Supreme court notes

Self-Defence - Section 28(f) Criminal Code - Section 408 (f) Criminal Code - Reservation of Question of Law

The Queen v Helen Patricia Secretary

No CA20 of 1995

Judgement of Martin CJ, Angel and Mildren JJ delivered 2 April 1996

The Court of Criminal Appeal considered a question of law reserved for the consideration of the Court pursuant to section 408(1) of the Criminal Code, namely whether the provisions of section 28(f) of the Criminal Code, Self Defence, could apply to the deliberate shooting of a man whilst he is asleep.

The accused had been in a de facto relationship with the deceased for eleven years. The relationship, a violent one, consisted of verbal, mental and physical abuse of the accused and their children. The day leading up to the shooting reveals escalating violence upon the accused - the deceased's last words uttered prior to sleeping were that when he awoke he intended to kill the accused.

Their Honours Angel and Mildren JJ (Martin CJ dissenting), were of the view that the trial judge erred in ruling that self defence was not open for the jury in the circumstances of the case. Their Honours were of the view that whether an assault continues or is on foot is a question of fact - in this case the threat to apply force at a future stated time remained and nothing changed to remove it.

Thus having regard to the nature of the threat and relationship of the accused and the deceased, it was open to the jury to find that the "assault being defended" was a continuing assault constituted by the threatening words uttered by the deceased immediately before he fell asleep.

Martin CJ, dissenting, held that the answer to the question lay in the consideration of the words in section 28(f) incorporating into it the definition of "assault" as provided for in section 187 of the criminal code. His Honour was of the view there must be a contemporaneous connection between the assault an the act of self defence - there needed to have been in the deceased an actual, apparent ability to apply force at the time of the threat. These circumstances did not exist at the time the accused shot the deceased.

This decision is also noteworthy for:

- its reference to the requirements of section 408(1) of the Criminal Code and the power of the Court

and

- its comment on what the Court may have regard to - specific mention of the fact that the Appeal Book contained more material than the special facts in questions as stated by the trial Judge.

Mildren J stated that the Court of Criminal Appeals is confined to these special facts and transcripts should not be considered by the Court nor be included in the Appeal Book. However, where a trial judge has given reasons for his ruling, there exists no rule which precludes the Court of Criminal Appeal from considering those reasons, nor any other legal materials helpful to the resolution of the questions reserved.

Counsel for the accused, Mr Ross QC

Acting Director of Public Prosecutions, Mr Wild QC.

Case Note

Geiszler -v- NTA and Anor

No AP9 of 1995

Court of Appeal

Judgment of Kearney, Angel and Mildren JJ delivered 3 April 1996.

The appellant was injured on 16 May 1993 at the Karama Tavern as a result of what as descrived as "a non-malicious piece of physical horseplay" in which the appellant was grabbed from behind in a bear hug, lost his balance and fell to the ground with the assailant falling on top of him. The appellant suffered a broken left ankle which required surgery, the result of which caused him to be hospitalised until 29 May 1993. The appellant consulted a solicitor on 18 June 1993 and was advised that the actions of the assailant may amount to a dangerous act under Section 154 of the Criminal Code and that the appellant could apply for compensaqtion pursuant to the *Crimes (Victims Assistance) Act.* After making enquiries to ascertain the true name of the assailant the appellant reported the incident to police on 20 July 1993. No criminal proceedings ensued.

Section 12(b) of the *Crimes (Victims' Assistance) Act* provides:

"12. The Court shall not issue an assistance certificate -

(b) where the commission of the offence was not reported to a member of the police force within a reasonable time after the commission of the offence, unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence."

The application for assistance was dismissed by the Magistrate (whose decision was upheld by Thomas J on appeal) on the basis that the applicant failed to report the offence to the Police within a reasonable time. Thomas J held that the Magistrate's finding of prejudice to the police investigation as a result of the delay was justified, without evidence, because it was axiomatic that the delay must have prejudiced the police enquiry.

Held: (1) In the absence of any evidence, the learned Magistrate and Thomas J erred in finding that the police were prejudiced in their enquiries.

(2) Having regard to the purposes of the subsection, prejudice to police enquiries would be a relevant circumstances to whether or not an offence is reported within a reasonable time. However, mere delay may not necessarily prejudice an investigation; it must always be a question of fact and degree (*Schmidt -v- South Australia* (1985) 37 SASR 570, distinguished), per Mildren J.

(3) The test for what constituted a reasonable time was an objective one having regard to all of the circumstances of the case.

(4) The onus of providing that the offence was not reported within a reasonable time rested with the first respondent. If the applicant then asserts that the Court ought to be satisfied that circumstances existed which prevented the reporting of the commission of the offence, the burden of proof in respect of that matter rests with the applicant, per Mildren J.

Mr J Waters instructed by Mildrens for the appellant.

Mr P Tiffin instructed by the Solicitor for the Northern Territory for the first respondent.

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