ASSAULT, AFFRAY AND SELF DEFENCE

By Michal Mantaj: LLB, Acc Spec (Crim Law)

Managing Lawyer- Conditsis Lawyers (m.mantaj@conditsis .com)

22 August 2014.

Introduction

This paper deals with the offences of assault, affray and, as a separate topic, the defence of self-defence (with a particular focus on its application to assault and affray charges). As will be obvious from this somewhat eclectic collection of topics, this is not an academic work with a cohesive flow, but rather what the writer hopes will be a useful guide to criminal law practitioners. In so far as there is any unifying theme throughout this paper, it is that is deals with topics which are of interest to criminal law practitioners who appear in Local Courts throughout New South Wales.

Assault

The basics

For the sake of completeness, but at the risk of patronising experienced criminal law practitioners, it is useful to state some basic propositions concerning the offence of Common Assault (being the most "basic" form of an assault offence).

The contemporary offence of assault is an amalgam of two separate common law offences of assault on the one hand and battery on the other. Consequently, an assault is can be made out in one of two ways.

An assault simpliciter (that is to say the old offence of assault) is an act by which the accused intentionally or recklessly causes another to apprehend immediate and unlawful violence. An assault with battery (that is, the old offence of battery) is the intentional or reckless application of force to the body of another.

There is a whole family of assault based offences created by various provisions of Divisions 8, 8A, 8B and 9 of the *Crimes Act* 1900 (the act). This paper will be confined to consideration of the offences of common assault (s.61) and assault occasioning actual bodily harm (s.59).

Defending against a charge of assault

Mens rea – It is sometimes easy to focus exclusively on the *actus reus* of an offence and overlook a careful consideration of the *mens rea* aspect of it. Yet, the *mens rea* element not infrequently provides fertile ground for mounting e defence to a charge of assault. This is particularly so in cases where the allegation is one of assault simpliciter.

In order to secure a conviction in respect of an offence of assault simpliciter, the prosecution must prove not only that the act of the accused in fact induced in the mind of the complainant an apprehension of immediate violence, but also that the accused intended his actions to have that effect or, at the very least, was reckless that they may have that effect. This can be very difficult to prove.

Before proceeding to illustrate this point, it is useful to digress briefly to the topic of recklessness. In law, the concept of recklessness has a very specific and narrowly circumscribed meaning. Only *advertent* recklessness (as distinct from *non-advertent* recklessness) is sufficient to ground criminal

liability[1]. Advertent recklessness requires that the accused actually turn his/her mind (i.e. adverted) to the possibility that his/her actions will produce the *actus reus* of the offence but went ahead with those actions despite that possibility. Or as was put succinctly by Beazly JA in *Blackwell v R* [2011] NSWCCA 93 at [76]:

"where the mental element of an offence is recklessness, the Crown must establish foresight of the possibility of the relevant consequence."

In the context of an allegation of an assault simpliciter, this means that the prosecution must establish that when the accused uttered the impugned words, or made the the impugned gesture she did so either:

> With the intention that by those words and/or gestures he **intended** to put the complainant in fear of immediate violence; or
>
> Realized that the impugned actions or words could make the complainant fearful of immediate violence and went ahead anyway.

It is therefore not enough to prove that the accused should have understood that his actions were threatening or that a reasonable person in her position would have know that, the actual state of mind of the accused him-self must be established beyond reasonable doubt if the prosecution is to succeed. In the absence of clear words to that effect (e.g. "you are not so brave now are you") this element can very difficult for the prosecution to establish. This is because it is axiomatic that people often act instinctively and without thinking. An utterance of a threat or a threatening gesture can be merely an instinctive reaction to feeling of frustration or anger rather than a calculated attempt to induce a state of fear in another person.

For this reason, whenever an allegation of assault is based on words or gestures, without physical contact, the question of whether the prosecution can discharge its onus of proof in relation to the mental element should be carefully considered. The less conducive the circumstances of the offence are to reflection, the more likely it is that the prosecution will fail to establish this element. It is suggested that the following matters may be useful indicia that the mental element of assault in not present:

- The alleged act (including words) was a spontaneous reaction to a provocation of some type.
- The alleged act was a single gesture or utterance rather than a sustained course of action.
- In the case of words, the alleged threat was so serious and so out of proportion to what had provoked it that it is likely to have been a hyperbole.

Immediacy and mens rea- Even in circumstances where the court is satisfied as to the accused's intention (or recklessness) to intimidate the alleged victim, that does not necessarily mean that the relevant *mens rea* for an assault simpliciter is made out. It will be recalled that the threat must be

[1] There is an exception to this rule in the case of sexual assault offences, however it is not presently relevant.

one of *immediate* violence. Hence, the relevant intention must also be to cause an apprehension of immediate violence. A statement or gesture calculated to induce a general apprehension of violence as some future point in insufficient. Often threats will lack the necessary immediacy to be capable satisfying this element. For instance a statement such as "watch you back, I will get you" or a throat slitting gesture would almost certainly, of themselves, be insufficient to ground a charge of assault.

Consent – Another potential source of defences to a charge of assault is the issue of consent. This issue is somewhat complicated by the uncertainty as whether absence of consent is a necessary element of the offence of assault.

The point of departure is the general principle that lack of consent is a necessary element of the offence of common assault and therefore it is incumbent on the prosecution to negative consent beyond reasonable doubt in order to succeed in a prosecution (see *R v Bonora* (1994) 35 NSWLR 74). However, where bodily harm is occasioned, consent may not vitiate criminal liability for assault depending on whether the court considers it in the public interest to criminalise the infliction of such harm in the circumstances of the case in question. In *Department of Health an Community Services (NT) v JWB (Marion's Case)* 1992 CLR 218 at [11] the Court said the following:

"Consent ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore acceptable, contact. Consensual contact does not, ordinarily, amount to assault. However, there are exceptions to the requirement for, and the neutralising effect of, consent and therefore qualifications to the very broadly stated principle of bodily inviolability. In some instances consent is insufficient to make application of force to another person lawful and sometimes consent is not needed to make force lawful.

This very nebulous pronouncement makes it difficult to advise clients about the prospect of securing an acquittal on the basis of consent. None the less, the general principle remains that absence of consent is an essential element of the offence of assault. The upshot is that whenever there is doubt about whether the prosecution can prove absence of consent the issue should be relied upon as a ground for a defence.

In practice, the question of absence of consent can arise in a number of circumstances:

In domestic violence cases, where the alleged victim is not co-operating with police, the prosecution sometimes relies on third party witnesses and/or admissions made by the accused during a record of interview. In such cases, the brief of evidence ought to be scrutinized carefully to determine whether there is any indirect evidence from which the court can readily infer an absence of consent (e.g. a witness who heard the alleged victim say "stop it") if there is no such evidence (or if there is a prospect that the court may not accept such evidence as there is) .

Sometimes, the defence is in a position to lead positive evidence of consent on the part of the alleged victim. Consider for instance the case of a 'pub fight' where the accused strikes the victim following an invitation to a fight from the victim e.g. "Come on, you want to fight? Let's fight" or similar words.

Actual bodily harm. The offence of assault occasioning actual bodily harm has all of the elements of assault, with an additional element that the assault occasioned actual bodily harm. It should be noted here that the element of occasioning actual bodily harm is an absolute liability offence. That is

to say, the prosecution does not have to prove that the accused either intended to inflict actual bodily harm upon the alleged victim o even that she was reckless as the possibility of such harm resulting from his actions (see *R v Williams* (1990) 50 A Crim R 213).

There is a tendency on the part of police to charge actual bodily harm whenever there is even the slightest injury. It is important to appreciate that nor every injury is capable of satisfying the definition of actual bodily harm. While an injury need not be either permanent or grievous in order to constitute actual bodily harm, it must be more than transient and trifling (see *r v Donovan [1934]* 2 KB 498 at 509). What is transient and trifling is, of course, a question of fact to be decided on the facts of the case. However it is strongly arguable that injuries such as slight bruising or redness of the skin do not amount to actual bodily harm. All too often police charge this offence (and defendants plead guilty to it) in circumstance where the injury complained of is not actual bodily harm.

Sentencing- how to get a s10-

What follows under this heading are some observations about aspects of preparation and presentation of a plea in mitigation in relation to assault matters which the writer has found useful in securing a lenient outcome. In the context of a local court assault matter, most clients of course want to obtain the benefit of a discharge without conviction under s10 of the *Crimes (Sentencing Procedure)* Act 1999. Accordingly, these observations have are focused heavily on ways to maximise the prospects of such an outcome.

Negotiate the facts The facts upon which the offender will be sentenced can have a profound influence upon outcome of the plea. For this reason, the importance of making a substantial effort to ensure that the facts placed before the court are as favourable as possible should not be under estimated. Examples of matters which typically arise are :

The number of strikes involved in the offence

The part of the body which is struck

The type of strike involved (i.e. punch, push, slap, kick etc...)

Provocation by the victim

Attitude of the victim In the Local Court, a positive attitude of the victim in relation to the offender being dealt with leniently can be a powerful consideration. Not infrequently, s10 are granted in relation to offences which would not otherwise a warrant such a lenient outcome of the facts primarily because the victim is supportive of such an outcome. This is typically a consideration in domestic violence matters where the offender and the victim have reconciled after a fight and wish to continue their relationship. In such cases, the competent practitioner should explore the possibility of obtaining a reference from he victim expressing her forgiveness and her desire for the offender to be treated leniently.

Impact of conviction of the victim- A related, but none the less separate consideration is the attitude of the impact that a conviction of the offender would have on the victim. This is also often a very persuasive matter in favour of dealing with an offender under s.10. It normally becomes relevant where a clean criminal record is necessary in order to allow the offender to continue in his

employment and the victim is financially dependent upon the offender. In those circumstances it is appropriate (and in the writers view incumbent upon the advocate) to advance the argument that if one of the effects of a conviction of the offender will be to further victimise the victim by depriving her of the benefit of the offenders financial support.

On occasions, such an argument is met with a retort from either the prosecutor or the bench that it flies in the face of the well established principle in *R v Edwards* (1996) 90 A Crim R 510 to the effect that hardship to a third party can only be taken into account in cases where it is truly exceptional. The response to such a point is that a case where the 'third party' is the victim of the offence constitutes an exception to the rule in *Edward*. The authority for this proposition is *R v NJK* [2011] NSWCCA 151 where in Hoeben J(with the concurrence of the remainder of the judges) said at [48] :

"Whilst the principle in Edwards is clear, the circumstances of this case are somewhat different. The distinguishing feature in this case is that the victim was one of the persons who would benefit from the respondent not being incarcerated and therefore being able to work. That additional factor enabled his Honour to properly take into account as a relevant consideration the benefits to the family, including the victim, of him being able to continue to work."

Affray

The Basics

The offence of affray is enshrined in s93C which provides as follows:

"(1) A person who uses or threatens unlawful violence towards another and whose conduct is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety is guilty of affray and liable to imprisonment for 10 years.

(2) If 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of subsection (1).

(3) For the purposes of this section, a threat cannot be made by the use of words alone.

(4) No person of reasonable firmness need actually be, or be likely to be, present at the scene.

(5) Affray may be committed in private as well as in public places."

Further the mental element for the offence is governed by s93D (2) which reads:

"(2) A person is guilty of affray only if the person intends to use or threaten violence or is aware that his or her conduct may be violent or threaten violence"

This provision is effectively a restatement of standard the common law *mens rea* requirement.

Despite the fact that affray is an offence of some antiquity, there is a dearth of authority in relation to the elements of it. In fact, in New South Wales, there appears to be only one decision of the superior courts which provides some guidance as to what is required to make out a charge of affray. That is the decision of Johnson J in *Colosimo and Ors v Director of Public Prosecutions (NSW)* [2005]

854. It should be noted that *Colosimo* subsequently went on appeal before the Court of Criminal Appeal, however that appeal concerned the issues of self defence and did not disturb his honours helpful comments concerning the elements of affray.

Defending a charge of affray

Violence or threat of violence- When dealing with a charge of affray, it is most important to bare firmly in mind that it is an essential element of the offence that the accused either used or threatened to use violence.

Affray is often utilised by police in circumstances where there is an all-in brawl and it is impossible to attribute a particular act to any particular person. That is, for the most part, an appropriate use of the provision. Indeed sub ss.2 permits the conduct of a group to be aggregated and attributed to each participant. However such aggregation is only permissible once it is proved that the individual accused herself used or threatened violence. It is not sufficient for the prosecution to prove that the accused was part of a group of people, some of whom used violence.

Whilst it is not necessary for the prosecution to attribute every act committed during the affray to a particular individual, the prosecution must be able to attribute at least one act which constitutes actual or threatened violence to every accused. If it is not possible to attribute any such act to a particular accused, he must be acquitted even if he was, in a broad sense, part of a group of people involved in an affray.

The other important issue to consider under this sub-heading is that despite the natural meaning of the phrase, a threat of violence, for the purpose of this section cannot be made by the use of words alone. If the prosecution is relying on a threat of violence, it must point to some action beyond mere words that is said to constitute the relevant threat.

Person present at the scene – An important question is how to identify who is a person 'present at the scene' for it is that person (of reasonable firmness) who must be put in fear of his or her safety. It is clear that this person is a hypothetical construct. This is because no such person need actually be present at the scene. The question is how 'close' this hypothetical person is to the action. The resolution of this question is very significant because the further a person is removed from the events unfolding at the scene (both physically and in terms of their involvement in or connection with those events) the less they are likely to fear for their safety.

In the respect, the only guidance which the common law gives is that this person is a 'bystander' (see *Colisimo at [27]*). Hence, when considering whether this element of the offence is made out, the court must put itself in the shoes of a person who has no connection with the people or events unfolding before them, but is simply present in their vicinity by chance. The consequence of this is that where the circumstances of the affray are such that it is clear that the violence is being directed at specific people rather than random victims, the prosecution may struggle to make out the offence.

Behaviour of actual bystanders – Because of a combination of the public nature of many affrays and the ploriferation of CCTV in public places, there is often available evidence of the reaction of actual bystanders to the fight with is the subject of the affray charge. Whilst the question of whether the hypothetical bystander of reasonable firmness would be put in fear always remains a matter for the

tribunal of fact, it is legitimate to consider evidence of the actual reaction of bystanders. Where CCTV footage shows that there is a large number of people standing around the fight, looking on with no apparent signs of fear, that can be a powerful platform for a submission that the court ought not be satisfied as to the fear of a hypothetical bystander.

Sentencing

Scope of culpability for co-offender's conduct – It is often assumed that because of the aggregative effect of ss2, the culpability of an offender is to be determined by reference to the conduct of the group as a whole. There is a strong argument that this approach is erroneous. In *R v Fajka* [2004] NSWCCA 166, Howie J (with whom Hulme J and Simpson J agreed) said at [27] and [28] :

"27 It seems to me, with respect, that too much was made throughout the sentencing hearing of the conduct of the brother rather than focusing, as his counsel sought to have the judge do, on the conduct of the applicant. The brother was charged with a number of offences, including, somewhat surprisingly, two counts of affray. The applicant did not become liable for all that his brother had done, either because of the nature of the charge of affray or because, in his Honour's words, "he was quite prepared to identify himself with his brother". If that phrase meant that he became involved in order to assist his brother or to take his brother's part in disputes with the hotel guests, then it might be accurate. But if it suggests that by participation in the brawl he adopted all that his brother did and in someway became criminally liable for it, that is not so.

28 Of course the applicant's conduct had to be considered in the context of the fact that his brother had become involved in a brawl with guests and staff at the hotel on what was in effect a family occasion, with children present. But that was the limited basis upon which the brother's conduct aggravated that of the applicant. Section 93(C)(2) does not mean, in my opinion, that the applicant was to be punished for all the conduct of both himself and his brother. Rather the section is concerned with ensuring that the conduct of the two of them is considered in determining whether that conduct "is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety".

In framing submissions on sentence, it is therefore important to isolate for the court the part played in the affray by the offender and submit strongly that the culpability of the offender ought to be determined by considering that conduct, and not the conduct of all persons involved in the affray.

Self Defence

The Basics

The test for self defence is set out in s418, which provides as follows:

1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:

> (a) to defend himself or herself or another person, or
>
> (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
>
> (c) to protect property from unlawful taking, destruction, damage or interference, or
>
> (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

In *R v Katarzynski* [2002] NSWSC 613, Howie J found that this test requires the tribunal of fact to ask itself two questions:

1. Is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and

2. If there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them.

The first of these questions is a purely subjective test. It is to be answered in the affirmative if there is a reasonable possibility that the accused held the requisite belief, no matter how unreasonable or even delusional that belief may be.

The second question is a hybrid of an objective and subjective analysis. The question of reasonableness is a purely objective one, however, it is to be resolved in the context of accused's subjective perception of the circumstances faced by him. Further this question was held in *katarzynski* to devolve into one of proportionality. In other words, the real question is whether what the accused did was a reasonably proportionate response to the threat faced by her. However, in answering that question, the tribunal must adopt the accused's subjective perception of the nature and extent of the threat, no matter how unreasonable or delusional it may be.

It follows from this that in running a case of self defence, it is important to lead evidence (usually, but not alway, from the accused) as to first their subjective belief that their actions were necessary to defend themselves and secondly a detailed description of their subjective perception of the threat they faced.

Although self defence is often referred to as a 'defence', the accused has only an evidentiary onus to raise the defence. Once raised, the onus shifts to the crown to negative self defence beyond a reasonable doubt. (see s.419).

Useful points

Having set out the basic principles concerning self defence, I now move to consider some further principles and points which are often useful to rely upon when the question of self defence is in issue.

Defence can be raised in absence of evidence from accused. – It is sometimes supposed that self defence can only be raised by an accused person if there is evidence emanating from him/her raising it. In other words, where the accused does not give evidence and there is no ERISP, self defence is not open. There rationale for this view is that the raising of the defence requires evidence of the subjective belief of the accused as to the necessity for her conduct and as to his perception of the relevant circumstances. That evidence, it is sometimes said, can only be lead from the accused himself. Whilst there is some superficial logic in this argument, it is wrong.

In *Colosimo & Ors. V Director of Public Prosecutions* (NSW) [2006] NSWCA 293 Hodgson JA (witht he concurrence of the other judges) had this to say on this point (at [19]):

(2) It is not essential that there be evidence from the accused as to the accused's beliefs and perceptions: evidence of circumstances from which inferences may be drawn as to the accused's relevant beliefs and perceptions may be sufficient. However, if the accused does not give evidence of his or her beliefs and perceptions, then generally, in the absence of other evidence suggesting the contrary, inferences have to be drawn on the basis of what beliefs and perceptions a person in the position of the accused could reasonably hold in the circumstances.

Reasonableness, not perfection – The second limb of the test for self defence (i.e. the second question posed by Howie J in *katarzynski*) requires *reasonableness,* but not perfection. Hence, the mere fact that it was possible to deal with the threat by retreating, while relevant, does not in and of itself foreclose the availability of self defence (see. *Viro v the Queen* (1978) 141 CLR 88 and *Zeceivic V DPP (Vic)* [1987] 162 CLR 645)

Equally, in determining the question of reasonableness, the court must bear in mind that at the time the accused is deciding how to respond to the threat presented to him, she is usually usually in a highly anxious state and has only a split second to react. Therefore, the accused cannot be expected to engage in the kind of calm, considered and thorough analysis which is possible in a courtroom in a hearing when there is opportunity to go through all of the evidence slowly and repeatedly. Particularly problematic, in the writers view, is the practice of courts watching and analysing CCTV footage of incidents repeatedly and often frame by frame. This can give the court a distorted perception of the perception which the accused had of the incident.

Pre emptive strikes allowed- It is not the law that a person must wait to be attacked before they are entitled to defend themselves. Where a person believes that he is in imminent danger of attack, a pre-emptive strike calculated to forestall an attack is capable of amounting to self defence.

Original aggressor- The fact that the accused initiated a physical confrontation (i.e. “started the fight”), while relevant, does not of itself exclude the possibility of self defence. However in such circumstances, the tribunal of fact must consider whether the original aggression had ceased so as to enable the accused to form a belief that his actions were necessary in self defence (see *Zecevic* supra).