

*Bird v Littman* [2009] NTSC 33

PARTIES: BIRD, Brett

v

LITTMAN, Andrew Kevyn

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION

FILE NO: JA 50 of 2008 (20810256)

DELIVERED: 17 July 2009

HEARING DATES: 8 July 2009

JUDGMENT OF: MARTIN (BR) CJ

APPEAL FROM: Mr G Cavanagh, SM

**CATCHWORDS:**

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION  
Adequacy of evidence for conviction – whether Magistrate’s findings were unreasonable – automatism and intention – whether there had been a miscarriage of justice – appeal dismissed.

*Criminal Code*, s 1A.

**REPRESENTATION:**

*Counsel:*

Appellant: Self Represented  
Respondent: T McNamee

*Solicitors:*

Appellant: -  
Respondent: Office of the Director of Public Prosecutions

Judgment category classification: C  
Judgment ID Number: Mar0909  
Number of pages: 17

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

*Bird v Littman* [2009] NTSC 33  
No. JA 50 of 2008 (20810256)

BETWEEN:

**BRETT BIRD**  
Appellant

AND:

**ANDREW KEVYN LITTMAN**  
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 17 July 2009)

**Introduction**

- [1] The appellant was convicted after a trial before a Magistrate of six offences arising out of the arrest of the appellant on 12 April 2008. Those offences were as follows:

<b>Count</b>	<b>Offence</b>
1	Resisting a member of the police force in the execution of his duty.
2	Behaving in a disorderly manner in a public place, namely, on the Stuart Highway at Stuart Park by yelling "I will kill you Police. I will terrorise the Police. I will launch a jihad against Police and fuck you all up".

3	Unlawfully assaulting a police officer (Constable Seears) while in the execution of his duty in the circumstance of aggravation that the police officer suffered harm.
5	Behaving in a disorderly manner in a police station, namely, the Darwin Watchhouse by kicking a plastic tub striking Constable Dash and yelling and swearing loudly, "Fuck the Police".
6	Unlawfully assaulting a police officer (Constable Millar) in the execution of his duty in the circumstance of aggravation that the police officer suffered harm.
7	Behaving offensively by urinating over the cell door in a police station, namely, the Darwin Watchhouse.

[2] The appellant appeals against his convictions on a number of grounds relating primarily to the adequacy of the evidence. For the reasons that follow, in my opinion the grounds are not made out.

### **Evidence**

[3] During the evening of Friday 11 April 2008 police were setting up a random breath testing station on the Stuart Highway at Stuart Park. Superintendent Rennie had just left the station in a police vehicle when he observed the appellant and another male person outside a business premises on Stuart Highway. The other male person had hold of the doors of the premises and was shaking the doors. Superintendent Rennie called for assistance and pulled up near the premises. Once out of the vehicle he asked the male person who had hold of the door handles what he was doing whereupon that person let go of the handles and said "nothing, we're not doing anything

wrong”. Superintendent Rennie said he needed to have a chat to both men and the appellant began to walk away. When asked to stop, the appellant said they had done nothing wrong and were heading home.

[4] Other officers arrived to assist. Superintendent Rennie was of the opinion that both the appellant and the other person were intoxicated to such an extent that he believed they needed to be taken into protective custody. When the Superintendent advised the men they were going to be taken into protective custody, the appellant said he had not drunk that much and was not drunk. He said he was not going into custody and became quite aggravated and agitated. The appellant commenced filming Superintendent Rennie on his mobile telephone and asked his name, rank and number, which he was given. Superintendent Rennie explained the protective custody provisions in the sense that the appellant would be taken into custody without charge and, in the words of Superintendent Rennie, “from there the situation just deteriorated”.

[5] A number of police officers gave evidence of the ensuing events. According to that evidence, the appellant became aggressive and swung two blows at one of the officers. Police took hold of the appellant and “stabilised him” against a wall. By reason of the appellant’s resistance, officers pushed the appellant face forward onto the ground in an action that police describe as “ground stabilisation”. The appellant was then brought to a standing position and escorted towards the police vehicle. In that process, the appellant dropped his body and broke free from the grip of one officer, after

which he arched his body up with some force and brought his head backwards to head butt an officer behind him across the right eye. The appellant was then ground stabilised for a second time before finally being placed in the police vehicle.

- [6] The appellant's actions at Stuart Park formed the basis of the charges of resisting a member of the police force, behaving in a disorderly manner and unlawfully assaulting a police officer in the execution of his duty. The learned Magistrate accepted the evidence of police officers and found the appellant guilty of those charges.
- [7] Following arrival at the Darwin Police Station, the appellant was brought to the charge desk in handcuffs. The events were captured on an audio visual record presented to the court by way of DVD. The appellant is seen to kick a plastic property crate which struck one of the officers in the shin, but the Magistrate found the appellant not guilty of assaulting the officer because he was not satisfied beyond reasonable doubt that the appellant intended that the crate hit the officer in the shin.
- [8] At about the time that the appellant kicked the box, he also yelled and swore loudly saying words to the effect "fuck the police". Although the Magistrate was of the view that the language itself was not sufficient to make out an offence of behaving in a disorderly manner, his Honour found the appellant guilty on the basis that kicking the plastic crate, together with the loud swearing, amounted to behaving in a disorderly manner.

- [9] The appellant was later taken into a holding cell. He was made to kneel while the handcuffs were removed. In that process the appellant threw himself to the side very quickly with force and head butted an officer to the bridge of the nose. The officer's nose was broken and began to bleed profusely. These actions were the basis of the charge of assaulting the officer in the circumstance of aggravation that the officer suffered harm.
- [10] The appellant was left alone in his cell. While alone he is seen on the DVD to engage in urinating actions on two occasions. Those actions were the subject of the seventh charge being the charge of behaving offensively.
- [11] The appellant gave evidence. He said that he had dinner at about 5pm at a premises operated by the Salvation Army, following which he and the other male person purchased a carton of full strength beer and walked to a park opposite the boat ramp of the Ski Club. At that locality he and the other man consumed approximately seven or eight beers each after which they went to the Buff Club at Stuart Park where they consumed approximately three to four schooners each in a period of about an hour and a half. The appellant said he and his male companion then walked to Uncle Sam's to get something to eat and were making their way back to Stuart Park. His evidence continued as follows:

“Well, it's pretty much the next really thing I can recall is being surrounded by policemen. I don't even know if that's a lucid memory. I'm not too sure, I just can't – the next thing I knew I was surrounded by police officers and the next day I've woken in at the Watchhouse with blood all over my face; it was very sore and not knowing what happened.”

[12] During cross-examination the appellant said he was not sure of his memory about being surrounded by police officers. His only positive memory was waking up in the Watchhouse very sore with blood all over his face. The appellant explained that he had previously been bashed by police and has a “psychological condition that directly involves the police” in the form of an “absolute fear of police” which he referred to as his “agoraphobia”.

### **Complaints on Appeal**

[13] The appellant was unrepresented at trial and on the appeal. At trial he demonstrated a good grasp of issues relevant to the credit of police witnesses. On the hearing of the appeal the appellant advanced a number of complaints about the conduct of the Magistrate and the prosecution. At times those complaints included unsubstantiated allegations of misconduct delivered in forceful terms. It is unnecessary to canvass those allegations except to observe that there is nothing in the material before me to support even a suspicion of inappropriate conduct by either the Magistrate or the prosecutor.

[14] Included in the appellant’s complaints was an allegation that the transcript of the trial proceedings has been heavily edited. Prior to the hearing of the appeal, the appellant was in custody for a significant period and on more than one occasion arrangements were made for the appellant to listen to an audio recording of the trial for the purpose of identifying areas where the appellant maintains that editing of significance has occurred. Although the

appellant commenced listening to the recording, eventually he declined to proceed with that exercise.

[15] The hearing of the appeal was delayed while the appellant was in custody and for the purpose of enabling the appellant to undertake the task of listening to the audio recording. At the hearing of the appeal, although the appellant mentioned his allegation that the transcript had been edited, he did not pursue that allegation as a separate ground of appeal and did not contend that edited portions were relevant to his numerous complaints. There is no material before me to suggest that the transcript of the trial before the Magistrate has been edited.

[16] As to specific complaints advanced either as part of the grounds of appeal or orally at the hearing of the appeal, at the heart of the appellant's major complaint is the assertion that the prosecution witnesses lied and the findings of the Magistrate were unreasonable. Bearing in mind the appellant's evidence that he did not have a memory of the events at Stuart Park, the appellant sought to advance his case through an analysis of the evidence and what he perceived were glaring inconsistencies and untruths. As will be obvious from these reasons, I do not share the appellant's perceptions of the evidence. In my view, not only were the findings made by the Magistrate open on the evidence, his Honour reached the correct conclusions.

- [17] Immediately following completion of the appellant's evidence and submissions, the Magistrate delivered brief extempore reasons for his findings. Those reasons demonstrate that the Magistrate had regard to inconsistencies in the evidence of the prosecution witnesses. His Honour also had regard to the conduct of a prosecution witness in adopting the statement of another witness as her own. While correctly criticising the conduct of the officer in copying the statement of another witness, his Honour reached the view that the officer in question, and other officers who gave evidence, were witnesses of truth. These findings were open to his Honour.
- [18] The appellant complained that the police acted unlawfully in detaining him. He maintained he had done nothing wrong and there was nothing in his conduct to justify the actions of police. He argued that the events at Stuart Park would not have occurred but for the aggressive and abusive behaviour of police officers.
- [19] The appellant's contention was not accepted by the Magistrate. His Honour found that the police officers formed the view that the appellant was "drunk and needed to be detained under protective custody provisions of the *Police Administration Act*". His Honour was satisfied that when the appellant argued "the toss", Superintendent Rennie attempted on more than one occasion to explain why the appellant was being detained, but the appellant resisted the officers in the execution of their duty. His Honour was satisfied that the police officers acted lawfully.

[20] It was open to the Magistrate to reach these views. Indeed, having accepted the evidence of the police officers, these findings were inevitable.

[21] The appellant repeatedly asserted that the police witnesses had lied. These assertions were based upon three primary propositions. First, that Constable McLean lied when he said that he was unable to identify the appellant from something removed from the appellant's pockets. The appellant contended that as there was no document of identification in his possessions lodged at the Watchhouse following his arrest, it followed that Constable McLean had lied.

[22] Constable McLean gave the following evidence:

“Q. How did you get our names?

A. I believe name checks were done. I believe when I searched your pockets I removed something with your name on it, possibly a driver's licence.

Q. A driver's licence?

A. I think so. There was some card there.

Q. With my photo on it?

A. I think so, I don't know. There was something in there. We did names checks, we do those too.

Q. Who's we?

A. Police.

Q. So you did. So how did you get my name?

A. How do I know who you are?

Q. How did you get my name?

A. As the evening transpired your name became apparent.

...

Q. Who told you it was my name?

A. I don't have a recollection of who told you [sic]."

[23] The Watchhouse record contains an entry that a wallet containing papers was lodged. It does not follow from the Watchhouse record, therefore, that there was no form of identification in the wallet. The incident occurred on 11 April 2008 and Constable McLean was giving evidence three months later purely from memory and about a topic which he had no cause to consider before giving evidence. It is not surprising that his evidence was vague and, contrary to the appellant's contention, it is far from obvious that Constable McLean lied.

[24] Secondly, notwithstanding that the appellant had no memory of the events at Stuart Park, the appellant maintained that the police witnesses lied when they said he was pushed against a wall. This was a lie, said the appellant, advanced in order to explain his facial injuries, but it was abandoned by the prosecution when it became apparent during his cross-examination of police witnesses that the injuries could not have been sustained in such an incident.

[25] There are two major obstacles facing this contention. First, the appellant said he had no memory of the events at Stuart Park. Secondly, there is no suggestion that the prosecutor or prosecution witnesses ever suggested to the Magistrate, either directly or indirectly, that the incident against the wall

was responsible for the appellant's facial injuries. This complaint amounts to mere speculation by the appellant without any foundation in the evidence.

[26] Thirdly, the appellant contended that the evidence of Constable Seears concerning the backwards head butt was a fabrication. The appellant maintained that that was obvious because, given the positions described by Constable Seears, it was impossible for the head butt to have occurred and to have struck the officer in the right side of the head.

[27] This contention was a legitimate argument to put to the Magistrate, but the Magistrate accepted the evidence of Constable Seears and it was open to his Honour to do so. It is perfectly understandable that evidence given months after the events concerning the positions and angles of bodies during a moving altercation is hardly likely to be precise in the manner suggested by the appellant.

[28] In connection with the backwards head butt which was the subject of count 3, the appellant contended that there was no evidence that Constable Seears sustained any harm as a consequence of the head butt. Constable Seears gave evidence that following the head butt, he was disorientated. Harm is defined in s 1A of the *Criminal Code* as meaning "physical harm", whether temporary or permanent, and "physical harm" is defined to include "any physical contact with a person that a person might reasonably object to in the circumstances". The backwards head butt plainly fell into that category of harm.

[29] In challenging the reasons of the Magistrate, the appellant referred to his Honour's finding that the last police officer to give evidence, Constable Dirkson, saw only the second ground stabilisation. The Magistrate said:

“... I believe [Constable Dirkson] only saw the second ground stabilisation. He having parked 30 or 40 metres up the road, got out and walked back, I think that the first ground stabilisation had happened after he saw the three of you in the entrance to the alleyway and before you were ground stabilised the second time.”

[30] The appellant submitted that in the time taken by Constable Dirkson to park the car and walk back to the scene, it was not possible for all of the events to have occurred.

[31] In my view, the finding that Constable Dirkson saw only the second ground stabilisation was open to the Magistrate. After the first ground stabilisation, the appellant was brought to his feet and the officers started to move him toward the police vehicle. Constable Dirkson first saw the appellant standing near the wall with two officers and he was unable to say whether the officers were holding the appellant or not. Other officers were observed by Constable Dirkson within a fairly close area. It is quite possible that Constable Dirkson saw the group immediately after the appellant had been brought to his feet following the first ground stabilisation. Constable Dirkson then parked the vehicle and commenced to walk back to the scene. There was ample time for the second altercation to occur while Constable Dirkson was not paying attention to the scene and his view of the events recommenced with the second ground stabilisation having occurred.

[32] Included in the appellant's challenges to the reasons of the Magistrate was a complaint that in finding the appellant guilty of count 7, the Magistrate relied entirely upon an audio visual record in the form of a DVD taken by cameras situated in the Watchhouse. Count 7 was a charge of behaving in an offensive manner by urinating over the cell door and the appellant submitted that the evidence in the form of the DVD, unsupported by any other evidence, was an inadequate basis for a finding that he performed such an act.

[33] Based on his own viewing of the DVD, his Honour found:

“You certainly urinated over the cell door, that was there for all of us to see, and more than once and in my view, that was offensive behaviour under the *Summary Offences Act* as particularised.”

[34] I have looked at the DVD. It is perfectly obvious that on two occasions the appellant, unsteady on his feet, shaped up to the doorway in a urinating stance. His actions are strongly suggestive of removal of his penis for the purposes of urinating. However, the image is not clear enough to discern that urinating actually took place. There is no sound accompanying the image. There was no evidence given by any witness that they observed urine in the cell.

[35] The appellant had consumed a significant quantity of alcohol. On two occasions he plainly engaged in actions from which it can reasonably be inferred beyond reasonable doubt that he removed his penis for the purpose

of urinating. It was open to the Magistrate to conclude that the act of urinating occurred.

[36] In connection with the DVD, the appellant submitted that as it was readily apparent that the DVD did not contain the original visual images and was only an edited version, it was not the best evidence and was inadmissible. This complaint is without substance. The oral evidence linked the DVD to the incidents in question and it was admissible.

[37] The charge of behaving in a disorderly manner at Stuart Park was based on the appellant's conduct which the Magistrate summarised as "screaming out on a major highway of Darwin, and near the central business district, words to the effect of 'fuck you, Jihad against the police, I'll kill you'". His Honour described the appellant as truculent, aggressive, upset and angry. The appellant submitted that this behaviour was little different from his conduct in saying "fuck the police" or words to that effect while in the Watchhouse in respect of which the Magistrate was of the view that the police would be "too sensitive" to have been offended.

[38] In my view the Magistrate reached the correct conclusion as to the conduct and words amounting to behaving in a disorderly manner at Stuart Park. The conduct, including the words, was significantly more aggravated than the words used at the Watchhouse. In respect of the words used at the Watchhouse, I note that while the Magistrate was not satisfied that the words alone amounted to behaving in a disorderly manner, his Honour was

satisfied that the appellant behaved in a disorderly manner because the words were accompanied by the actions of the appellant in kicking the plastic crate in anger.

[39] The appellant complained of error by the Magistrate in finding that the appellant was drunk. This finding was based upon the evidence of police officers as to the appellant's condition. In addition, however, his Honour observed that the appellant had admitted to the court that he was drunk. This observation was incorrect.

[40] The appellant did not admit that he was drunk on the occasion in question. It appears that the Magistrate confused a statement by the appellant that he was drunk on a previous occasion when he had an altercation with police. In my opinion, however, this slip by the Magistrate was of no consequence. His Honour accepted the evidence of the police officers as both truthful and reliable and that evidence plainly established that the appellant was drunk.

[41] The final complaint upon which it is appropriate to comment is a complaint that the Magistrate erred in finding that the appellant's actions "were voluntary and not as a result of his being in a state of automatism".

[42] Most of the Crown evidence was completed on 14 July 2008. When the hearing resumed on 15 July 2008 the Magistrate decided that the hearing should not proceed that day because the appellant informed him that he had not slept for 24 hours and it was apparent to his Honour that the appellant had not had much sleep the previous night. Discussion occurred concerning

the issue of a subpoena for medical evidence in the course of which the prosecutor indicated that on her reading of the material it did not support a conclusion that the appellant had sustained concussion. The Magistrate then made the following observation:

“Well, I mean, concussions can be a matter of inference if he’s got a bashed face I’m prepared to infer on a reasonable basis that there was some concussion, I don’t – but that’s a matter for you and further submission, all right.”

[43] As I have said, in evidence the appellant said that he recalled being at Stuart Park and surrounded by policemen, but the next he knew was waking in the Watchhouse with blood all over his face. In cross-examination the appellant said he was not even sure about being surrounded by policemen.

[44] In submissions to the Magistrate the appellant accepted that Constable Millar received an injury, but said that he was not in control because he was suffering from a “head injury”. The appellant referred to his condition of agoraphobia and panic attacks from which he suffered.

[45] The appellant also submitted that the evidence demonstrated there were periods of calm and then periods of outbursts. He contended that these periods were “consistent with a head injury of the type that would cause a concussion and concussion that can cause automatism”.

[46] The Magistrate found that the appellant sustained “not insignificant” facial injuries when he was thrust to the ground face downwards. It appears that his Honour was prepared to infer that there may have been some degree of

concussion, but there was no evidence to support a conclusion that it was reasonably possible that the appellant was suffering from “automatism” or from some form of brain injury which would have prevented him from forming the necessary intention to commit the offences. The evidence fell far short of providing a basis for a conclusion that it was reasonably possible that the appellant did not possess the necessary intention. This complaint is not made out.

[47] I am unable to discern any basis upon which it can reasonably be said that a miscarriage of justice has occurred. The appeal is dismissed.

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