O'Donaghue v Ferry [2016] NTSC 2

PARTIES:	O'DONAGHUE, James
	v
	FERRY, Nicholas Jon
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 8 of 2015 (21301715)
DELIVERED:	11 JANUARY 2016
HEARING DATES:	29 OCTOBER 2015
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

APPEAL – Justices Appeal – Appeal against finding of guilt – Whether there is a significant possibility that an innocent person has been convicted – Evidence established guilt to requisite standard of proof – Appeal dismissed.

CRIMINAL LAW – Assault Police in the execution of duty – *Criminal Code*, s 189A – Scope of duty – Consideration of core functions of the Police Force – Police attempted to assist the appellant by physically guiding him towards the back of a police van in order to take him to hospital – Appellant not under arrest – Force used reasonably needed for the common intercourse of life – Reluctance does not indicate lack of agreement in this context – Police acting within the due execution of their duty.

Criminal Code, s 189A
Justices Act, s 163(1)(b)

Mental Health and Related Services Act, s 32A
Police Administration Act, s 5(2)

Carr v The Queen (1990) CLR 314; *Chidiac v The Queen* (1991) 171 CLR 432; *Director of Public Prosecutions (NSW) v Gribble* (2004) 151 A Crim R 256; *Fox v Percy* (2003) 214 CLR 118; *Gipp v The Queen* (1998) 194 CLR 106; *M v The Queen* (1994) 191 CLR 487; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 90 ALJR 38; *Osabeday v The Queen* [2014] NTCCA 6; *R v Grimley* (1994) 121 FLR 236; *Re K* (1993) 71 A Crim R 115, referred to.

Ashley v Millar [2015] NTSC 63; *Cintana v Burgoyne* (2003) 13 NTLR 130; *Prior v Mole* [2015] NTSC 65, distinguished.

REPRESENTATION:

Counsel:

Appellant:	T Collins
Respondent:	G Dooley

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	BLO 1601
Number of pages:	19

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

O'Donaghue v Ferry [2016] NTSC 2
No. 21301715

BETWEEN:

JAMES O'DONAGHUE
Appellant

AND:

NICHOLAS JON FERRY
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 11 January 2016)

Introduction

[1] This is an appeal against a finding of guilt made on 22 April 2015 for the charge of unlawfully assaulting a police officer in the execution of his duty contrary to s 189A of the *Criminal Code*.

[2] The grounds of appeal, argued together, are that:

i) His Honour erred in finding that the police officer was acting in the execution of his duty; and

ii) His Honour erred in finding the defendant guilty of the offence charged.

[3] The appeal is brought as of right pursuant to s 163(1)(b) of the *Justices Act*. To be successful, error must be established on a question of fact, law or a question of both fact and law.

[4] The central issue is whether police officers acted in the execution of their duties when they attempted to assist, or purported to assist, the appellant by physically guiding or taking him towards the back of a police van in order to take him to hospital. In short, the learned Magistrate found police were acting in accordance with their duties as they were in fact assisting the appellant, who, although reluctant, had not made it clear he was "resisting" being taken to hospital until he struck one of the officers.

[5] The appellant argues the finding of guilt was in error as it could not be proven police were acting in the execution of their duty because the appellant did not want to go with them to the hospital and police have no power to compel a person to go to hospital against the person's will. It is common ground the appellant was not under arrest for any offence. Neither was he being apprehended pursuant to the intoxicated person's provisions of the *Police Administration Act*. It is common ground that police were not in the process of arresting the appellant but rather intended to take him to hospital in the back of the police van.

[6] In the circumstances of this case, the question of whether the appellant agreed to go with police for the purpose of going to hospital is central to the

question of whether it was proven police were acting in the execution of their duty.

Review of the Evidence and Findings in the Court of Summary Jurisdiction – Relevant Principles

[7] The nature of the appeal requires an assessment of the evidence, bearing in mind findings based on credibility are not immune from challenge on appeal, particularly in circumstances where such findings are contrary to the otherwise well-established evidence.[1]

[8] With reference to ground two, this Court must ask whether on the whole of the evidence it was open to the learned Magistrate to be satisfied beyond reasonable doubt that the appellant was guilty.[2]

[9] Modifying the application of the principles set out in *M v The Queen* in acknowledgement that this is an appeal against the decision of a Magistrate rather than a jury verdict, this Court is required to:

> Make its own assessment of the evidence not for the purpose of concluding whether (it) entertains a doubt about the guilt of the person convicted but for the purposes of determining whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt.[3]

[10] It is not for this Court to substitute its own assessment of the significance and weight of the evidence for the assessment made in the Court of

[1] *Fox v Percy* (2003) 214 CLR 118.
[2] *M v The Queen* (1994) 191 CLR 487 at [7]; *Gipp v The Queen* (1998) 194 CLR 106 at [49]; *Osabeday v The Queen* [2014] NTCCA 6.
[3] *M v The Queen* (1994) 181 CLR 487 per Brennan J at [13].

Summary Jurisdiction, nor to retry the case, nor to determine whether the verdict is against the evidence. Rather, it is for this Court to determine whether there is a significant possibility that an innocent person has been convicted because the evidence did not establish guilt to the requisite standard of proof.[4]

[11] On appeal it must be kept in mind that the Magistrate as the trier of fact is entrusted with the primary responsibility of determining guilt or innocence and enjoyed the benefit of having seen and heard the witnesses.[5] This Court is not however absolved from the responsibility of making its own assessment of the evidence, paying appropriate deference to any advantage the learned Magistrate may have enjoyed as the primary trier of fact. Unlike the position with respect to an appeal against a jury verdict, this Court has the benefit of the learned Magistrate's reasons.

Summary of the Evidence in the Court of Summary Jurisdiction

[12] Constables Marsh and Waters attended at house 43 Hidden Valley Camp, Alice Springs after being tasked by police communications on 11 January 2013 at 12:50 am to attend in relation to a disturbance. Certain observations were made by the officers about the area until they determined all was calm.

[13] Officer Marsh's evidence was that he observed the appellant at house 43. The appellant was leaning against the gate, appeared to be intoxicated and

[4] *Chidiac v The Queen* (1991) 171 CLR 432 per Mason CJ at 443-444.
[5] *Carr v The Queen* (1990) CLR 314 per Brennan J at 330-334; *Gipp v The Queen* (1998) 194 CLR 106 per Gaudron J at [18].

had cuts and bruises on his face that appeared to be fresh. His shirt was ripped. Officer Marsh asked him if he was okay and the appellant replied he was fine.

[14] Officer Marsh then spoke to a person who identified herself as the appellant's aunty. He asked if she wanted police to take the appellant to hospital and she replied that she did. Officer Marsh said several other occupants also indicated they wanted police to take the appellant away.

[15] Officer Marsh said that given the appellant was unsteady on his feet, he assisted him to walk towards the police vehicle with his aunty. He said he was standing on the appellant's right side and supporting him by holding his right arm. As they were nearing the police vehicle, the appellant stated "I don't want to go to the hospital. I'm going to punch this guy". As the appellant was saying those words, he threw a punch with his left fist that hit Officer Marsh in the throat. Officer Marsh said the punch was hard enough to cause him to step backwards. He then pushed the appellant backwards before restraining him and placing him in the cage of the police van. Officer Marsh said his decision to take the appellant to hospital was based on the fact that he appeared to have fresh injuries, was unsteady on his feet and because Officer Marsh was unsure whether his condition was the result of intoxication or a possible head injury. He told the learned Magistrate he was concerned for the appellant's welfare.

[16] In cross-examination Officer Marsh agreed that as he was walking the appellant towards the police vehicle he assisted him by putting his hands on him. He agreed the appellant said he did not want to go to hospital. He agreed that he intended to transport the appellant to the hospital in the back of the cage, adding "that's standard procedure". He agreed the reason he was helping the appellant was because he was unsteady on his feet. He said the aunty was walking along with them; she was not physically assisting. Officer Marsh agreed the appellant had made it clear that he did not want to go to the hospital. In relation to the timing of the punch, Officer Marsh said it occurred when he was escorting the appellant to the police van. He said he had one hand on the appellant's shoulder at the relevant time. Officer Marsh agreed he pushed the appellant back with some force after he was assaulted as he needed to get some distance from the appellant. He rejected suggestions of violence on his part towards the appellant. Those suggestions are not significantly relevant for the purposes of this appeal.

[17] Officer Waters told the Court the appellant stated he was fine after Officer Marsh asked him if he wanted to be taken to hospital. His aunt requested that police take him to hospital. He said Officer Marsh took the appellant by the arm to assist him to the police van as he was unsteady on his feet. The appellant became agitated and pulled his arm away from Officer Marsh and he saw Officer Marsh reel backwards and yell out "he just hit me". He said he saw Officer Marsh push the appellant backwards before restraining him and placing him in the back of the police van.

[18] In relation to whether or not the appellant wanted to go to the hospital, Officer Waters said originally the appellant was not willing to accompany them to the hospital. He said that they "implored him to come to the hospital as he had injuries". His aunty then stepped in and tried to convince the appellant to go with them. She was telling him, "yes go with the police officers" and that was when "he seemingly agreed" to go with them to the hospital.

[19] Officer Waters agreed he did not see the appellant hit Officer Marsh as his back was turned; however, he observed Officer Marsh had his hands up to his throat when he said "he just hit me". Officer Waters said he did not recall the appellant saying that he did not want to be taken to hospital. He also said the appellant was too intoxicated for a record of interview shortly after the incident. The record of interview was done later.

[20] Constable Canning gave evidence of the record of interview with the appellant.

[21] The record of interview was tendered and played in the Court of Summary Jurisdiction. When asked what happened the appellant said:

> My cousin was talking to one of the officers and I was drunk, just being dumb and I (inaudible) the police. The officer asked me to go to him so I walked to him. He grabbed me and said "Oi (inaudible) go into lock up". And he grabbed me and slammed my head on the paddy wagon inside the thing, cage. And that's where I got this cut and I pushed them away and he's grabbed me and just chucked me in the back and yeah.

[22] In the interview the appellant accused police of certain misconduct towards him, resulting in bruises. In relation to going to the hospital, there was the following exchange:

> CONST CANNING – I'll just tell you what we have been told. So the police came to that area because someone was being disruptive and disturbing the peace because there was a disturbance, general disturbance. And when they were there they found out from family members that it was you.
>
> O'DONAGHUE – Yeah.
>
> CONST CANNING – And they found that you had some injuries so your aunty was asked if we should take you to hospital. She said yes. They were walking you to the cage to take you to hospital and then you said you were going to punch one of them and then you turned around and punched one of them in the throat.
>
> O'DONAGHUE – I don't remember that.
>
> CONST CANNING – So you remember them taking, telling you that they were going to take you to hospital?
>
> O'DONAGHUE – Guess I do.
>
> CONST CANNING – So they were going to do a courtesy run for you. Instead of getting an ambulance they were going to take you to hospital for your injuries.
>
> O'DONAGHUE – I said no.
>
> CONST CANNING – And then on the way to the cage you decided that you didn't want to go and then swung and hit one of the officers.
>
> O'DONAGHUE – The reason why I hit him is cos he slammed my face into the thing, the back of the paddy wagon. So I just pushed him (inaudible) hit him.

CONST CANNING – But why would he slam your face into the car if he's taking you to hospital?

O'DONAGHUE – I dunno. Self-defence.

CONST CANNING – What, he's doing self-defence?

O'DONAGHUE – I was doing self-defence.

CONST CANNING – Ok. So you agree they were going to take you to hospital?

O'DONAGHUE – Yes.

CONST CANNING – And they were walking you to the car?

O'DONAGHUE – Yes.

CONST CANNING – And then what happened then?

O'DONAGHUE – Then the officer grabbed me, ripped my shirt and then just pushed me against the car. So I just turned around and pushed him back.

CONST CANNING – For no reason?

O'DONAGHUE – (inaudible).

CONST CANNING – Did you identify that they were police? They had their uniform?

O'DONAGHUE – Yes.

CONST CANNING – So you understood that they were police?

O'DONAGHUE – Yes.

CONST CANNING – You understood that, did you understand that they were taking you to hospital?

O'DONAGHUE – No, I didn't.

CONST CANNING – Did they tell you they were taking you to hospital?

O'DONAGHUE – They told me but I said no.

CONST CANNING – And when did you say no? Straight away or on the way to the car?

O'DONAGHUE – Straight away.

[23] The following exchange is also relevant:

CONST CANNING – Do you think that when all this happened you were a little bit drunk?

O'DONAGHUE – Yeah, I was.

CONST KERSHAW – So you were aware that they told you that they were going to take you to hospital?

O'DONAGHUE – Yes.

CONST KERSHAW – Did you believe they were going to take you to hospital?

O'DONAGHUE – No, I just said no straight out.

CONST KERSHAW – So why do you think they would have hurt your head if they were just going to take you to hospital?

O'DONAGHUE – I don't know.

CONST KERSHAW – So when they said they were going to take you to hospital did you walk nicely to the back of the cage or did you arch up?

O'DONAGHUE – Yeah, I did that.

CONST CANNING – Which one?

O'DONAGHUE – The second.

CONST CANNING – So you got angry and tried to get away from them?

O'DONAGHUE – Yeah.

CONST CANNING – And how were they holding you?

O'DONAGHUE – By the arms, my T-shirt and shoulders.

[24] Nakeisha Ahfat gave evidence that she was present at the premises. She said police attended after there had been fighting. She said the appellant was trying to stop other persons from fighting. She said she had seen the appellant drinking. When police arrived, the appellant spoke with them, he was sitting down in the yard. When the appellant went to talk to police she could not really hear anything but she remembered the appellant was trying to get peace and there were "no dramas". She said police then said they were going to lock him up. She said she and her cousin were saying things like "why does he have to get locked up". She said police grabbed the appellant and threw him in the paddywagon and she saw a police officer hit him. She said the appellant's T-shirt was torn and ripped up, but she agreed she observed that before police attended. She thought there may have been a fighting incident before police came.

The Learned Magistrate's Findings

[25] His Honour found the appellant was reluctant to go with police. His Honour acknowledged police had no power to detain or forcibly remove the appellant for the purpose of taking him to hospital. His Honour referred to the Court being bound by the principles in *Cintana v Burgoyne*.[6] His Honour acknowledged that *Cintana v Burgoyne* stood for the proposition that if the police had detained or forcibly removed the appellant against his will for the purpose of taking him to hospital, even if they perceived it in his interests to do so, they would be acting beyond their powers.

[26] His Honour said it was a question of whether as a matter of fact the appellant was being forcibly walked or being effectively persuaded to go with the police, noting he was clearly intoxicated. It was also noted there was evidence that the appellant appeared to be someone who needed assistance.

[27] His Honour accepted the police version of events that the appellant was not being forcibly marched or removed to the police vehicle, but rather that police were attempting to assist him at the request of his aunty. Although he may have been somewhat reluctant to go, his Honour found that at the relevant time the appellant had not shown he was resisting going with

[6] (2003) 13 NTLR 130.

police. His Honour distinguished the overall facts from the circumstances that arose in *Cintana v Burgoyne*.[7]

Consideration of the Issues

[28] I do not disagree with the series of propositions of law submitted on behalf of the appellant. Counsel for the respondent does not dispute them. It is essential police be aware of the limits of their powers as the citizen's right to personal liberty is the most elementary right.[8] It is the fact finding and the application of the relevant principles to the particular facts that are the principal issues.

[29] The respondent acknowledged police were not exercising a power to arrest the appellant. Police were unsure about whether the appellant had head injuries or was intoxicated and did not purport to apprehend him pursuant to the intoxicated person's provisions of the *Police Administration Act*. The circumstances that arose here are unlike recent cases involving particular powers that required the fulfilment of statutory criteria to be made out before an arrest or apprehension can be considered lawful.[9]

[30] The police officers were clearly acting within the scope of their duties when they attended house 43. Leaving aside the question of Officer Marsh having his hand on the appellant's shoulder or arm, there is nothing to indicate that police were doing anything other than performing the functions expected of

[7] (2003) 13 NTLR 130.
[8] *R v Grimley* (1994) 121 FLR 236 at 253.
[9] See, e.g. *Ashley v Millar* [2015] NTSC 63; *Prior v Mole* [2015] NTSC 65.

them in the circumstances of being called to a disturbance. The analysis of whether police were acting within the ambit of their duties needs to be seen in the context of the wide variety of duties police may be required to perform.

[31] Section 5(2) of the *Police Administration Act* provides:

> The core functions of the Police Force are:
>
> (a) to uphold the law and maintain social order; and
>
> (b) to protect life and property; and
>
> (c) to prevent, detect, investigate and prosecute offences; and
>
> (d) to manage road safety and enforcement measures; and
>
> (e) to manage the provision of services in emergencies.

[32] Section 5(2) of the *Police Administration Act* was referred to generally in an introduction to the discussion of police powers of arrest in the Northern Territory in a different context in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*.[10]

[33] The equivalent New South Wales provisions were discussed in *Director of Public Prosecutions (NSW) v Gribble*[11] in the context of the question of whether police exceeded their powers by forcibly removing a person from the middle of a busy road. These were more dramatic circumstances than

[10] [2015] HCA 41 per French CJ, Kiefel and Bell JJ at [12].
[11] (2004) 151 A Crim R 256.

the current matter and were closely associated with a duty of protection, however, Barr J made the following observations about those provisions:[12]

> It was submitted that the legislative history and the current s 6 of the *Police Act* extended the duty of a police officer beyond the prevention and investigation of crime so as to include actions reasonably necessary for the protection of persons from injury or death, and property from damage, regardless of whether the need for those services arises from any criminal act.
>
> It seems to me that that this is the intent of the legislation and that the submission should be accepted. This approach is consistent with the common law. In *Johnson v Phillips* [1975] 3 All ER 682 at 685 it was said –
>
> > The first function of a constable for centuries has been the preservation of the peace. His powers and obligations derive from the common law and statute. It is his general duty to protect life and property … the powers and obligations of a constable under the common law have never been exhaustively defined and no attempt to do so has ever been made: see, for example, *R v Waterfield* [1964] 1 QB 164 where Ashworth J, who delivered the judgment of the court said: "… it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed". Also there is the case of *Rice v Connolly* [1966] 2 QB 414, where Lord Parker CJ said: "It is also in my judgment earlier that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those."

[34] In *Re K*,[13] the Federal Court said of the phrase "in the execution of duty" in s 64 of the *Australian Federal Police Act 1979* (Cth):

> Section 64 should not be construed in any narrow or restricted sense, but should be given a broad operation to protect the performance of

[12] (2004) 151 A Crim R 256 at [23] - [24].
[13] (1993) 71 A Crim R 115.

> all police duties, and not just some. The section is general: "in the execution of his duty". That means that the section applies whenever the police officer is doing something which can fairly and reasonably be regarded, given the existing circumstances, as a carrying out of his duty.[14]

[35] Section 5(2) of the *Police Administration Act* is not determinative of the issue here, however, neither is it irrelevant. Whether police were acting in the execution of their duties must have regard to the broad nature of police functions set out in the *Police Administration Act*.

[36] In *Cintana v Burgoyne*,[15] it was found police had exceeded their powers by lifting up the alleged offender and taking her from the floor of a store that she refused to move from. She did not respond to police requests to allow them to assist her. In those circumstances, and given the powers under the *Trespass Act* were not enlivened and no other basis for arrest or detention was valid, it was found police could not be proven to have acted in the execution of their duty.

[37] I agree with the learned Magistrate that the facts here are markedly different to those encountered in *Cintana v Burgoyne*. It is acknowledged that absent consent, that may be express or implied, police have no power to force or detain a member of the public in order that they attend hospital. Save for possibly the case of a youth and the position of a responsible adult, another person, such as the aunt here, cannot consent on behalf of a person.

[14] (1993) 71 A Crim R 115 at 120.
[15] (2003) 13 NTLR 130.

[38] This may be contrasted with the express power police officers in the Northern Territory possess to apprehend a person who the police officer believes on reasonable grounds may require treatment or care in the particular terms set out in s 32A of the *Mental Health and Related Services Act*. If the strict criteria governing those circumstances are met, police may apprehend the person for the sole purpose of taking them to an authorised medical practitioner or designated mental health practitioner.

[39] No such power exists generally for police to apprehend a person to take them to hospital. Consistent however with the general functions of police to protect life and maintain social order, in my view it is not outside of the scope of police duties to attempt to persuade a person who appears injured to go to hospital and if appropriate to offer them transport to do so. Constable Canning referred to this practice in the record of interview as a "courtesy run".

[40] Having reviewed the evidence independently, I have come to a conclusion similar to the learned Magistrate's findings. The appellant did not, at least initially, want to go to hospital, or was reluctant to go. That is clear. His conduct was then such that he walked with Officer Marsh and his aunt towards the police van. This gave the appearance that he would go with police. Officer Waters said, "he seemingly agreed". Reluctance does not indicate lack of agreement in this context. He "seemingly agreed" after police "implored" him to go with them. I would not characterise an attempt

to persuade an injured person to accept being taken to hospital by police as outside of the scope of duties of police.

[41] Clearly at the point of the assault, the appellant determined not to go along any further with the wishes of police and his aunt. After seemingly going along with police he then said he did not want to go and assaulted Officer Marsh. On the evidence, the appellant's attitude to the circumstances fluctuated.

[42] In my opinion at the moment of the assault, police were still engaged in the execution of their duty.

[43] It is the case as argued by counsel for the appellant that the evidence of the two police officers on some points differs. However, the effect of their evidence is that the aunt and police spoke to the appellant about going to hospital and it appeared at least for a time that he seemed to go along with that course. That police were engaged in persuading the appellant to go to hospital does not mean they were no longer acting in the execution of their duties. I do not regard Officer Marsh having his hand on the appellant to assist him in the circumstances as an excessive use of force. It had all the hallmarks of assisting someone who was impaired for a reason that was not at that time clear. In terms of being "force" it should be characterized as nothing more than what was reasonably needed for the common intercourse of life.

[44] I do not think significant weight could be given to the appellant's record of interview given his intoxication at the time of the incident and given the unlikely suggestion that his injuries were caused by police. It was clearly the fact that he was noticeably injured and that led police to attempt to take him to the hospital. Neither could much weight be placed on Ms Ahfat's evidence. She did not see or did not acknowledge the assault had taken place. Her evidence did not assist the appellant.

[45] After reviewing the evidence I cannot conclude there is a significant possibility that an innocent person has been convicted. In my opinion it was proven to the requisite standard that police were acting in the course of their duties. Their whole reason for attending house 43 and then attending to the appellant who appeared injured was in accordance with their general functions and duties as police officers. The appellant was not picked up or subject to heavy handedness as was evident in *Cintana v Burgoyne*.

[46] In my opinion the appeal should be dismissed.

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