unlawfully causes grievous harm to another is guilty of a crime and is liable to imprisonment for 14 years.

[61] I do not think it can be doubted that the evidence supported a finding that grievous harm was caused to the appellant. The definition of "grievous harm" then contained in s 1 of the *Criminal Code* was defined to mean "any physical or mental injury of such a nature as to endanger or be likely to endanger life or to cause or be likely to cause permanent injury to health". Mr Anderson submitted that on the uncontested facts there was a mental injury which caused permanent injury to the appellant's health which, at least in part, was due to the third stage of the exercise. According to the report of Professor Whiteford, the appellant suffered a post traumatic stress disorder which he appears to regard as being a consequence of the right shoulder injury. His report states that although he has improved with treatment, the appellant will be left with residual manifestations of post traumatic stress disorder for the foreseeable future. I think that is sufficient to establish that the appellant suffered grievous harm.

[62] However, what must be proved is that the two officers either intended to cause him grievous harm or at least foresaw the possibility that the manner

in which they were dealing with him could bring that result about, in terms of s 31 of the *Criminal Code*.

[63] Although neither White nor Ryan have given any evidence, there is no evidence that either man held any bad feelings towards the appellant. They were fellow workmates and one would expect them, knowing at this stage that the appellant was also a prison officer, not to have any such intention. So far as foresight is concerned, there is of course no evidence that they had any such foresight and there is nothing particular about the manner in which the appellant was handcuffed or lifted to the ground which in my opinion would necessarily lead me to conclude that either man foresaw the possibility that grievous harm would be caused to him. I would therefore reject this argument.

[64] Mr Anderson submitted, alternatively, that in any event the force used in each of the three stages of the exercise concerning the appellant was excessive. The learned Magistrate considered that the force used was reasonable physical force and the restraint was (by inference) considered necessary by the officers concerned to maintain the security of the prison, and that their actions were therefore authorised under s 62(3) of the *Prisons Act*.

[65] Mr Anderson submitted that the evidence was all one way that the use of force was excessive. The appellant's evidence was clear that at the time he was forced to the ground, struck on the back of the head, punched to the

middle centre back of his head and grabbed by the ankles and stomped on the back of the lower legs at a time when he was suffering the effects of the gas, he was not offering any resistance. The evidence of Usher was also referred to as being consistent with the appellant's account. Similarly, he referred to the evidence of the "prisoner" Donald at para 25 of his statement and the evidence of "prisoner" Anderson at para 26 of his statement.

[66] On the other hand, the evidence of Carroll was that, as he followed into the block, "I saw that gas was being administered because of the attack by the prisoners on the riot formation… I was looking to the right and I observed that the prisoners were attacking the riot formation which was against the orders".

[67] Mr Anderson submitted that Carroll's assertion was inconsistent with the evidence of others there and his own contemporaneous reports and lacked credence. The difficulty with this submission is that to the extent that there was conflicting evidence as to the facts, if the Court below preferred one account to another, that decision is a question of fact to be determined by that Court and is not reviewable on appeal, even if it is patently wrong.[11]

[68] The learned Magistrate does not explain why he found that the use of force was not excessive. There is no ground of appeal that the learned Magistrate's reasons were inadequate. So far as the amount of force used outside of H Block is concerned, given the whole of the circumstances

[11] *Wilson v Lowrey* (1993) 4 NTLR 79 at 84.

including the fact that the appellant was a very large man and required two officers to lift him up onto his feet, I am unable to see how a finding that the amount of force used was not excessive was wrong in the sense that there was no evidence to support such a finding.

[69] It was submitted on appeal that the learned Magistrate ought to have considered the positions of both CPO Carroll and Superintendent Williams. No such submission appears to have been made before the learned Magistrate. It was put that if the other prison officers were innocent agents of Carroll and Williams, then as neither Carroll nor Williams had any mistake about the extent to which the appellant had given his consent, or held any mistake as to whether or not they were prisoners, they could not reply upon s 62 of the *Prisons Act* or on s 31 of the *Criminal Code*. Reference was made to *White v Ridley*[12] and *Pinkstone v The Queen*[13] for the proposition that it is well settled at common law that a person who commits a crime by the use of an innocent agent is himself liable as a principal offender. In *White v Ridley*,[14] Gibbs J said:

> That is so not only where the agent lacks criminal responsibility, as, for example, when he is insane or too young to know what he is doing, but also where the agent, although of sound mind and full understanding, is ignorant of the true facts and believes that what he is doing is lawful.

[12] (1978) 140 CLR 342.
[13] (2004) 219 CLR 444.
[14] (1978) 140 CLR 342 at 346.

[70] In *White v Ridley*,[15] Stephen J preferred the expression "innocent instrument" rather than that of "innocent agent", but otherwise his view was consistent with that of Gibbs J. Aickin J agreed with Stephen J.[16]

[71] As the matter was not argued in this way before the learned Magistrate, the question which I now must ask myself is whether that was an error of law requiring this appeal to be allowed.

[72] There are numerous authorities which discuss the circumstances under which an appeal court will entertain a point of law which is raised for the first time on appeal. In *University of Wollongong v Metwally [No 2]*,[17] the High Court said:

> It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.

[73] When an appeal is by way of rehearing it was said in *Water Board v Moustakas*:[18]

> More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient

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[15] (1978) 140 CLR 342 at 353-354.
[16] See also *Pinkstone v The Queen* (2004) 219 CLR 444 at 450-451 [10]-[11] per Gleeson CJ and Heydon J; McHugh and Gummow JJ at 463 [53]; and at 464-465 [57]; Kirby J at 479-481 [102]-[104].
[17] (1985) 59 ALJR 481 at 483.
[18] (1988) 180 CLR 491 at 497.

> and in the interests of justice to entertain the point, but otherwise the rule is strictly applied.

[74] However in *Roncevich v Repatriation Commission*,[19] the High Court dealt with a case where the Administrative Appeals Tribunal confirmed a decision of the Repatriation Commission to reject a claim brought under s 70(1) of the *Veterans Entitlements Act 1986* (Cth) for a pension by way of compensation to a member of the Armed Forces who had become incapacitated from a defence-caused injury. An appeal from the Administrative Appeals Tribunal to the Federal Court of Australia under s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) was limited to a question of law. In that case, the appellant sought to argue a point which was not advanced in or founded upon any ground of appeal to the Federal Court. In the joint judgment of McHugh, Gummow, Callinan and Heydon JJ, their Honours said[20] that as the argument was not advanced in or founded upon any ground of appeal to the Federal Court, the appellant should not therefore be permitted to raise it.

[75] Even in appeals to courts of criminal appeal, there are significant obstacles facing a party who wishes to take a point for the first time. In *Strong v The Queen*,[21] Callinan and Heydon JJ said:[22]

> When complaint is made of the handling by intermediate courts of appeal (and trial courts) of proceedings before them, it is imperative to keep steadily in mind what it was that those courts were asked to

[19] (2005) 222 CLR 115.
[20] at 124-125 [21].
[21] (2005) 79 ALJR 1171.
[22] at 1193 [121].

> determine. It is unfair for appellants to criticise them for failing to deal with what they were not asked to deal with. Subject at least to the need to prevent possible miscarriages of justice in criminal cases, appellants who make criticisms of that kind face serious obstacles in having those criticisms accepted.

[76] The view I have reached is that it is not an error of law by the learned Magistrate to fail to consider an argument that Carroll and Williams were guilty of offences by virtue of the doctrine of innocent agency.

[77] Mr Jobson for the respondent did not object formally to the Court's jurisdiction to allow an appeal on this ground. The amended Notice of Appeal does not specifically refer to this issue, although it might be obliquely encompassed in grounds 4 and 5. The matter was first raised in the appellant's substituted Outline of Submissions which were dealt with by Mr Jobson on the basis that there was no evidence to support the arguments.

[78] I do not think that I have jurisdiction to deal with the point as it was never argued in the Court below. The Court below was therefore not required to consider it and it cannot, in my view, be said to be an error of law on the part of the learned Magistrate to have failed to consider it. If I am wrong in this conclusion, I decline to consider it in the exercise of my discretion on the ground that no exceptional case has been made out as to why I should now consider the point.

Conclusion

[79] The appeal is dismissed.
