**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CRI 2008-404-395**

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| BETWEEN | SEGAL DANIEL-EREZ<br>Appellant |
| AND | NEW ZEALAND POLICE<br>Respondent |

Hearing: 23 June 2009

Appearances: David Hoskin for Appellant
Nick Whittington for Respondent

Judgment: 26 June 2009

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## JUDGMENT OF HARRISON J

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*In accordance with R11.5 I direct that the Registrar endorse this judgment with the delivery time of 4:30 pm on 26 June 2009*

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SOLICITORS
David Hoskin (Albany) for Appellant
Meredith Connell (Auckland) for Respondent

## Introduction

[1] Mr Segal Daniel-Erez was found guilty following a summary trial in the District Court at North Shore on 3 April 2008 on one charge of assaulting his female partner. He was convicted and sentenced to 75 hours community work. He appeals against his conviction but not his sentence.

[2] Mr Daniel-Erez's counsel on appeal, Mr David Hoskin (who did not appear in the District Court), has filed a full written synopsis of submissions. He raises three grounds of appeal. The first two are of trial error – of failing to put the defence of self defence adequately and of failing to follow Mr Daniel-Erez's instructions. The third is that the decision to convict was unreasonable or cannot be supported by the evidence. Only the first ground was pursued in oral argument.

[3] It is appropriate to record immediately that the defence of self defence proceeds on Mr Daniel-Erez's admission that he intentionally applied force to the complainant: s 48 Crimes Act 1961. That is also the constituent element of the charge of assault: s 2 Crimes Act. The only issue at trial would thus have been (assuming self defence was not expressly raised) whether or not the force used was reasonable in the circumstances as Mr Daniel-Erez believed them to be.

## District Court

[4] The complainant was Mr Daniel-Erez's partner. At the time they lived together with their two year old son at Beachhaven (they have since apparently reconciled).

[5] The complainant was the only prosecution witness at trial. At an early stage she advised the Court that she did not wish to testify about an assault allegedly committed by Mr Daniel-Erez at about 2 am on 27 January 2008. But she admitted that she had made a full written statement about events to a police officer at about 1.40 pm that day. She accepted that the statement outlined what took place; that the police officer read it back to her after she had made the statement; and that she

confirmed that it was a true and accurate account to the best of her knowledge. She thought she had signed the document.

[6] Events then took an unusual turn. The transcript notes a legal discussion, presumably between counsel and Judge Hinton. But unfortunately he did not deliver a decision. I can only infer that the prosecution had applied for a declaration of hostility. Examination-in-chief followed briefly and the complainant confirmed that photographs, later formally produced, showed bruising to her arm 'in relation to that incident'.

[7] Mr Daniel-Erez's trial counsel then commenced cross-examination. His opening exchange with the complainant, set out as follows, summarised the essence of Mr Daniel-Erez's defence:

> Q. I put it to you … that the allegations you made against [Mr Daniel-Erez] are a complete exaggeration, what do you say to that?
>
> A. No that's not true.

At that stage, of course, the complainant had not made any formal allegations because her statement had not been produced.

[8] The complainant then denied trial counsel's suggestion that the bruising shown in the photograph of the complainant's arm was sustained on 26 January when she put her arm through a car window.

[9] Trial counsel, by way of a question, produced the complainant's written statement as an exhibit. Again the transcript records that a legal discussion followed. Again there is no record of a decision. I infer that counsel were discussing with the Judge the mode of admission of the statement. Whatever is the case, trial counsel then undertook an extensive cross-examination based upon the statement, even though it had not been formally produced, and the complainant again confirmed its truth.

[10] In summary, the complainant's viva voce account was that the alleged offence occurred after Mr Daniel-Erez had returned home in the early hours of the

morning following a visit to the casino. He attempted to join the complainant and their son in bed. She pushed him out and he fell on the floor. At one stage she scratched his neck. She suffered a bruise on her arm. He slapped her head and yelled. The scratching occurred 'during [Mr Daniel-Erez's] hurting me'. She again rejected the proposition of exaggeration.

[11] In re-examination the complainant said that the scratches occurred 'when he was on top of me, choking me'. She said that she was acting defensively, in her 'own safety'. She also said he 'tried to suffocate me with a pillow and at that moment I thought I was going to die'.

[12] So, by the conclusion of the prosecution case, the complainant had given evidence, led in cross-examination and re-examination, which if accepted would justify a finding of guilt of an assault. She confirmed what she had said in the statement that Mr Daniel-Erez had attempted to strangle her.

[13] Mr Daniel-Erez was the principal witness in his own defence. His evidence-in-chief was very full, possibly unduly so. The essence of his defence was expressed in these words:

> Needless to say our room is pretty pitch black at night time, 2 o'clock in the morning, there was no lights, I didn't really saw what I've landed on but I think I am pretty sure I hurt my left knee bad as well and there was breathing was pretty hard, I was quite shocked from getting thrown off the bed and at this stage I felt my shoulder getting pinned down to the ground as she landed with her fully body weight on me. I think at that stage was when I cropped, I copped most of the bruising and the scratches to the face, it was like having a wild animal attacking you pretty much.

[14] Mr Daniel-Erez was also cross-examined at length. It would not be unfair to characterise his answers as evasive and, at times, arrogant, earning judicial rebukes. Mr Daniel-Erez himself raised self defence. He said that he 'had no other choice but to try and defend myself' when the complainant jumped on him after throwing him off the bed, involving a 'degree of physical contact with her, trying to prevent her further scratching my face and further harming me'.

[15] Mr Daniel-Erez expanded on this answer on a number of occasions and in a number of ways. He was obviously dissatisfied with the tenacity of the cross-

examiner's questions. He volunteered that the complainant had a 'long history of lying and making false allegations'. Of particular relevance was his evasive denial of the proposition that at one stage he was attempting to strangle the complainant. At times the Judge intervened.

[16] In re-examination Mr Daniel-Erez's counsel expressly introduced the question of self defence by asking 'what did [the complainant] do to you?' He repeated his account of events. He said that 'the only thing I could do is try to push her away from me'.

[17] Judge Hinton delivered an oral decision. He noted that counsel did not object to the introduction of the complainant's 'statement which has been received as evidence under s 96 Evidence Act'. Counsel concur that this statutory reference is an error. The Judge must have intended to reply upon s 83(1)(b). A good deal of oral argument was devoted to whether or not the prosecution had satisfied the statutory prerequisite of hostility. As I have noted, there is no record of a decision or its reasons, but the issue is now academic in view of the complainant's oral verification of the elements of the offence.

[18] The prosecution case stood or fell on Judge Hinton's evaluation of the competing accounts. He plainly preferred the complainant's evidence. The Judge was influenced by Mr Daniel-Erez's failure to address and answer the complainant's allegations of physical violence. He noted that Mr Daniel-Erez's 'focus was on in fact (sic) being attacked by the complainant' – in other words, his defence of self defence. He was unimpressed by Mr Daniel-Erez's 'concentration on commentary and on the known propensity of the complainant to lie and fabricate'.

[19] The Judge was satisfied beyond reasonable doubt that the charge was proven.

**Decision**

[20] I have set out the relevant evidence and findings at some length because their recital is in itself an answer to Mr Daniel-Erez's primary ground of appeal of trial

counsel's incompetence in failing to put the defence of self defence in accordance with his instructions.

[21] Mr Daniel-Erez swore an affidavit in this Court in support of the appeal. He covered a number of topics. He noted that 'my defence was one of self defence'. He then outlined its factual foundation. On analysis, it is little different from what he said at trial. He admits pinning the complainant 'down on the upper part of the chest area … for several seconds'. He did this, he says, to prevent her from assaulting him. But, as at trial, Mr Daniel-Erez did not answer the complainant's allegation that he tried to strangle her at one stage.

[22] I agree with Mr Hoskin that trial counsel did not expressly highlight self defence in cross-examination or evidence-in-chief. But he carefully and properly led Mr Daniel-Erez's narrative of events. The transcript discloses that Mr Daniel-Erez was not a disciplined or focused witness. Without offending the prohibition on leading questions, trial counsel could not expressly suggest to Mr Daniel-Erez that he acted to protect himself. It was only in cross-examination that Mr Daniel-Erez started making this assertion. By the end of the trial, as shown by the extracts recited above, Mr Daniel-Erez had fully ventilated his thesis of self defence.

[23] It is regrettable that Judge Hinton did not identify the act or acts which he found constituted the assault or directly address self defence. However, I agree with Mr Nicholas Whittington for the Crown. The Judge's unconditional acceptance of the complainant's credibility and reliability must, by inference, include her assertion that Mr Daniel-Erez placed his hands round her throat and at one stage pushed her head under a pillow. I repeat, as the Judge emphasised, that Mr Daniel-Erez never answered this evidence even though given every opportunity. The finding of guilt is consistent only with a rejection of Mr Daniel-Erez's evidence that, acting in self defence, he did no more than hold the complainant to the floor (assuming for the purpose of argument that a Court might have accepted that the use of such force was reasonable in the circumstances).

[24] Mr Daniel-Erez's primary ground of appeal fails.

[25] I can deal with Mr Daniel-Erez's two subsidiary grounds of appeal briefly. Mr Hoskin submits that trial counsel did not elicit sufficient evidence from two defence witnesses about their knowledge of the complainant's character and her previous conduct towards Mr Daniel-Erez. The Judge found the evidence of both witnesses of little assistance. Moreover, if they had been used as a foundation to challenge the complainant's character, the police would have been able to produce a record of Mr Daniel-Erez's previous conviction for the same charge of assaulting a female. The prejudice inherent in that course is obvious.

[26] Mr Hoskin did not point to any additional material which might support an alternative argument that the verdict was unreasonable. Both these grounds of appeal must fail also.

**Result**

[27] Mr Daniel-Erez's appeal against conviction is dismissed.

[28] I wish to compliment both Mr Hoskin and Mr Whittington on the quality of their argument, both written and oral.

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Rhys Harrison J