

BETWEEN D _____ E _____

Appellant

AND THE POLICE

Respondent

Hearing: 10 April 1992

Counsel: *Arthur Fairley* for appellant
 Kim Thomas for respondent

Judgment: 10 April 1992

ORAL JUDGMENT OF TOMPKINS J

The appellant was charged with assaulting his sister, Mrs S . Following a defended hearing in the District Court at Whangarei on 29 January 1992, Judge Satyanand found the charge proved. A conviction was entered accordingly. He was fined \$300 plus costs. He now appeals against the conviction.

The circumstances

On 1991 there was a family birthday party. The appellant is the brother of Mrs Singh. Other members of the family were present, including another sister. The Judge found that an argument developed between Mrs S and one of her sisters. The defendant intervened to try to stop that argument.

As a result of his intervention Mrs S was holding the appellant around his neck from behind. When she was in that position, the appellant struck her.

There was a conflict between the appellant and his sister, the complainant, she claiming that the appellant punched her in the mouth with his fist. He claimed that with the appellant on his back, he swung his bent arm to the rear, striking the complainant in the mouth with his elbow. However it occurred, the result of the blow was that one tooth was knocked completely out, a second was knocked loose and the complainant suffered a cut to her top lip.

At the hearing the appellant advanced two defences. The first was that what occurred was by way of an accident. The Judge rejected that defence. That decision is not challenged on appeal. The second ground raised was that the appellant was acting in self-defence. The Judge found that in all the circumstances, the degree of force the appellant used was unreasonable in the circumstances as he believed them to be. Mr Fairley for the appellant submits that that finding is not justified and should be reversed.

S 48 of the Crimes Act 1961 provides -

“Everyone is justified in using in the defence of himself or another such force as, in the circumstances as he believes them to be, it is reasonable to use.”

There are four matters that are required to be considered when applying this definition. The first is that where there are circumstances that give rise to the question of whether the provision applies, the onus of proof is on the Crown to prove that it does not. So, although self-defence is referred to as a defence, that is not strictly correct.

The second is that the person must be acting in the defence of himself or another. It is not suggested in the present case that he was acting in defence of another. It was the Judge's finding that the action of the complainant in grabbing him around the neck from behind caused him “annoyance and hindrance.” This would appear to me to be an accurate assessment. I accept, as Mr Fairly pointed out, that Mrs S made the following acknowledgment in cross-examination, “Q. Were you strangling him? A. I suppose so.” But that is not how her actions were described by the appellant. He said, “Mrs Si jumped up on my back.” He does not make any reference to any strangling. So the evidence that he was acting in defence of himself is not strong, but for

the purposes of the appeal I am prepared to accept that the actions of the sister in grabbing him around the neck from behind justified some reaction by him.

The third element is the circumstances as he believed them to be. This clearly involves a subjective assessment. The Judge found the defendant's belief to be that someone, probably his sister, was grabbing him from behind around - the Judge thought - his shoulder or his neck. But in considering the circumstances the Court should have regard not only to the circumstances as they were at the moment, but also to all the surrounding circumstances, which in this case would include the fact that both the appellant and his sister were intoxicated - she describes herself as "over drunk" - and that the particular action of the appellant, the subject matter of the charge, occurred in the middle of an argument between the two sisters that the appellant was endeavouring to stop.

The fourth element is that acting in defence of himself and having regard to the circumstances as he believed them to be, the appellant is justified in using such force as it is reasonable to use. That, it is accepted, is an objective test. The Judge did not find it necessary to resolve the conflict of evidence as to how the blow was inflicted - that is, whether it was with the appellant's fist or his elbow. His finding on this element was -

"For any person to react in this way, he being a full grown and upright male person and Mrs S being a slight and short individual, causes me to find that Mrs E over-reacted and used simply much more force than even simply may be necessary to calm down Mrs S in these circumstances."

It is that finding that the appellant challenges. Mr Fairley submitted that the instinctive reaction of the appellant in using his elbow to dislodge Mrs S from his back was reasonable, and that if that account of the events is accepted, there was no evidence that the appellant intended to hit Mrs S in any particular part of her body, and in particular her teeth. He was simply trying to get her off him.

Mr Fairley also rightly points out that the appellant used force on only the one occasion in a reactive situation. I also accept that these events would have occurred quickly in the heat of a volatile situation, fuelled by drink.

I do not find any basis on which to differ from the conclusion reached by the Judge. In order to cause the injuries that he did, the blow that the appellant struck, even accepting that it was with his elbow, must have been a strong one.

On his account of the circumstances there was no justification for striking a blow at all. Having regard to the Judge's assessment of him as a full grown and upright male, and her as a slight and short individual, I have not the slightest doubt that the appellant could have got rid of the annoyance and hindrance that his sister was causing him by dislodging her hands and arms from around his neck and shoulder. Violence of the degree that he used was far beyond that which was necessary.

In those circumstances, I consider that the Judge was correct in his assessment that in striking her in the way that he did, even accepting that he may not have intended to strike her on the teeth, he was using substantially more force than in the circumstances it was reasonable to use. The appeal is dismissed.



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