CITATION:	*The Queen v Andrew Walker* [2019] NTSC 6
PARTIES:	THE QUEEN
	v
	WALKER, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NOs:	21655453 & 21728729
DELIVERED ON:	30 January 2019
HEARING DATE:	10 December 2018
JUDGMENT OF:	Mildren AJ

CATCHWORDS:

Criminal law- historic offences – repealed legislation - maximum penalty prescribed two years - whether offence is an indictable offence - plea of no jurisdiction - whether plea made out.

Bail Act (NT) s 37D
Criminal Law Consolidation Act and Ordinance (NT) s 66, s 334
Criminal Code (NT) s 3, s 14(1), s 188(1) and (2) (c) and (k), s 298, s 347, s 388(a), s 389(2), s 390, s 451
Criminal Code Act (NT) s 6(2)
Criminal Law and Procedure Act (NT) s 20
Director of Public Prosecutions Act s 38(1)
Interpretation (Criminal Code) Amendment Act (NT) s 4, s 38E
Interpretation Act (NT) s 3(3), s 12, s 17
Justice and Other Legislation Amendment Act 2014 s 4
Northern Territory Acceptance Act 1910 (Cth) s 7
Northern Territory (Self-Government) Act 1978 (Cth) s 57
Supreme Court Act (NT) s 14(1)(b)

Rodway v The Queen [1990] HCA 19 at [14]; (1990) 169 CLR 515 at 522; *Yrttiaho v Public Curator (Qld)* (1971) 125 CLR 228 at 241; *Dowler v Princes Securities Pty Ltd (1971) 1 SASR 578;* referred to

Blackstone, *Laws of England*, Special Edition (1983) Vol IV, p 299, para II,
Kenny, *Outline of Criminal Law*, 6th Edn, (1914) p 91, pp 93-100, p 421, pp 454-454
Pearce, D. *Interpretation Acts in Australia* para [10.34]
Pearce and Geddes *Statutory Interpretation in Australia* paras [10.23]-10.34]

REPRESENTATION:

Counsel:

Prosecution:	S Geary
Accused:	T Collins

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	B
Judgment ID Number:	Mil19551
Number of pages:	9

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Andrew Walker [2019] NTSC 6
Nos. 21655453 & 21728729

BETWEEN:

THE QUEEN

AND:

ANDREW WALKER

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 30 January 2019)

Introduction

[1] The accused, Andrew Walker, is charged with five offences under the provisions of the *Criminal Law Consolidated Act and Ordinance* (the previous Act). Two of the counts (counts 1 and 5) allege that at certain times between 1981 and 1983, the accused indecently assaulted two girls namely, JF and CW, contrary to s 66 of the previous Act. The maximum penalty prescribed by the previous Act is imprisonment for two years. The previous Act did not specify that this offence is a felony, nor did it specify that it is a misdemeanour, although the other offences which were charged were characterised by the Act as one or the other. Historically, indictable offences were required to be either felonies (including

treason) or misdemeanours[1]. The significance of this is that, unless an offence is indictable, there can be no trial by jury in relation to that offence.

[2] The charges were contained in an indictment presented by the Director of Public Prosecutions on 16 April 2018. When called upon to plead, the accused pleaded not guilty to counts 2, 3 and 4 but as to counts 1 and 5, he pleaded that this court had no jurisdiction to try him. Accordingly, I heard submissions from the parties on this issue, in accordance with s.347 of the *Criminal Code* (NT) (the Code).

[3] After hearing submissions, I ruled that this court has no jurisdiction to try the accused in respect of those offences. Accordingly, Mr Geary who appeared on behalf of the Director of Public Prosecutions, filed an amended indictment which removed counts 1 and 5 from the indictment. The trial then proceeded on the amended indictment.

[4] Due to the fact that the parties were anxious to proceed with the trial, and there was a jury panel waiting, I advised the parties that I would provide written reasons for my ruling at a later time. These are my reasons.

---

1 Blackstone, *Laws of England,* special edition (1983) Vol IV, p299, Para II; Kenny, *Outlines of Criminal Law,* 6th Edn. (1914) p91; p 421. The distinction between felonies and misdemeanours is discussed in Kenny, at pps 93-100. The classification of crimes as either treason, felonies, misdemeanours or petty offences was abolished in the Northern Territory by the *Criminal Code* in 1984, which reclassified offences as either crimes, simple offences or regulatory offences: s 3. All offences which carried a maximum penalty of *more than* two years were classified as crimes "unless expressed to be otherwise" by s 38E of the *Interpretation (Criminal Code) Amendment Act*. Regulatory offences were defined by the *Interpretation (Criminal Code) Amendment Act* s 4 (which came into force on 1 January 1984) as offences "specified in an Act or in regulations made under an Act to be a regulatory offence." What was or was not a simple offence was not defined, except by a process of elimination. Arguably, s 66 of the previous Act then became a summary offence.

The statutory provisions

[5] The previous Act was a law of the State of South Australia which remained in force when South Australia surrendered the Northern Territory to the Commonwealth.[2] It was repealed by the *Criminal Code Act* (the Code Act) when the latter came into force on the 1st of January 1984: ss 3 (1) and (2) of the *Code Act.*

[6] Section 14 (1) of the Code provides:

> A person cannot be found guilty of an offence unless the conduct impugned would have constituted an offence under the law in force when it occurred; nor unless that conduct also constitutes an offence under the law in force when he is proceeded against for that conduct.

It is not contended that the conduct is not an offence under the existing law.

Clearly it is: see, for example, s 188(1) and (2)(c) and (k) of the Code.

[7] Section 6 (2) of the *Code Act* provides:

> Where an offender is punishable under the Code or another law of the Territory, a person may be prosecuted and found guilty either under the Code or that other law.

It was contended by Mr Geary that s 66 of the previous Act is "another law of the Territory." Miss Collins, for the accused, did not contend otherwise. I accepted that submission.

[8] Section 334 of the previous Act provided:

> Any person may be put upon his trial at any Criminal Session of the Supreme Court for any crime or offence whatsoever, upon an information presented to the said Court in the name and by the authority of the Attorney-General of the Commonwealth, and every provision of the laws in force in the Territory relating to indictments and to the manner and form of pleading thereto and to the trial thereon, and generally to all matters subsequent to the finding on the indictment, shall apply to any information to be so presented as aforesaid.

---

2 *Northern Territory Acceptance Act 1910* (Cth) s 7

For the sake of argument, I accepted that "any crime or offence whatsoever" included an offence which was neither a felony nor a misdemeanour.[3]

[9] Section 57 of the *Northern Territory (Self-Government) Act* (Cth), which came into force on 1 July 1978, provides:

> (1) Subject to this Act, on and after the commencing date, all existing laws of the Territory have the same operation as they would have had if this Act had not been enacted, subject to alteration or repeal by or under enactment.
>
> (2) Where any existing law of the Territory, the operation of which is preserved by this section, is a law of the State of South Australia, any power or function which by that law is vested in the Governor of the State of South Australia, in the Governor of that State with the advice of his or her Executive Council or in any authority of that State shall, in relation to the Territory, be vested in and exercised or performed by the Administrator, the Administrator acting with the advice of the Council or the authority exercising similar powers and functions in the Territory, as the case may be, or as the Administrator directs.
>
> (3) In this section, ***existing law of the Territory*** means:
>
> (a) any law in force in the Territory immediately before the commencing date, other than an Act or an instrument (not being an Ordinance or an instrument made under an Ordinance) made under an Act; or
>
> (b) an Ordinance, or an instrument under an Ordinance, in force immediately before the commencing date or made and assented to before that date but not in force before that date.

Consequently, s 334 of the previous Act required an information[4] to be presented by the Attorney-General of the Northern Territory. It is not in doubt that after the passage of the *Director of Public Prosecutions Act*, indictments could be brought in the name of and under the authority of the Director of Public Prosecutions and

---

3 S 334 of the *Criminal Law Consolidation Act* (SA) was in the same form as at 31 December 1910 except that the reference to the Attorney General was to the Attorney General of South Australia.

4 Strictly speaking, an information is not the same as an indictment. An information was the name given to a charge brought ex officio by the Crown, and applied only to misdemeanours: see Kenny, op.cit pp 453-454. However, by the *Interpretation Act*, s.17, "indictment includes information".

that the Director's powers so to do extended to offences committed before the commencement of the *Director of Public Prosecutions Act*: s 38(1).

[10] Section 14 (1) (b) of the *Supreme Court Act* (NT) provides:

> In addition to the jurisdiction conferred on it elsewhere by this Act, the Court-
>
> (1) (b) has, subject to this Act and to any other law in force in the Territory, in relation to the Territory, the same original jurisdiction, both civil and criminal, as the Supreme Court of South Australia had in relation to the State of South Australia immediately before 1 January 1911.

Accordingly, the Court has jurisdiction to hear and determine an offence against s 66 of the previous Act, "subject to any other law in force in relation to the Territory."

[11] Mr Geary's principal contention was that the Court's jurisdiction to hear this offence was preserved by s 12(c) of the *Interpretation Act*, which provides that the repeal of an Act does not affect… a liability acquired, accrued or incurred under an Act… or an investigation, legal proceeding or remedy in respect of that liability." There is no doubt that this provision included offences committed under an Act which has since been repealed. S12 further provides that "the investigation, legal proceeding or remedy may be instituted, continued or enforced, and a penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been made." Whether s 12 has the effect of continuing the Supreme Court's jurisdiction to hear the charge may be doubted: see for example

Rodway v The Queen.[5] Be that as it may, s 12 of the *Interpretation Act* is subject to s 3(3) which provides:

> "In the application of a provision of this Act to a provision, whether in an Act or in another law, the first mentioned provision yields to the appearance of an intention to the contrary in that other provision."

[12] The argument then resolves into a question of whether or not the Court's jurisdiction has been affected by a contrary intention to be found in the *Criminal Code* as it presently provides. Miss Collins, for the accused, contended that by virtue or amendments to the Code passed in 2014, whatever may have been the situation in the past, the Code now makes it abundantly clear that the Supreme Court has no jurisdiction to try summary offences at *nisi prius*, and except as the Code specifically provides, cannot impose a penalty for a summary offence. Her contention was that the offence in question is now characterized as a summary offence.

[13] S 3 of the *Criminal Code* as amended in 2014 provides that an offence is not an indictable offence unless an Act states that the offence is an indictable offence or the maximum penalty exceeds two years. As the maximum penalty for the offence is two years, and therefore does not exceed two years, prima facie the offence created by s 66 of the previous Act is not an indictable offence. The question then is whether there is an Act which states that the offence is an indictable offence.

---

5 [1990] HCA 19 at para [14]; (1990) 169 CLR 515 at 522; see also *Yrttiaho v Public Curator (Qld)* (1971) 125 CLR 228 at 241; *Dowler v Princes Securities Pty Ltd* (1971) 1 SASR 576; D. Pearce, *Interpretation Acts in Australia* para [10.34]; Pearce and Geddes *Statutory Interpretation in Australia*, paras [10.23]-[10.34]

[14] S 66 of the previous Act did not state that that offence was an indictable offence, and as it was neither a felony nor a misdemeanor, I concluded at the time that s 66 was to be characterized as not an indictable offence and that it was therefore a summary offence as defined by s 3 of the Code, which provides, inter alia, that an offence which is not an indictable offence is a summary offence.

[15] The Supreme Court only has jurisdiction to hear and determine by jury at *nisi prius* indictable offences: see s 298 of the Code. Further, s 389 (2) of the Code provides that:

> "…the Supreme Court must not hear and determine the charge of a summarily triable offence unless the charge has been transmitted to the Registrar of the Supreme Court under s 390."

[16] A "summarily triable offence" is defined by s 388(a) as a summary offence[6].

[17] Section 451 of the Code, which was inserted by s 7 of Act No. 22 of 2014, provides:

> "To avoid doubt, the Supreme Court may exercise powers under s 389 in relation to an indictment that was presented, or a summary offence the charge for which was laid, before the commencement of s 4 of the *Justice and other legislation Amendment Act* 2014."

[18] The charges under s 66 of the previous Act had not been laid prior to the commencement of s 4 of the *Justice and Other Legislation Amendment Act*

---

6 One exception to this is a complaint laid for breach of bail under s 37D of the *Bail Act*, which specifically provides for certain breaches of Supreme Court bail to be tried summarily by a Judge of the Supreme Court.

2014[7] and nor had the charges against s 66 of the previous Act been transmitted to the Registrar of the Court under s 390.

[19] The argument of Mr Geary was that s 389 (2) of the Code must be read in context and did not apply to charges which were laid under the previous Act which were triable only in the Supreme Court. In my opinion, the language of s 389 (2) was crystal clear. There was no occasion for reading into the section or into the definitions, words which would have the effect of excluding prosecutions against s 66 of the former Act. I therefore concluded that, whatever may have been the situation in the past, the Supreme Court no longer had jurisdiction to try the accused for these offences, and I so ruled.

[20] Subsequent to the time of my ruling and after the trial had concluded, Mr Geary drew my attention to s 20 of the *Criminal Law and Procedure Act* which was in force in the period 1981-1983, but has since been repealed[8]. That provision stated:

> "Subject to a provision of a law of the Territory which provides for the hearing and determination of offences in a summary manner, offences against a law of the Territory which are punishable by imprisonment by a period exceeding six months shall be indictable offences."

---

7 Commenced on 30 April 2014: *Government Gazette* (NT) No G24, p2, 30 April 2014

8 Repealed by the *Criminal Code* (NT) 1983 which came into force on 1 January 1984

[21] Had I been aware of that provision, my ruling may well have been different.[9]

---

9 But quaere whether Section 3 of the Code, when it refers to "an Act", applies to a repealed Act: see *Interpretation Act*, s 17. I was aware of the existence of this Act and attempted to obtain a copy of it as in force at the relevant time. It was not available to me in Alice Springs, the library facilities there being totally inadequate for research of this nature, neither was it able to be retrieved through the NT Government website nor through Austlii. I requested my Associate to obtain a copy of it through the Supreme Court Library before the commencement of the trial. The copy provided to me was the *Criminal Procedure Ordinance* as in force in 1978, which did not contain s 20. It now appears that the copy provided to me may have been repealed by the *Criminal Law and Procedure Act*.