IN THE COURT OF APPEAL OF NEW ZEALAND

CA242/2014
[2015] NZCA 35

BETWEEN	CHARLES STEPANICIC Appellant
AND	THE QUEEN Respondent

Hearing: 12 February 2015

Court: Wild, MacKenzie and Lang JJ

Counsel: PHH Tomlinson for Appellant
M G Wilkinson for Respondent

Judgment: 2 March 2015 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The appellant's conviction on count 3 in the indictment is quashed.

C A retrial on that charge is ordered.

REASONS OF THE COURT

(Given by Wild J)

[1] Mr Stepanicic appeals against his conviction on a charge of causing grievous bodily harm with intent to avoid arrest or facilitate flight in the commission of a crime (Crimes Act 1961, s 191(1)(c)). This was count three in the indictment. The jury found him guilty in a trial in the Auckland District Court on 6 March 2014.

[2] Mr Stepanicic had burgled two residential properties in Massey in Auckland.[1] Constable Carter, one of the police officers called to the scene, found Mr Stepanicic in a nearby park. Mr Stepanicic had three bags with him. The Crown case was that Constable Carter approached Mr Stepanicic and asked him what he was doing. Mr Stepanicic said he had come from a nearby house and pointed with his arm. He then used that arm to punch Constable Carter, who fell to the ground unconscious. When the Constable recovered consciousness Mr Stepanicic was sitting on top of him and punching him repeatedly in and around the head. He then threatened to kill Constable Carter. The Constable said he was able to get hold of his pepper spray and spray Mr Stepanicic in the face, at which point Mr Stepanicic made off.

[3] Mr Stepanicic's evidence at trial was that Constable Carter had pepper sprayed and then assaulted him, and he had punched the Constable in self-defence. In the course of doing this he lost his balance and fell on top of the Constable, accidentally elbowing him in the face and causing the injury the Constable sustained to his eye socket.

[4] As part of her summing up, Judge Philippa Sinclair handed the jury a comprehensive question trail headed 'Questions for the Jury'.

[5] For the Crown, Ms Wilkinson accepts Mr Tomlinson's criticism as to the order of the questions in this trail relating to count three. Mr Tomlinson submitted the jury should have been directed to consider self-defence before considering issues of Mr Stepanicic's intent or the harm cause to Constable Carter. But, for reasons we shall explain, we need not go into that criticism.

[6] These are the questions the Judge gave the jury in relation to self-defence:

> 3.3 Are you sure that the circumstances as Charles [Stepanicic] believed them to be justified the use of force against Constable Carter in defence of himself?
>
> 3.4 Are you sure that the force used by Charles [Stepanicic] against Constable Carter was used for the purpose of defending himself?

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[1] Mr Stepanicic pleaded guilty to the two charges of burglary on 4 March 2011, the morning his trial started.

3.5 Are you sure that the force used by Charles [Stepanicic] in self defence of himself [sic] was reasonable in all the circumstances?

[7] Ms Wilkinson readily accepted these questions reversed the onus of proof on self-defence. We accept Ms Wilkinson's submission that the Judge's oral directions to the jury on the onus of proof, both generally and specifically in relation to self-defence, were accurate and comprehensive. But we are unable to accept her further submission that those oral directions overcame the inaccurate way in which the question trail questions on self-defence were framed.

[8] The question trail is the document the jurors had in the jury room as a basis for their deliberations. They did not have the Judge's oral directions in summing up. In accordance with current and best practice, the Judge directed the jury to use the question trail in deliberating on its verdicts. In summing up she led the jury through the question trail. At the very least, the oral directions coupled with the way in which the questions in the trail were framed had the potential to confuse the jury. That the jury did not seek clarification from the Judge about the onus of proof on self-defence suggests they relied on the way the questions were framed, as they had been directed to do. They doubtless relied on the question trail, and the way the questions cast the onus of proof as to self-defence.

[9] All this bears out the critical importance the question trail now has in a criminal jury trial and the imperative that the questions be framed accurately. Unfortunately this question trail was not framed accurately. The questions misdirected the jury as to the onus of proof on self-defence.

[10] We consider the questions should have been framed as follows:

3.3 What were the circumstances as Mr Stepanicic believed them to be?

3.4 In those circumstances, are you sure Mr Stepanicic honestly believed Constable Carter was using excessive force against him?

3.5 And further, in those circumstances, are you sure Mr Stepanicic was ***not*** defending himself?

(This question is framed in this way because the Crown must exclude Mr Stepanicic's defence that he was acting in self-defence.)

3.6 Are you sure the force Mr Stepanicic used was ***not*** reasonable in the circumstances as he believed them to be?

(This question is framed in this way for the same reason.)

[11] We include question 3.4 to accommodate the legal position outlined in *R v Thomas,* that self-defence is available to a defendant who holds an honest, albeit mistaken, belief that the police are using excessive or unlawful force, and uses reasonable force against the police in response.[2] Although this principle was subjected to some criticism in *Mackley v Police* and *Clarke v Police,*[3] it finds support in Simester and Brookbanks' *Principles of Criminal Law*, *Glanville Williams Textbook of Criminal Law* and more generally in *Millar v Ministry of Transport*.[4]

[12] In question 3.4, we have used the phrase "excessive force" rather than "unlawful force" to make it clear the mistake must be one of fact, rather than law.[5] In directing the jury, a trial judge should explain that "excessive force" means "more force than is necessary to overcome any force used by the defendant in resisting arrest". This wording is adapted from the Crimes Act, s 39, and was applied in *Beagle v Attorney-General*, where the police used force on a very slight man (the Judge described him as a "flyweight")[6] such that he sustained injuries requiring hospitalisation.[7] The Court considered the police treatment was "over-vigorous" and "wholly unnecessary" given Mr Beagle was not violent and the constables involved were "much bigger and unquestionably stronger" than he was.[8] Conversely, the issue of excessive force by the police was held not to arise in *Ropiha v R* and *Oosterman v Police,* because both defendants had physically resisted arrest and the police had used no more force than was reasonably necessary in response.[9]

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2 *R v Thomas* [1991] 3 NZLR 141 (CA) at 144, applied in *Mackley v Police* (1994) 11 CRNZ 497 (HC) at 503–504, *R v Sarich* CA407/04, 16 May 2005 and *Kazazi (aka Van Gosliga) v Police* HC Wellington CRI-2011-435-2, 4 August 2011.

3 *Mackley v Police,* above n 4; *Clarke v Police* HC Wellington CRI-2003-485-28 at [57].

4 AP Simester and WJ Brookbanks *Priniples of Criminal Law* (4th ed, Thomson Reuters, Wellington, 2012) at 506; Dennis Baker *Glanville Williams Textbook of Criminal Law* (3rd ed, Sweet & Maxwell, London, 2012) at [21-047]; *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 673.

5 *R v Thomas,* above n 4, at 125; *Mackley v Police,* above n 4, at 504; *Tuialli v Police* HC Auckland AP301/86, 19 March 1987.

6 *Beagle v Attorney-General* [2007] DCR 596 at [1].

7 At [28].

8 At [20].

9 *Ropiha v R* CA36/06, 7 August 2006 at [17]; *Oosterman v Police* [2007] NZAR 147 (HC) at [54].

[13] In accordance with our finding that the jury questions erroneously reversed the burden of proof, the appeal is allowed. We quash Mr Stepanicic's conviction on count three in the indictment and order a retrial on that charge.

Solicitors:
Crown Law Office, Wellington for Respondent