

*Jensen v Davis* [2010] NTSC 48

PARTIES: CHRISTOPHER ANDREW JENSEN

v

STUART AXTELL DAVIS

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
TERRITORY EXERCISING  
APPELLATE JURISDICTION

FILE NO: JA 48 of 2009 (20907145)

DELIVERED: 22 September 2010

HEARING DATES: 24 March 2010

JUDGMENT OF: KELLY J

APPEAL FROM: WALLACE SM

**CATCHWORDS:**

*Gipp v R* [1998] 194 CLR 106; *M v R* (1994) 181 CLR 487; *Uranerz v Hale* (1980) 30 ALR 193, referred to.

**REPRESENTATION:**

*Counsel:*

Appellant: Self  
Respondent: C Dixon

*Solicitors:*

Appellant: Self  
Respondent: Director of Public Prosecutions

Judgment category classification: C  
Judgment ID Number: KEL 10008  
Number of pages: 8

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

*Jensen v Davis* [2010] NTSC 48  
No. JA 48 of 2009 (20907145)

BETWEEN:

**CHRISTOPHER ANDREW JENSEN**  
Appellant

AND:

**STUART AXTELL DAVIS**  
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 11 August 2010)

- [1] In February 2009, the appellant, Christopher Jensen, worked as a mini-bus driver in his mother's business. At about 8 o'clock in the morning on 25 February 2009 he picked up some passengers at the Holiday Inn in Darwin. While in the driveway of the Holiday Inn, he spoke to his mother on his mobile telephone. Constable Cramp was driving down the Esplanade and saw him. Constable Cramp formed the view that Mr Jensen was still talking on the phone as he turned his min-bus onto the Esplanade and pulled him over.
- [2] While Constable Cramp was in the process of collecting the details of the mini-cab and Mr Jensen's licence, and writing out an infringement notice,

Mr Jensen became upset and started protesting loudly. Matters escalated and Constable Cramp arrested Mr Jensen, put him in the back of a caged police vehicle, and took him back to the Darwin watch house.

- [3] As a result of the incident on the Esplanade, Mr Jensen was charged with driving while using a phone, disorderly conduct, and resisting a police officer in the exercise of his duty. He pleaded not guilty and was acquitted on all three charges.
- [4] At the Darwin watch house there was a further incident, the bulk of which was captured on very poor quality cctv. Mr Jensen continued to protest – speaking loudly and quickly and conducting himself physically in what the learned magistrate described as “a fairly uninhibited way”. The noise attracted Constable Baker who assisted Constable Cramp to escort Mr Jensen to a cell.
- [5] According to Constable Cramp, as they were placing Mr Jensen in a cell, Mr Jensen spat in Constable Cramp’s face. As a result, Mr Jensen was charged with assaulting a police officer.
- [6] He was convicted on this charge in the Court of Summary Jurisdiction and has appealed to this Court against his conviction. The sole ground of appeal is “that the evidence before the Court did not support a finding of guilt”.
- [7] Constable Cramp, Constable Baker and Mr Jensen gave evidence before the learned magistrate and the cctv footage was tendered.

- [8] Constable Cramp gave evidence that, as he was placing Mr Jensen in the cell, Mr Jensen “spun around”, said, ‘Fuck you,’ and spat in Constable Cramp’s face. Spit landed on Constable Cramp’s chin and neck and the front of his shirt. Constable Cramp told Mr Jensen he was under arrest for assaulting police, wiped his face, closed the door of the cell, and went to wash his face with disinfectant.
- [9] Mr Jensen gave evidence that he did not spit at Constable Cramp. He simply made a spitting motion towards the floor in the direction of Constable Cramp as a gesture of contempt. He was so scared that he could not get any saliva up and nothing came out of his mouth.
- [10] Constable Baker said that as they put Mr Jensen into the cell, Mr Jensen lunged his head forward and spat and said, “Fuck you.” He saw the spit come out of Mr Jensen’s mouth in the form of spray, in the direction of Constable Cramp but didn’t observe any actually on Constable Cramp. He was not cross examined in any detail and was not asked if he saw Constable Cramp wiping his face, or washing his face with disinfectant.
- [11] The cctv footage which was tendered is frustratingly incomplete and of poor quality. It shows three police officers (Constable Cramp and Constable Baker and one other) putting Mr Jensen in the cell. It shows Constable Cramp turning away to leave the cell and then turning back evidently in response to something that occurred in the cell. It then shows Constable

Cramp closing the cell door and Constables Cramp and Baker walking in a leisurely fashion back down the corridor.

[12] The learned magistrate said that the cctv footage was of no assistance. It did not show Mr Jensen during the incident; it did not show Constable Cramp wiping his face; and it did not show him not wiping his face.

[13] In finding Mr Jensen guilty of the charge of assaulting a police officer, the learned magistrate said, “I just do not believe Mr Jensen when he says no spittle came out of his mouth. I can only conclude on the evidence before me that the striking of Cramp with the spittle was intentional and I can’t, in light of what Jensen’s evidence is, find any reason to doubt otherwise.”

[14] Because he found the cctv evidence of no assistance, the magistrate’s decision was based squarely upon his view of the credibility of the witnesses. He found Constable Baker in particular to be an honest and compelling witness. He also believed the evidence of Constable Cramp and disbelieved that of Mr Jensen on the issue in question. Accordingly, it would be wrong to reverse the finding of the learned magistrate that Mr Jensen spat on Constable Cramp unless it is seen to be clearly wrong on grounds that do not depend merely on credibility, for example on the ground that the evidence which was accepted was inconsistent with established facts

or was so improbable that no reasonable person could accept it or that his conclusion was otherwise affected by some error of fact or law.<sup>1</sup>

[15] The account given by Constables Cramp and Baker and accepted by the magistrate was not inherently improbable. The sole ground of appeal is that the conviction was not supported by the evidence. The only objective evidence available was the cctv footage which the learned magistrate found to be of no assistance.

[16] I have considerable sympathy with the learned magistrate's view that the cctv footage was unhelpful; it is very short and of poor quality and parts of Constables Cramp's body are obscured during a crucial part. However, having viewed it numerous times I am of the view that the cctv footage is in fact inconsistent with the evidence of Constable Cramp that Mr Jensen spat on him (rather than, as Mr Jensen said, in his direction); that the spit landed on his face; and that he wiped his face with his hand.

[17] First, the cctv footage shows that Constable Cramp had almost closed the door and his face was turned away from the cell when whatever happened in the cell happened. That, by itself might be equivocal. It might be that it was the utterance, "Fuck you," that caused him to turn back and that was followed by the spit. However, Constable Cramp's evidence on the sequence of events was not clear but seemed to be that the spitting occurred

---

<sup>1</sup> *Uranerz v Hale* (1980) 30 ALR 193 per Gibbs J at 199

while the door was being closed. The relevant part of his evidence is as follows:

“... As we’ve placed Mr Jensen into the cell he spun around said, ‘Fuck you’, and spat in my face. I’ve then reached back as if I was going to punch Mr Jensen in the face. However, I instead stepped back and closed the door and advised Mr Jensen that he would also now have an additional charge of assault police added to the traffic and the summary offences. ...

... HIS HONOUR: Perhaps if you could run that sequence again, and Mr Cramp if you would tell me as best you can the moment when you say you were spat at? --- Just as we pushed him in. That’s where I’ve said you’re under arrest, assault police as well, and that’s where I’ve just wiped my face. I’ve then gone down to the wash bay and used disinfectant and washed my face. ...

- - - you saying to – then it’s closed again. When Mr Jensen spat at you did that happen before Mr Stroud started closing the door the first time?---He was put into the cell, he spun around and spat at me. I wasn’t closing the door.

I’m not suggesting that you’re closing the door, I’m saying that - - -

HIS HONOUR: Can you answer the question, Mr Cramp. Do you know whether the door was stationary or moving at the moment that you were spat upon?---Going off the footage, as he’s put in the door is starting to be closed.

You’d say it’s - - -?---He spat at me as the door is closing.

MR ABAYASEKARA: When he’s done that you say that you told him at that point that ---? --- At that point I’ve said - - -

- - - that he’s going to have to be charged with assault police?---Yes. Then the door is closed.”

[18] Constable Baker’s evidence of the sequence of events seems to indicate that the spitting came first. He said:

“... MR FISHER: Now, when do you say the spit happened?---Just as we put him into the cell, he turned around and lunged – like lunged his head forward and spat, and said words to the effect of ‘Fuck you’. And then as we were walking down there, I advised Constable Cramp, I said that I was happy to provide a statement with what I saw. ...”

- [19] That does not seem to be consistent with the sequence of events shown on the cctv footage. As the door was closing, Constable Cramp’s face was turned away from the cell.
- [20] Secondly, when Constable Cramp’s face was towards the cell, he displayed no flinching, or drawing back in disgust as one might expect if spit had just landed in his face. Nor did he wipe his face at that point. He turned away and shut the door.
- [21] There follows on the cctv footage a short sequence in which most of Constable Cramp is briefly hidden behind another police officer. I take it that that is the segment which Constable Cramp insisted showed him wiping his face. As the learned magistrate pointed out, it does not. However, in my view the learned magistrate was wrong in finding that it did not show Constable Cramp not wiping his face. Constable Cramp’s right hand is visible at all times being used to close the cell door. He passes behind the other police officer for a second and when he is seen again, his head is up and his left hand is not raised to his face but by his side; he is turning smoothly and walking in an unhurried fashion down the corridor side by side with another police officer. This, it seems to me, is inconsistent with

Constable Cramp's evidence that he instinctively wiped his face after the instinct of wanting to punch Mr Jensen.

[22] In my view, therefore, there is objective evidence of established facts (namely the sequence of events shown on the cctv footage) which is inconsistent with the evidence of Constable Cramp upon which the learned magistrate based his finding that Mr Jensen's spittle landed on Constable Cramp's face.

[23] On this appeal the question is whether upon the whole of the evidence it was open to the learned magistrate to be satisfied beyond reasonable doubt that the accused was guilty.<sup>2</sup> If upon the whole of the evidence the magistrate, acting reasonably, was bound to have a reasonable doubt, then the verdict of guilty must be set aside.

[24] In answering that question I am bound to keep in mind that the learned magistrate was entrusted with the primary responsibility of determining guilt or innocence, and has had the benefit of having seen and heard the witnesses.<sup>3</sup>

[25] Although I come to this conclusion with some hesitation, given the quality of the cctv footage, and with considerable sympathy for the learned magistrate's dilemma, I am of the opinion that, in view of the

---

<sup>2</sup> Gipp v R [1998] HCA 21; 194 CLR 106 per McHugh and Hayne JJ at p 123, paragraph [49] re-affirming the test laid down in *M v R* [1994] HCA 63; (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at p493 paragraph [7] and affirmed in *Jones v The Queen* [1997] HCA 12; (1997) 72 ALJR 78; 149 ALR 598.

<sup>3</sup> *M v R* per Mason CJ, Deane, Dawson and Toohey JJ at [7]

inconsistencies between the cctv evidence and the evidence of the police witnesses, the learned magistrate was bound to have a reasonable doubt as to the guilt of the accused and the conviction must be set aside.