Edwards v Tasker [2014] NTSC 56

PARTIES:	EDWARDS, Melinda v TASKER, Derek
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 5 of 2014 (21228782)
DELIVERED:	1 December 2014
HEARING DATES:	23 June 2014
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – Prosecution appeal against not guilty finding and consequent dismissal of charge - Aggravated assault - Conduct engaged in by respondent was to ensure safe custody and protection of detainee - Restrictions on the use of force imposed by s 153(3)(a) *Youth Justice Act* do not apply - Force "necessary or convenient" under s 152(1) *Youth Justice Act* - Appellant failed to establish error in the magistrate's conclusion that prosecution had not proved force used was unreasonable or excessive - Appeal dismissed.

CRIMINAL LAW- Appeal - Defensive conduct raised on evidence but not considered by magistrate - Strength of magistrate's findings about respondent's conduct would have equal application on consideration of

defensive conduct under s 29 *Criminal Code* – No substantial miscarriage of justice - Retrial not ordered.

Criminal Code 1983 (NT), ss 26(1), 29.

Justices Act 1928 (NT), ss 163(1), 177(2)(f).

Youth Justice Act 2005 (NT), ss 151, 151(3)(c), 152, 152(1), 153, 153(2), 153(3), 153(3)(a), 153(3)(c), 153(3)(d), 153(4).

Youth Justice Regulations 2006 (NT), regs 71(1), 71(2).

Police v Derek James Tasker [2014] NTMC 02, referred to.

REPRESENTATION:

Counsel:

Appellant:	S Robson
Respondent:	J McBride

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	J McBride

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

Edwards v Tasker [2014] NTSC 56
No. JA 5 of 2014 (21228782)

BETWEEN:

MELINDA EDWARDS
Appellant

AND:

DEREK TASKER
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT
(Delivered 1 December 2014)

Introduction

[1] The respondent youth worker was charged on information with one count of aggravated assault upon DV, a 13-year-old male who was being held in detention at Aranda House, Alice Springs. The events giving rise to the charge took place on 9 December 2010. The charge was heard summarily ("the hearing") in the Court of Summary Jurisdiction on 5 and 6 December 2013. The trial magistrate reserved his decision and on 5 February 2014 found the respondent not guilty of the charge. His Honour published written reasons for decision.[1] This appeal is a prosecution appeal against the finding

[1] *Police v Derek James Tasker* [2014] NTMC 02 ("Reasons").

of not guilty and the consequent dismissal of the charge.[2] Such an appeal may be on a ground involving an error of law alone or an error of both fact and law.

[2] DV had been placed "at risk" (of self-harm), and the operational procedures of the detention centre therefore required that all his clothing be removed and that he be dressed in a non-rip gown. A significant factual issue at the hearing was the nature and extent of force used by the respondent to ground stabilize DV to remove his clothes. The prosecution alleged in opening that the force used by the respondent was excessive, therefore not authorised by law and therefore an unlawful assault.[3] The magistrate found that the respondent had been tasked by the OIC of the detention centre, the respondent's superior, to physically restrain DV,[4] and that it was reasonable for the respondent to ground stabilise DV. His Honour did not consider that the degree of force used to take DV to ground was unreasonable.[5] The magistrate was not satisfied that the prosecution had proved beyond reasonable doubt that the respondent applied unreasonable and/or unnecessary force to DV.[6] For that reason, he could not find that the respondent had unlawfully assaulted DV.

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[2] An informant may appeal the dismissal of a charge laid on information, although no appeal lies from an order dismissing a charge on complaint – see s 163(1) *Justices Act*.
[3] Prosecution opening, transcript p 5. The magistrate decided the case on that basis, as is apparent from Reasons [43]. In closing submissions, transcript p 103, the prosecutor argued that the force engaged in was not "reasonably necessary force" since it was clearly physical violence, and physical violence is expressly prohibited by s 153(3) *Youth Justice Act*.
[4] Reasons [65].
[5] Reasons [75].
[6] Reasons [80].

[3] The grounds of appeal are that (1) the magistrate erred in finding that the respondent's use of force was authorised in law and that (2) the magistrate erred in not ruling upon the question of whether the defendant's use of force was otherwise justified by reason of the principles of defensive conduct set out in s 29 of the *Criminal Code*.

Facts at hearing

[4] In setting out the relevant facts, I have relied (although not exclusively) on a document prepared by counsel for the appellant, which set out facts said to have been established at the hearing.[7] Counsel for the respondent did not dispute those facts.

[5] DV was born on 24 September 1997 and so, as at 9 December 2010, he was 13 years and two months old. He had been in detention since October 2009 and had spent some of that time in Darwin before being moved to Aranda House, Alice Springs ("the detention centre").

[6] The respondent was a senior and experienced youth worker of some 13 to 14 years standing. He had acted as the detention centre manager for a period of 18 months before the appointment of Barry Clee to the position in October 2009. The respondent had participated in the Professional Assault Response Training (PART) Program, in which he received training in the techniques of de-escalation of volatile situations, anger management and the use of restraints. The restraint techniques were the one-arm and two-arm

[7] Exhibit A1 on appeal, "Basic Facts Established at Hearing".

restraint, and another technique commonly referred to as the "wedgie". No aspect of the respondent's training had involved taking hold of a detainee by the throat. No instruction or procedure of the detention centre advised or authorised taking hold of a detainee by the throat.

[7] DV was an extremely difficult detainee to deal with. He was known as a "spitter" and prior to the respondent's alleged offending on 9 December 2010, DV had spat at youth workers, by his own admission at least twice.[8] However, DV's own estimate was conservative. Barry Clee said that DV had spat on him 200 times.[9] The respondent's evidence was that DV had spat at him "multiple times": at Aranda House, at Alice Springs Police watch house and at the Alice Springs courthouse.[10]

[8] On 7 December 2010, DV had threatened self-harm. A case note of that date recorded that DV had spat on youth worker Knispel, after which he was declared "at risk" and dressed in a non-rip gown, without incident.[11]

[9] In the early evening of 9 December 2010, DV had been misbehaving in the company of another detainee, KM. An Incident Report for 9 December 2010[12] recorded the nature of the misbehaviour of the two boys. The document also recorded that at 19:10 hours DV "spits towards YW Knispel and hit PO Donaldson on his chest"; further that DV was then marched to

[8] DV said in evidence at transcript p 24.2 that he would spit "every now and then", he claimed, to defend himself; see also transcript page 26.7.
[9] A reference to the evidence of Barry Clee, transcript p 45.9.
[10] Evidence of Derek Tasker, transcript p 69.5.
[11] Evidence of Barry Clee, transcript p 52.7.
[12] "Incident Report Re KM, DV", part of the "at risk" file, exhibit P4 at the hearing.

his room by Knispel and, at 20:10 hours, that DV was placed in Room 4 "for observation". The Incident Report was loaded by Barry Clee onto the IOMS System on 10 December 2010, and Clee's writing was at the top of the document.[13]

[10] As a result of the misbehaviour of DV and KM, the respondent and Barry Clee were called on duty that evening.[14] At 20:10 hours, after he arrived at the detention centre, Barry Clee placed or caused DV to be placed in an observation room. DV was not "at risk" at that time.

[11] At 20:40 hours, while in the observation room, DV threatened to harm himself. A case note recorded that the threat had been heard by the respondent and another youth worker, Jason Bryers.

[12] As a result of DV's threat of self-harm, he was declared "at risk" and certain emergency procedures were put in place. Those procedures were contained in the Youth Detention and Remand Centres Procedures and Instructions Manual[15] and the "At Risk" Procedures Manual.[16]

[13] The initial steps involved in the implementation of the emergency "at risk" procedures included:

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[13] Evidence of Barry Clee, transcript p 48. The reference to "IOMS" is to the Integrated Offender Management System. The magistrate made comment on the Incident Report document at Reasons [39], including the following statement, "Someone (I don't know who or when) has written on the top of each page 'This document posted on IOMS 10/12/10'". His Honour appears to have overlooked the evidence of Mr Clee that it was his writing at the top of each page and that he actually loaded the document onto the computerised management system on 10 December 2010. His Honour ultimately held at Reasons [62] that there were a number of untruths and inaccuracies in the Incident Report and that he gave it no evidentiary weight.

[14] Evidence of Barry Clee, transcript p 37.9/38.4; evidence of Derek Tasker, transcript p 70.

[15] Exhibit P3, Section 5.4.

[16] Exhibit P5.

(i) Youth Workers maintaining, as far as possible, a humane and supportive attitude in their dealings with the detainee and the making of active efforts to dispel the impression that any part of [the procedures] is being applied for punitive reasons;[17]

(ii) Moving the detainee to an observation room;

(iii) When placing the detainee in the observation room, endeavouring to calm the detainee and inform him regarding the "at risk" procedures, asking the detainee if he requires anything and spending "as much time as possible comforting the detainee";[18]

(iv) Removing the detainee's clothing and dressing the detainee in a non-rip gown under supervision of a youth worker;[19]

(v) Keeping the detainee under constant CCTV observation, with observation notes being made at 15 minute intervals.[20]

[14] The emergency "at risk" procedures referred to were in force pending the development of an individual management plan for the detainee by a medical professional. The magistrate found that there was no such management plan for DV for 9 December 2010.[21] The default situation was therefore that the emergency procedures were in force. Moreover, his Honour proceeded on the basis that DV had been properly placed "at risk" prior to the alleged assault, because that was the prosecution case, or was an assumed (and uncontested) fact in the prosecution case.[22]

[17] Exhibit P5, par 6.3.
[18] Exhibit P3, par 5.4.4.
[19] Exhibit P5, par 6.4(d).
[20] Exhibit P5, par 6.5(b).
[21] Reasons [38], second dot point.
[22] Reasons [42].

[15] At 20:44 hours on 9 December 2010, Barry Clee offered DV a non-rip gown to put on. DV refused to put on the gown.

[16] After DV refused to put on the gown, Barry Clee, the respondent and another youth worker, Jason Bryers, held discussions in which they planned the physical restraint of DV in order to remove his clothing and clear the room of debris. Barry Clee was the officer-in-charge. He acknowledged in evidence that it was his responsibility and at his direction that the ground stabilising of DV and the removal of his clothes took place.[23] Mr Clee assigned the role of restraining DV to the respondent, and the task of removing DV's clothing to Bryers. Clee was the self-designated 'communicator' and also had the role to clean up rubbish in the room. The respondent said in evidence that he was assigned the task of "the takedown". His role was to restrain DV and ground stabilise him on the mattress.[24]

[17] There was no further communication between Barry Clee (or any other youth worker) and DV after 20:44 hours, when DV refused the non-rip gown, up to the time the respondent, Bryers and Clee entered the observation room at 20:51 hours and the alleged assault occurred.

[23] Evidence Barry Clee, transcript p 55.8.
[24] Transcript p 71.1.

The alleged assault

[18] A disc showing CCTV footage of the observation room was tendered in evidence.[25] I extract below the magistrate's description and assessment of that evidence:[26]

> 61. In my view, the CCTV (Ex P1) speaks for itself, and is objective evidence that the following occurred:
>
> - 20:51:36 DV leaning against wall opposite the door holding playing cards, when a foot appears in doorway;
>
> - 20:51:39 Tasker walks in briskly towards DV, DV throws the cards to his left and lowers his hands, Tasker places his right hand to the back of DV's neck and turns DV's head to the right, Clee enters holding a gown;
>
> The actions of Tasker at this point are consistent with removing a spitting risk;
>
> - 20:51:42 Tasker swings DV anti-clockwise and puts him face down onto the mattress holding his right hand on the back of DV's neck and left hand to the back of DV's head; Clee is grabbing up sheets and other items and heading back towards the door; Bryers comes in and moves to the bottom half of DV;
>
> - 20:51:46 Bryers pulls shorts and underpants off DV; Tasker has his left hand on back of neck of DV and moves his right hand to small of DV's back; Clee takes items out of room;
>
> - 20:51.49 Bryers leaves room with DV's clothing; Clee returns with white sheet and throws gown next to DV; Tasker resting on his left knee with left hand still on back of DV's neck and right hand holding DV down at top of buttocks;

[25] Exhibit P1.
[26] Reasons [61].

- 20:51:51 Tasker goes up to his feet still pushing DV down with his hand; Clee moves to the left of DV.

It appears here that Tasker may have been putting himself into a position to be able to leave, but can't as Clee is still there;

- 20:51:59 Tasker goes back down onto his left knee still holding DV in the same way, while Clee moves quickly to the top of the mattress and starts collecting cards etc;

- 20:52:04 Tasker still holding DV down, Clee still picking up cards, Bryers quickly comes in and starts helping Clee pick up items;

- 20:52:07 Clee and Bryers still picking up cards; DV kicking with his legs and manages to get his right knee up to level with his right hip but flat on the mattress, Tasker moves his right hand to right hip of DV and places his right knee onto DV's right upper leg, DV straightens his right leg back below him, and Tasker moves his right hand to DV's head area;

- 20:52:08 Tasker moves his weight onto his right knee that is still on DV's upper right leg and both hands still at DV's neck/head area; Clee and Bryers are still picking up cards;

- 20:52:11 Tasker moves his right hand to somewhere above DV's shoulders;

- 20:52:20 Clee and Bryers still quickly gathering cards etc from around where DV is lying; Tasker uses his right hand and picks up something near DV's head and passes it behind him to Clee; Tasker's left hand on back of DV's neck with his thumb and forefinger closest to DV's shoulders;

- 20:52:29 Clee and Bryers kicking pieces of paint that DV had earlier peeled off the wall out the door; Tasker

picks up gown with his right hand and places it on the upper shoulders of DV;

- 20:52:32 Clee and Bryers exit the room and Tasker rises to his feet with left hand still on back of DV's neck and right hand now on upper buttocks;

- 20:52:34 Tasker moves his right foot as if to get a good start towards the door;

- 20:52:35 Tasker releases both hands off DV and rushes quickly to the door before DV can move;

- 20:52:36 Tasker has gone from the room.

[19] I have viewed the same CCTV several times and I substantially agree with the magistrate's narrative of the events depicted. The magistrate did not, at Reasons [61], mention the fact that the respondent initially took hold of DV by the throat, with his left hand, although he had referred to that action in the course of the prosecutor's closing address, where his Honour said, "… he's got one hand by the throat but the other hand is pushing his head away".[27]

[20] I would add an observation of my own with reference to the second dot-pointed paragraph, for the events from 20:51:39, where the magistrate observed, "Tasker places his right hand to the back of DV's neck and turns DV's head to the right." My observation was that the respondent approached DV front on, and cupped the palm and fingers of his right hand around the left side and to the back of DV's head, at about ear level, while at the same

time he used his thumb to put pressure on DV's left side jaw to push DV's face to DV's right and the respondent's left. I agree with the magistrate's observation that the actions of the respondent at that point were consistent with preventing DV from spitting at the respondent.

[21] My further observation in relation to the series of actions by which the respondent took hold of DV and took him to ground was that the manoeuvre was reasonably skilful, and swiftly executed. Force was used, but the force did not appear to be excessive. It probably did not require significant force for the respondent to turn DV's head to one side and then unbalance him to put him to ground, face down on the mattress. The respondent said in evidence that he "guided" DV down onto the mattress,[28] and that is consistent with what the CCTV depicts; DV does not appear to fall heavily. The respondent said he was very mindful throughout of the significant difference in weight between DV and himself.[29]

[22] With further reference to the CCTV, the magistrate observed that the actions of the respondent and the other persons with him in the room were done at pace, giving the clear impression that they wanted to be in and out of the room as quickly as possible. I agree with that observation; I had the same impression. The magistrate found that the physical contact between the respondent and DV was "for the shortest time necessary" to enable others to

[27] Transcript p 104.8; see also p 104.4. The respondent admitted that he initially grabbed DV by the throat with his left hand, at transcript p 81.8.
[28] Transcript p 82.3.

clear the room of playing cards and debris and to remove DV's clothing.[30] As a result, his Honour said that the respondent could not be criticised for any overly prolonged physical contact with DV. His Honour went on to make the following finding:[31]

> It is clear from exhibit P1, and I find that at no time did Tasker punch, slap, kick or palm strike DV. There was no gratuitous strike or punishment inflicted. Tasker said he applied force to neutralise DV's head, then take him to ground, and then to ground stabilise him. In my view this is consistent with what exhibit P1 shows.

[23] Notwithstanding the magistrate's findings and my own observations, I would still characterise the series of actions in which the respondent took hold of DV, took him to ground and then restrained him as "physical violence". The degree of physical violence was low level. That is an objective description of the actions involved, without regard to the respondent's reason or motivation for those actions.

The appellant's case

[24] On the appellant's case, the respondent's actions constituted "physical violence". Therefore, those actions could not have been "reasonably necessary force" for the purpose of s 153 *Youth Justice Act* because s 153(3)(a) expressly provides that "reasonably necessary force" does not include any form of physical violence. As a consequence, the respondent's

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[29] Transcript p 82.8. The respondent weighed approximately 110 to 120 kg at the time, and estimated that DV weighed around 45 to 50 kg. The size difference is evident in the CCTV evidence; the respondent appears quite big and beefy, DV quite thin and small.
[30] Reasons [64].
[31] Reasons [71].

physically violent acts were not authorized by s 153(2) *Youth Justice Act* and hence not authorised for the purposes of s 26(1) *Criminal Code*.

[25] The appellant's counsel argues that the learned magistrate misunderstood the prosecution case and wrongly attributed to the prosecutor a concession that the force used against DV, a child in detention, was lawful but excessive.[32] I note that, in opening the prosecution case to the magistrate, the prosecutor had said, "… the prosecution ultimately will be asserting that, regardless of whatever procedures or legislative authorities are afforded to youth workers in situations such as this, that the force used was excessive and therefore not authorised by law and therefore an unlawful assault." That statement, on its own, might be interpreted as justifying the magistrate's understanding as to a concession. However, counsel for the appellant contends that the concession attributed to the prosecutor was wrongly attributed, because, in his closing address, the prosecutor submitted that the conduct of the respondent constituted "physical violence" within the meaning of s 153(3)(a) of the *Youth Justice Act* and hence could not have been authorised.

[26] Counsel for the appellant acknowledges that the asserted error on the part of the magistrate does not lead to the result that the respondent should have been found guilty. That is because the issue of defensive conduct under s 29 *Criminal Code* was raised on the evidence but was not considered by the magistrate. Counsel for the appellant submits that defensive conduct was

"not addressed according to the test at law".[33] Accordingly, the appellant seeks a retrial.

Consideration of the appellant's case

[27] In my view there is a significant legal difficulty with the appellant's case, both at the hearing and on appeal. The prosecution case relied on the statutory prohibition of physical violence for maintaining discipline. In my judgment, however, the respondent's actions were not done for the purpose of maintaining discipline and the prohibition therefore did not apply.

[28] Section 153 *Youth Justice Act* is contained within Division 2 of Part 8, dealing with superintendents of detention centres: their responsibilities, obligations and powers. Section 153 *Youth Justice Act* should be considered in that context. I set out below s 151 to s 153 (with underline emphasis added):

> 151 Superintendent of detention centre
>
> (1) The Commissioner must appoint an employee, within the meaning of the *Public Sector Employment and Management Act*, to be the superintendent for a detention centre.
>
> (2) The superintendent of a detention centre is responsible, as far as practicable, for the physical, psychological and emotional welfare of detainees in the detention centre.

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[32] Reasons [25], [43].
[33] Appellant's Submissions, p 19, par 60(3). The relevant 'test at law' was explained in *Burkhart v Bradley* [2013] NTCA 5 at [11] et seq. Counsel for the present appellant argued at the hearing before the magistrate that the only potential lawful justification for the respondent's use of force was defensive conduct. At transcript p 104.5 onwards, Mr Robson submitted that the known risk of DV spitting, and the respondent's conduct in response or anticipation, was relevant to defensive conduct, not authorization.

(3) The superintendent of a detention centre:

(a) must promote programs to assist and organise activities of detainees to enhance their wellbeing; and

(b) must encourage the social development and improvement of the welfare of detainees; and

(c) must maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise; and

(d) is responsible for the maintenance and efficient conduct of the detention centre; and

(e) must supervise the health of detainees, including the provision of medical treatment and, where necessary, authorise the removal of a detainee to a hospital for medical treatment.

152 Powers of superintendent

(1) The superintendent of a detention centre has the powers that are necessary or convenient for the performance of his or her functions.

(2) The superintendent has power to approve the participation of a detainee in programs conducted in accordance with section 151 in place of consent by a parent or responsible adult in respect of the detainee.

(3) The powers and functions of the superintendent of a detention centre in relation to a detainee are not altered or diminished by the fact that the detainee may be outside the precincts of, or absent from, the detention centre.

153 Discipline

(1) The superintendent of a detention centre must maintain discipline at the detention centre.

(2) For subsection (1), the superintendent may use the force that is reasonably necessary in the circumstances.

(3) Reasonably necessary force does not include:

(a) striking, shaking or other form of physical violence; or

(b) enforced dosing with a medicine, drug or other substance; or

(c) compulsion to remain in a constrained or fatiguing position; or

(d) handcuffing or use of similar devices to restrain normal movement.

(4) However, if the superintendent is of the opinion that:

(a) an emergency situation exists; and

(b) a detainee should be temporarily restrained to protect the detainee from self-harm or to protect the safety of another person,

the superintendent may use handcuffs or a similar device to restrain the detainee until the superintendent is satisfied the emergency situation no longer exists.

(5) If the superintendent is of the opinion that a detainee should be isolated from other detainees:

(a) to protect the safety of another person; or

(b) for the good order or security of the detention centre,

> the superintendent may isolate the detainee for a period not exceeding 24 hours or, with the approval of the Commissioner, not exceeding 72 hours.

[29] This appeal calls for consideration of two particular statutory obligations on the part of the superintendent: the obligation under s 151(3)(c) of the Act to ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise; and the obligation under s 153(1) to maintain discipline at the detention centre.

[30] As mentioned in [24] and [27] above, the appellant's argument, both in written submissions and at the appeal hearing, proceeds on the basis that the respondent's conduct was "physical violence" and thus could not have been authorised by s 153(2) *Youth Justice Act* because force authorised under that subsection, "force that is reasonably necessary in the circumstances", is qualified and limited by s 153(3) which provides that "reasonably necessary force does not include … physical violence".

[31] Section 153(2), from which the appellant's argument derives, permits the use of reasonably necessary force "For subsection (1)", that is, in order to maintain discipline at the detention centre, which s 153(1) obliges the superintendent to do.

[32] However, the superintendent of a detention centre has a separate 'non-discipline' obligation under s 151(3)(c) to "ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise". Discharging that obligation is a

function - a mandatory function - of the superintendent. Under s 152(1), the superintendent “has the powers that are necessary or convenient for the performance of his or her functions”.

[33] It is clear from a reading of s 153(1) and (2) that s 153(3) is only concerned with the use of force to maintain discipline. It is not concerned with the use of force for purposes other than maintaining discipline. On its proper construction, s 153(3) limits force used for the purpose of maintaining discipline, and not force for other purposes.

[34] Subsection 153(4) may at first appear inconsistent with the construction in the previous paragraph, because it refers to situations where the detainee needs to be temporarily restrained to prevent self-harm or harm to others, which is not essentially a ‘discipline’ situation but rather (on my interpretation) a ‘safe custody and protection’ situation within the superintendent’s functions or obligations set out in s 151(3)(c). However, I do not consider that s 153(4) affects the construction explained in [33]. A logical explanation, should one be required, is that s 153(4) is inserted at that point because it is a specific qualification or exception to the immediately preceding ban on handcuffing and other restraints specified in s 153(3)(d), in that it expressly permits handcuffs or similar devices to be used in emergency situations, notwithstanding the bar on their use in situations which are not emergency situations.

[35] I am satisfied that the purpose of the conduct engaged in by the respondent from 20:51:39 hours on 9 December 2010 was not to maintain discipline at the detention centre, but was rather for ensuring the safe custody and protection of DV. Therefore, the restriction on the superintendent's use of force imposed by s 153(2) and s 153(3)(a) did not apply, because they were restrictions on the use of force to maintain discipline. The only relevant statutory restriction on the use of force against DV on 9 December 2010, implied by s 152(1), was that the use and extent of force had to be "necessary or convenient" for the performance of the superintendent's function to ensure the safe custody and protection of DV. Reasonableness was also implied, consistent with regulation 71(2) *Youth Justice Regulations*,[34] but physical violence was not excluded.

[36] At the time of the appeal hearing in late June 2014, I had not reached the conclusions set out in paragraphs [33] and [35], and so neither counsel had the opportunity to make submissions on a point which, I determined, was crucial. Accordingly, I arranged for counsel to be notified of my preliminary conclusions on 14 November 2014 to enable them to provide further submissions. An extension of time was granted to enable counsel for the

[34] Regulation 71(1) *Youth Justice Regulations* relevantly provides: "… if it is necessary to physically restrain a detainee for the protection of a detainee, other detainees or other persons, physical force may be used." That regulation is relevant to the s 151(3)(c) function or obligation of the superintendent of a detention centre. Regulation 71(2) states that the force used "must not exceed force that is reasonable in the circumstances." Somewhat incongruously, regulation 71(1) is expressed to be subject to regulation 70(2), whereas regulation 70 is concerned with "management of misbehaviour" and, in that context, provides "In the discipline or control of behaviour of detainees, a practice that is prohibited by the rules of the detention centre must not be used."

appellant to prepare and file supplementary submissions. Counsel for the respondent was overseas, but given my ultimate conclusions it was not necessary to delay my decision pending receipt of further submissions on behalf of the respondent.

[37] Counsel for the appellant filed further, detailed, written submissions in which he argued that the respondent's conduct "in forcing DV's compliance" with the requirements of the Emergency Management Protocol was "a matter of discipline"; therefore, the specific power under s 153(2) to use "reasonably necessary" force applied, together with the prohibition under s 153(3).[35] I reject the factual basis on which that submission is made. Mr Clee, Mr Bryers and the respondent were not, relevantly, forcing DV's compliance but were acting to ensure that they, as youth workers at the detention centre, complied with *their* obligation[36] to remove the detainee's clothing after the detainee had refused to do so. It is an important factual distinction. They were not making DV take off his clothes; they were removing DV's clothes because DV had refused to do so.

[38] Similarly, in a later part of the submissions, counsel for the appellant suggested that the removal of DV's clothing was "supposedly for his own protection and to make him less suicidal".[37] I reject the submission that the purpose for removing DV's clothing was to make him less suicidal. Rather,

[35] Appellant's further written submissions, dated 26 November 2014, paragraph 2.
[36] See sub-paragraph (iv) in [13] above.
[37] Appellant's further written submissions, paragraph 9.

it was to deny him the means of suicide or self-harm. That is also an important factual distinction.

[39] Counsel for the appellant also submitted that the respondent used force to subjugate and control the disobedient DV in order to achieve the object of having DV dress in a non-rip gown, and thus the respondent "was engaging in an act of discipline",[38] in effect because he was subjecting DV to rules, forcing him to obey and conform.

[40] Counsel for the appellant further submitted that there is no basis or need to imply from s 152(1) a general and undefined power authorising the use of physical force/violence against a detainee for his or her safe custody and protection, because: "In practical terms all scenarios where it might prove necessary for a youth worker to use physical force against a detainee come down to the exercise of the disciplinary power"; and: "It is always a matter of discipline, regardless of whether the overlying purpose is to correct the detainee or to ensure that the detainee is kept safe and protected from himself."[39]

[41] I find myself unable to agree with the several propositions which I have quoted in the preceding two paragraphs. As a matter of law, the appellant's argument fails to take account of the fact that the Act creates separate and distinct obligations on the part of the superintendent, as explained in [29]

[38] Appellant's further written submissions, paragraph 5.
[39] Appellant's further written submissions, paragraph 6.

and [32], and that the prohibition on physical violence only applies to one of them, as explained in [33]. Moreover, the practical fallacy with the appellant's argument is apparent when one considers the range of potentially dreadful situations in which a detainee might cause serious or fatal harm to himself, to fellow detainees or to other persons within the precincts of the detention centre. It would be quite extraordinary in such circumstances if, because of the prohibition on physical violence for maintaining discipline, a necessary but physically violent intervention could not take place to ensure the protection of affected persons. The argument that 'it is always a matter of discipline, regardless of whether the overlying purpose is to correct the detainee or to ensure that the detainee is kept safe and protected' cannot be sustained.

[42] The learned magistrate raised this very issue in the course of the prosecutor's closing address. I set out an extract from the exchange between his Honour and the prosecutor:[40]

> MR ROBSON: Of course, an absurdity in this case, your Honour, is that the actions of the defendant weren't to discipline DV. They were to implement 'at risk' procedures, which are meant to be a protective measure. So if physical violence cannot be used in disciplining a detainee, plainly similar force, physical violence is not authorised in implementing these protective measures for the benefit of a detainee. It would be an absurd result of the legislation if somehow more extreme force could be used in a case such as this, where a detainee is 'at risk', than would otherwise be the case in disciplining the detainee.
>
> HIS HONOUR: But isn't the consequence more serious? If you've

[40] Transcript p 103.6.

> got someone who might kill themselves that you have to take more strenuous action to prevent it?
>
> MR ROBSON: Well, but in my submission that that action cannot exceed or cannot fall into the realm of physical violence because of the provisions of the Act itself, which cannot be trumped by any regulation or any procedural guideline, your Honour, as I've submitted. If the Act prohibits physical violence in disciplining, it must also prohibit physical violence in implementing protective measures."

[43] It may be noted from the above extract that, in his closing submissions in the Court of Summary Jurisdiction, the prosecutor conceded (indeed submitted), contrary to what is now submitted in [37] and [39], that the actions of the defendant were not to discipline DV, but to implement the 'at risk' protective measures. The prosecution contention was that, if the Act prohibited physical violence in disciplining, it must also be taken to prohibit physical violence in implementing protective measures. The prosecutor was thus arguing that there was an *implied prohibition* on physical violence in implementing protective measures because there was an express prohibition on physical violence in maintaining discipline. The prosecutor did not in that context refer the magistrate to the superintendent's separate obligations set out s 151(3)(c) of the Act and the powers granted to the superintendent under s 152(1) of the Act.

[44] I now turn to consider the separate components of the respondent's conduct, namely the initial taking hold of DV for the purpose of taking him to ground, and then the combination of the takedown and ground stabilisation. The magistrate made clear findings about those matters:

Paragraph 72

“I find it was both reasonable and necessary for Tasker to take action to neutralise the threat of spitting by DV. He did so by forcing DV’s head towards his right shoulder. This action would appear consistent with the achieving this objective.”

Paragraph 73

“I find it was reasonable and prudent for Tasker to take hold of DV in the head area and turn his head away from him, and use sufficient force to keep his head pointing away. Whilst the size differential raises issues as to what level of force would be reasonable, it is not clear, in my view, that the level of force used to achieve this necessary aim was excessive.”

Paragraph 74

“ … it was necessary to ground stabilise DV, for a number of reasons … [to reduce the risk of Bryers being punched or kicked in removing DV’s clothing, to reduce the risk of DV hurting himself if he had the opportunity to flail his arms and legs freely, and to give Tasker the best opportunity of exiting the room without repercussions from DV].”

Paragraph 75

“I find it was reasonable for Tasker to ground stabilise DV as he was directed to by Clee. Choosing to do so on the mattress was a reasonable decision and one which was likely to reduce the risk of harm to DV. I do not find that the degree of force used to take DV to ground was unreasonable. He was not lifted off his feet and thrown onto the ground. He was not pole-driven into the mattress.

Paragraph 76

“When DV was initially held down on the mattress the force applied did not appear to be excessive …”.

Paragraph 78

> "While Tasker is holding DV down … His behaviour is consistent with him wanting to get out as quickly as possible."
>
> Paragraph 79
>
> "Whilst it is arguable that Tasker might have been able to achieve his lawful purpose using less force than he did, it is also equally arguable that if he had used less force he could have increased the risk of injury to himself, to DV, and to Clee and Bryers."

[45] I refer also to the magistrate's findings extracted at [18] and [22] above.

Conclusions

[46] In relation to ground 1 of the appeal, the appellant is correct that the magistrate did not determine the issue raised by the prosecutor in relation to s 153(2) and (3) *Youth Justice Act*. However, in light of my conclusions and findings at [27], [32] and [35], there was no need for his Honour to do so. In my view, the prosecution's reliance on s 153(3) was misconceived.

[47] The appeal should be dismissed. The appellant has not established error in the magistrate's findings or in the conclusion reached by his Honour that the prosecution had failed to establish that the force used by the respondent in each of the component actions taken by him against DV was unreasonable or excessive, and hence not authorized.

[48] Further, even if any one or more of the respondent's actions were unauthorized, and the magistrate, as asserted in ground 2, did not specifically consider whether the respondent's actions were reasonable in terms of defensive conduct (self-defence), as distinct from reasonable in

terms of the degree of force in ensuring the safety and protection of DV, I would not order a retrial because of the strength of the magistrate's findings, including those set out in [44], which would have equal application on a consideration of defensive conduct under s 29 *Criminal Code*. I am satisfied that there has been no substantial miscarriage of justice.[41]

[49] The appeal is dismissed.

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[41] See s 177(2)(f) *Justices Act*.