

CITATION: *Marinov v Noble* [2007] NTMC 082

PARTIES: IVAN MARINOV

v

ELLE NOBLE

TITLE OF COURT: Youth Justice Court

JURISDICTION: Youth Justice Court

FILE NO(s): 20708060

DELIVERED ON: 30th November 2007

DELIVERED AT: Darwin

HEARING DATE(s): 23 November 2007

JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

Defensive action – Citizens arrest – Section 29 Criminal code – Section 441 Criminal code.

REPRESENTATION:

Counsel:

Crown: Mr Smith

Defendant: Mr Norris

Solicitors:

Crown: Director of Public Prosecutions

Defendant: North Australian Aboriginal Justice Agency

Judgment category classification: C

Judgment ID number: [2007] NTMC 082

Number of paragraphs: 30

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20708060

[2007] NTMC 082

BETWEEN:

IVAN MARINOV

AND:

ELLEN NOBLE
Defendant

REASONS FOR DECISION

(Delivered 30th November 2007)

Ms FONG LIM RSM:

1. The defendant pleaded not guilty to charges that she:
 1. Trespassed on premises, namely, 11 / 25 Bradshaw Terrace Nakara
 2. Unlawfully assaulted Liam Samuels with the aggravating circumstance that she threatened Liam Samuels with an offensive weapon namely a piece of timber.
 3. Unlawfully assaulted Geoffrey Charles Samuels with the aggravating circumstance that she threatened Geoffrey Charles Samuels with an offensive weapon, namely a piece of timber
 4. Did resist a member of the police force in the execution of his duty.
2. Evidence was called from the alleged victims, Liam and Geoffrey Samuels, a neighbour and the defendant also gave evidence. In addition several statements of police officers were tendered.

3. The evidence is uncontroversial on some issues:
 - a. Liam Samuels was the owner of Unit 11/25 Bradshaw terrace Nakara.
 - b. Liam Samuels required a young man who he found to be trespassing on his property to remain there until the police arrived.
 - c. That the Defendant came onto the property with the intention to extricate the young man from the property.
 - d. That the Defendant slapped, punched and spat on Liam Samuels.
 - e. The Defendant also accepts that she threw a large rock at Liam Samuels and hit him with a piece of timber.
 - f. The Defendant hit Geoff Samuels with a piece of timber.
4. The evidence on the trespass and resist police was uncontested.
5. In relation to the assaults there was no issue of identification or that the assaults occurred. The issue was whether the Defendant could be excused from criminal responsibility for the assaults pursuant to section 29 of the Criminal Code. It is the Defendant's case that the young man was being wrongfully detained by Liam Samuels and that she was trying to get him out of that unlawful detention, her solicitor argued that she was acting in the defence of another and also preventing the unlawful detention of another.
6. It was conceded by Liam Samuels that even though he did not initially lay a hand on the young man, who he had found trespassing on his property, he did so when the Defendant tried to physically remove the young man and would have done had he tried to escape. Therefore it is clear from the evidence that Liam Samuels had effected what is known as a "citizen's arrest".
7. The evidence of both Liam Samuels and Geoffrey Samuels was given in a straight forward and frank manner. They were mostly consistent with there

description of the events and any inconsistencies are minor and can be explained by the vagaries of the human memory. Mr Liam Samuels made the proper concessions in his evidence and I find both to be witnesses of credit.

8. The Defendant also gave evidence in a frank manner for the most part but was evasive in some of her answers particularly as to the identity of the young man in question and the involvement of others in the assaults on the victims. In answer to the Prosecutor's question was the young man's name "Yowane Namabi" after the defendant had identified the young man as "Yowane" she answered "Probably". In answer to Defence Counsel's question "Do you know Yowane's last name" she answered "Its'hard". The Defendant also accepted that she had been drinking on that day having consumed half of a 750ml bottle of rum. Those factors make the Defendant a less reliable witness than Mr Geoff Samuels and Mr Liam Samuels.
9. The Defendant relied on section 29(2)(a)(i) & (ii) submitting that she acted in defence of the young man who was being detained and herself and/or that she acted to stop the unlawful detention of the young man.
10. Dealing with the unlawful detention issue first, the prosecution rightly brought section 441 of the Criminal Code to the court's attention. Section 441 reads:

(2) A person, not being a member of the Police Force, may without warrant arrest a person ("the offender") where the person –

(a) finds the offender committing an offence or doing an act or behaving or conducting himself, or in such circumstances, that the person believes on reasonable grounds that the offender has committed an offence and that the arrest of the offender is necessary –

(i) to ensure the appearance of the offender before a court of competent jurisdiction;

(ii) to preserve public order;

(iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or

(iv) for the safety or welfare of members of the public or of the offender;

(b) is instructed to do so by a member of the Police Force having power under an Act to apprehend the offender; or

(c) believes on reasonable grounds that the offender is escaping from legal custody or aiding or abetting another person to escape from legal custody or avoiding apprehension by some person having authority to apprehend the offender in the circumstances of the case.

11. It is clear from the evidence that the young man had been detained by Liam Samuels. Mr Samuels heard some noise outside of his unit and when he went to see what it was he observed some youths running through his property and scaling his back fence. One of the young men had not yet made it over the fence and when challenged verbally by Mr Samuels he stopped attempting to climb. When asked by Mr Samuels why he and the others were trespassing on his property the young man gave the answer “we are running away from the Police”. Mr Samuels then indicated to the young man that was “handy” because he was to stay there until the police arrived. Mr Samuels also told the young man that he was trespassing.
12. Section 441 clearly allows a citizen’s arrest in certain circumstances. The relevant circumstances in this matter were that the youth had been trespassing on Mr Samuel’s property and Mr Samuel’s also believed he was running away from the police. The evidence is clear that Mr Samuels believed that the young man was trespassing on his property and had probably caused some damage to the lattice fence between his and a neighbours property. Mr Samuels was also led to be believe, by the young man himself, that the police were chasing them.
13. There were reasonable grounds for Mr Samuels to believe the young man had committed an offence, trespass on his property, and arrest was necessary to ensure the young man came before a court of competent jurisdiction.

Simply put if he had not been arrested by Mr Samuels at the time he would not likely be caught and taken to court. Mr Samuels also had the reasonable belief that the young man was either escaping lawful custody or avoiding apprehension by the police from the young man's own words.

14. Defence counsel argued that section 441 was not intended to allow arrest for a minor offence such as trespass. The submission was that sub sections 441(2)(a)(ii) & (iv) are an indication of the seriousness of the offending required before an arrest can be authorised by this section. There were no authorities put to the court to support that proposition. It could just as easily be argued that had the legislature intended to limit the power of arrest to offences other than minor offences then the section would have specifically limited that power. The intention of the section is clear and that is to re-established the right to citizen's arrest which had previously been brought into doubt by Mildren J in his decision in Mark Darren Hulley v Maxwell Hill (1993) 91 NTR 41 in which his honour found that the citizens power of arrest had been severely limited by the advent of the Criminal Code. The section was introduced directly as a result of that decision. In his second reading speech Minister Manzie stated:

“A recent decision of the Supreme Court has cast doubt on the existence of a citizen's right of arrest in the Northern Territory”

and later

“The power of arrest applies to all offences”.

15. The legislature intended that section to apply to all offences including trespass.
16. In those circumstances I am satisfied beyond the reasonable doubt that the arrest of the young person in question was a lawful arrest by Mr Liam Samuels. The Defendant voiced a belief that the young person was being held unlawfully to the victims and the young person and I have no doubt that

she held that belief. The question is whether her response to that situation was reasonable. I will deal with that question after considering the second arm to the Defendant's defence and that is whether she "reasonably perceived" it was necessary to act in defence of her self and/or the youth.

17. It was submitted that the Defendant assaulted both victims because she was scared of what might happen to her and the young person who was being detained. She gave evidence that she lashed out at the victims after Liam Samuels grabbed her arm to try and get her to let go of the young man she was trying to liberate. In her own words the Defendant "cracked him" she punched, slapped and spat at him. The Defendant did not allege any retaliation to her onslaught by Mr Liam Samuels nor did she allege that she witnessed any physical violence on the young man by Mr Liam Samuels. The evidence of Mr Geoff Samuels and Mr Liam Samuels is that after being assaulted by the Defendant he pushed her away from him towards the hole in the fence and the pushing action is corroborated by the Defendant in her evidence.
18. The Defendant's "Defensive conduct" of herself or the young man is only available to the Defendant as a defence if she can prove that she believed the conduct was necessary to protect herself and /or the young man from being assaulted by the victims and her conduct was a reasonable response to circumstances as she reasonably perceived them.
19. The Defendant went to great pains to point out the difference in size of Mr Liam Samuels and to emphasize that the young man being "detained" was a "little 15 year old boy" however her evidence does not support the proposition that she reasonably believed that she and he were about to be assaulted. Her evidence is confused about why she first assaulted Liam Samuels she was asked why she punched Liam Samuels and her answer was "because he wouldn't let Yowane go". She also says that she was pushed by

Mr Samuels and told that he was going to call the cops and “that’s when I punched him”. Her further evidence is that after she “cracked the big fella” she was grabbed by the older man who said that she could stay and wait for the cops and that is when she picked up a piece of timber and hit the older man. Her motivation for using the “stick” on the victims and throwing a rock was plainly set out in her evidence and that was because she didn’t want to be kept there to wait for the police. She was asked in cross examination why she did not wait for the police she answered “because I was drunk and I knew I would get locked up”. It was the Defendant’s evidence that at that stage the young man had escaped and she was trying to extricate herself from the being held to wait for the police. She clearly did not believe she was about to be assaulted she believed she was going to be held to answer to the police.

20. The Defendant did give evidence that she was scared and that the young man was also scared (even though there is no evidence to support that statement). She wasn’t directly asked what she was scared of and the defence might submit that I should infer from her evidence that she was scared of being assaulted. Her evidence in examination in chief and cross examination was peppered with references to the size of Mr Liam Samuels and the fact that “Yowane” and the defendant were alone as all of her mates had left the area. She admitted she assumed that Liam Samuels must have “knuckled or something”, “Yowane” but did not give cogent basis for her belief. She gave evidence that she felt that because of the size of the men and the fact that she and “Yowane” were alone she felt threatened and she needed to arm herself to extricate herself and her friend from the situation. The Defendant was defiant when giving this evidence, she showed that she thought she was well within her rights to protect herself from the perceived threat. The question is was the threat a threat of being assaulted.

21. Even if I accept that the Defendant perceived the circumstances as she has put to the court before she can avail herself of the defence under section 29(2)&(3) I have to be satisfied that she has produced evidence that proves on the balance of probabilities that her perception was reasonably held and that her response to that perception was a reasonable response. I further have to be satisfied that the prosecution has not negated that defence in each of its elements beyond a reasonable doubt.

22. I remind myself that the Defendant was a youth of almost 15 years at the time of the offence and that the victims were clearly stronger physically than the Defendant. I cannot be satisfied as to the physical size of the young man whether he was a “big islander male” as described by Mr Geoff Samuels or a “little boy” as described by the defendant. Mr Liam Samuels did not describe the person being held. However the Defendant has given her evidence of that her perception and that was it was her and her “little boy” friend against two adult males and by doing so has discharged the evidentiary burden of what her perception was at the time. While the prosecution has evidence that her perception was wrong I cannot be satisfied beyond a reasonable doubt that her description of the person is incorrect and therefore cannot be satisfied that her perception was not reasonably held.

23. This is a situation of oath on oath and the prosecution has not proved to me beyond a reasonable doubt that I should disbelieve that defendant’s evidence of how she perceived the balance of power between the parties involved.

24. However the Defendant also has to prove that she held the perception that she and/or the young man were going to be assaulted by the victims to justify her response, assault by punching slapping and spitting and further assault with a weapon, to the situation. The evidence does not support that proposition. The Defendant clearly wanted to extricate herself and the young man from the property and while I accept her evidence that she was scared, I

am satisfied beyond a reasonable doubt that she was scared of being caught and having to answer to the police not scared that she was going to be assaulted. It was clear from the defendant's own evidence that the real reason for her fear particularly for the second assault on Liam Samuels (with the stick and later the rock) and on Geoff Samuels that she did so because she did not want herself or Yowane to be kept there to face possible arrest by the police.

25. The Defendant's stated belief that "they could have done anything to us, locked us up in a room or anything" was fanciful and not reasonably held. Her response to the situation was not reasonable, there was no evidence of physical retaliation by Mr Liam Samuels to the first assault, punches, slapping and spitting, except to push the defendant away from him towards the hole in the fence. There was certainly no evidence of any physical retaliation by the victims to the assaults with the weapons.

26. It is important to note as well that the evidence of the victims' is that while the defendant engaged in assaulting them with the slats from the lattice from the fence she was joined by others who used slats to assault the victims. The Defendant was questioned about others being present and denied that there were no others and I cannot accept the Defendant's evidence on this point. I found the victims to be credible witnesses and I have no reason to doubt their evidence about other youths joining in on the assault. The victims are adult males the Defendant, a young girl, I have no doubt if they were the only persons involved the Defendant would not have been able to assault and escape both men in the manner she did without assistance of others. The Defendant on the other hand while she was candid about the actual form of assault on the victims was not candid about her knowledge of other youths' involvement, the identity of the young man or her motivation for assaulting the victims. She was evasive in her answers about other youth's identities and was clearly exaggerating her fear of the victims.

27. I find that that the Defendant has not established on the balance of probabilities that her response to the circumstances was a reasonable response. To arm yourself with a weapon and an assault another could only be a reasonable response if you perceived you (or another) were about to be physically assault and injured, this was not the case here.
28. In relation to the resist police charge, the defendant's evidence corroborated the evidence of the police and presented no real contest to that charge.
29. In relation to the trespass charge the evidence clearly supports a trespass and I am satisfied beyond a reasonable doubt that the Defendant had no lawful reason to be on the property and had been warned by the victim that she was trespassing and continued to do so after that warning.
30. I therefore find the Defendant guilty of all charges and will hear the parties on sentence.

Dated this 30th day of November 2007.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE