

**McKinnon v R**

**19 October 2004, 12 November 2004  
(BR) Martin CJ, Angel and Mildren JJ  
[2004] NTCCA 8**

The appellant was found guilty by a Darwin Supreme Court jury of one count of assault together with the circumstance of aggravation that the victim was unable to affectively defend himself due to his situation of being handcuffed.

The Crown case was that the appellant, a security guard working in Mitchell Street, Darwin, together with another security guard arrested a member of the public (W) who was observed to be intoxicated, rude and making excessive noise. Prior to trial, following a request by the appellant, the Crown provided particulars of the overt acts said to constitute the offence of assault. It was alleged that the appellant assaulted W by taking hold of him and throwing him to the ground where handcuffs were applied. After W was handcuffed the appellant grabbed W in a choking type hold and lifted him onto a bench. While W was sitting limply on the seat, the appellant grabbed him around the throat, lifted him off the chair and threw him into the ground or threw him headfirst into the pavement. The appellant then put W back onto the seat.

At trial two police officers gave evidence that when they arrived on the scene they observed the appellant standing behind W who was then seated on the bench. They said that W tried to stand up from the bench, that the appellant then grabbed W around the neck in a choke hold, lifted him up briefly, slammed him back down on the seat and shook him. This evidence did not form part of the particulars that had been provided to the defence.

While the jury was considering its verdict, it sought assistance on a number of issues including the evidence of the two police officers “in relation to the treatment of W during such time as they were present”. Appellant’s counsel submitted that the Crown case was concerned with a transaction that had ended prior to the arrival of the police. According to the Crown particulars, it was not part of the prosecution case that the treatment of W by the appellant as witnessed by the police officers could be the basis for a conviction of assault. The trial judge determined that the evidence of the police officers should be read to the jury and that no qualification by way of direction should be given.

Leave to appeal against the findings of guilt was granted on 5 March 2003.

The Court of Criminal Appeal allowed the appeal holding:

1. The trial was conducted on the basis that the acts observed by the police officers were not capable in themselves of constituting the offence charged. Accordingly, at trial, the appellant did not address the reliability of the police observations which were contradicted by the evidence of other witnesses. Nor did appellant’s counsel address the question of whether there was a reasonable possibility that such acts were justified in law. The trial judge should have directed the jury that the acts observed by the police officers were no more than part of the total context in which the particularised events occurred. The failure to do so amounted to a miscarriage of justice.

2. The failure of the trial judge to make any mention of section 27 of the *Criminal Code* (which justifies the use of force when making an arrest or preventing the continuance of a breach of the peace) when the very issue for the jury's determination was whether or not the appellant's actions when arresting W were justified constituted a fundamental flaw in the trial.

The court quashed the findings of guilt and directed that a judgment and verdict of acquittal be entered.