

CITATION: *Heath v Rout and Heath v Pearce* [2018]
NTSC 17

PARTIES: HEATH, Andrew

v

ROUT, Tahnieerae and
PEARCE, Kerry Anne

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: LCA 24 of 17 (21705220) and LCA 23
of 17 (21705224)

DELIVERED: 14 March 2018

HEARING DATE: 12 March 2018

JUDGMENT OF: RILEY AJ

APPEAL FROM: Local Court

CATCHWORDS:

CRIMINAL LAW – Liquor offences – bringing liquor into an Alcohol Protected Area – whether s 86 defence available to offences under s 75B of *Stronger Futures in the Northern Territory Act* (2012) (Cth)

Criminal Code Part 11AA
Emergency Response Act s 12
Liquor Act (NT) s 75, s 75(1)(a), s 75B (1), s 86
Liquor Regulations
Northern Territory National Emergency Response Act s 4(3)

*Stronger Futures in the Northern Territory Act (2012) (Cth) s 8, s 9,
Division 1AA of Part V111*

Rockman v Smallridge [2012] NTSC 56; *Rosas v Cahill* [2013] NTSC 65;
Turley v Byrne [2009] NTSC 22, referred to

REPRESENTATION:

Counsel:

Appellant:	R Murphy
Respondent:	S Lapinski

Solicitors:

Appellant:	Murphy and Associates
Respondent:	North Australian Aboriginal Justice Agency

Judgment category classification: B
Judgment ID Number: Ril1802
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Heath v Rout and Heath v Pearce [2018] NTSC 17
No. LCA 24 of 17 (21705220) and LCA 23 of 17 (21705224)

BETWEEN:

ANDREW HEATH
Appellant

AND:

TAHNIEERAE ROUT
KERRY ANNE PEARCE
Respondents

CORAM: RILEY AJ

REASONS FOR JUDGMENT

(Delivered 14 March 2018)

[1] The respondents were jointly charged with the offence of bringing alcohol into an Alcohol Protected Area contrary to s 75B(1) of the *Liquor Act* (NT) read with s 8 of the *Stronger Futures in the Northern Territory Act* (2012) (Cth) (*SFNT Act*). Following a hearing before a Local Court Judge the charges against each respondent were dismissed.

[2] The appellant appeals against the dismissal on two grounds:

(a) the learned Local Court Judge erred in holding that s 86 of the *Liquor Act* was a defence to a charge under s 75B(1) of the *Liquor Act*, and

(b) the learned Local Court Judge erred in holding that the mental element of the charge under s 75B(1) of the *Liquor Act* had not been proved beyond reasonable doubt.

[3] In written reasons for decision the Local Court Judge found that the respondents had purchased alcohol from the Todd Tavern Bottle Shop intending to take it to the home of Ms Rout in the suburb of Gillen. As part of the journey they drove to House 14 Ulpaya Road, Charles Creek Camp in order to pick up the children of Ms Rout and take them to her home in Gillen. His Honour found it was to be a “quick pick up and go”. When they stopped at the relevant address at Charles Creek Camp police searched the vehicle and located a range of alcoholic drinks including cider, rum and rum and cola. It was not disputed that this was “liquor” as defined in the *Liquor Act*. Charles Creek Camp was, at the relevant time, an Alcohol Protection Area and a Prescribed Area pursuant to s 4(3) of the *Northern Territory National Emergency Response Act*. Under the subsequent *SFNT Act* the Town Camps (including Charles Creek Camp), which were Prescribed Areas under the old Act, became Alcohol Protected Areas.

[4] His Honour concluded that the respondents “entered the Alcohol Protection Area to pick up the children and they intended to transport the alcohol back to Rout’s address in Gillen”. There is no challenge to the findings of fact.

[5] His Honour then conducted a review of the relevant legislation and concluded that the defence established by s 86 of the *Liquor Act* remained

available to the respondents. That section, which has been referred to as the “drive-through defence”, provided that it was not an offence to transport liquor through a prescribed area (which now includes an Alcohol Protected Area) if it can be demonstrated that the destination was outside the prescribed area.

- [6] In light of the factual findings the charges were dismissed. In the alternative, his Honour determined that the requisite fault elements were not made out in that the necessary intention had not been established beyond reasonable doubt.

The legislative regime

- [7] This area of the law is governed by a combination of Commonwealth and Northern Territory legislation and it is the interaction of that legislation which gives rise to the present discussion.
- [8] The *Liquor Act* (NT) contains provisions enabling the Northern Territory Licensing Commission to declare general and public restricted areas for the purposes of the Act. Section 75 of the Act then creates an offence of bringing liquor into a general restricted area. It does so in the following terms:

75 Prohibitions for restricted areas

- (1) A person commits an offence if the person:
 - (a) brings liquor into a general restricted area; or

- (b) has liquor in his or her possession, or under his or her control, in a general restricted area; or
- (c) consumes, sells, supplies or otherwise disposes of liquor in a general restricted area.

[9] Section 75 goes on to provide that an offence against subsection (1) is a regulatory offence and also sets out various exceptions. Section 86 of the Act then provides for the so-called drive-through defence in the following terms:

- 86 Not an offence to transport liquor through general restricted area
- (1) It shall not be an offence under section 75(1) where a person brings liquor into, or has liquor in his possession or under his control within, a general restricted area, for the purpose only of transporting that liquor to a destination outside a general restricted area.
 - (2) In any proceedings for an offence under section 75(1), the onus of establishing a purpose of a nature referred to in subsection (1) shall be on the accused.

[10] The Commonwealth Parliament passed the *Northern Territory National Emergency Response Act* (Cth) (the *Emergency Response Act*) which commenced in August 2007. The *Emergency Response Act* made provision in relation to existing legislation in the Northern Territory including by modifying the operation of the *Liquor Act*, the *Liquor Regulations* and the *Police Administration Act* in relation to “prescribed areas”. The *Emergency Response Act*, in s 12, provided that the *Liquor Act* would have effect in relation to a prescribed area as if such area had been declared to be a general

restricted area under the *Liquor Act*. Section 12 went on to create an offence in similar terms to s 75 of the *Liquor Act* but in relation to prescribed areas.

- [11] In *Turley v Byrne*¹ it was held that the defence available under s 86 of the *Liquor Act* continued to have application in relation to the offence created by s 12 of the *Emergency Response Act*.
- [12] In 2012 the Commonwealth Parliament passed the *SFNT Act* which was, *inter alia*, aimed at reducing alcohol-related harm in the Northern Territory. Measures included in the Act were said to apply in alcohol protected areas prescribed by rules made under the Act and, further, that the *Liquor Act* applies “as if each alcohol protected area were a general restricted area under that Act”. There is no dispute that the Charles Creek Camp was an alcohol protected area at the relevant time.
- [13] Section 8 of the *SFNT Act* provided that the *Liquor Act* applied “while this Act is in effect” as if the provisions contained in Division 1AA of Part V111 of the *SNFT Act* were included within the *Liquor Act*. Those provisions included s 75A which set out various definitions and also provided that Part 11AA of the *Criminal Code*, dealing with criminal responsibility for offences, applies to an offence against the Division.
- [14] Importantly, for present purposes, the *SFNT Act* created a further offence for possessing liquor in alcohol protected areas. It did so in the following terms:

¹ [2009] NTSC 22.

75B Possessing etc. liquor in alcohol protected areas

(1) A person commits an offence if:

(a) the person:

(i) brings liquor into an area; or

(ii) has liquor in his or her possession, or under his or her control, in an area; or

(iii) consumes liquor in an area; and

(b) the area is an alcohol protected area.

[15] Section 75B went on to provide a range of defences which are not relevant to this matter. Of significance for present purposes was the fact that the *SFNT Act* did not include a “drive-through” defence of the kind referred to in s 86 of the *Liquor Act* and nor did it amend that section to give it wider application than to “an offence under section 75(1)” of the *Liquor Act*.

[16] The reasons for decision in the Local Court reveal that his Honour placed some reliance on two decisions of this Court as lending support for a conclusion that the drive-through defence under s 86 of the *Liquor Act* still has application. In my opinion the cases referred to do not assist and neither counsel submitted otherwise.

[17] The first of those cases was *Rockman v Smallridge*² which is an application of the well-known proposition that where there is an inconsistency between

² [2012] NTSC 56.

Northern Territory legislation and Commonwealth legislation, the Commonwealth legislation prevails. The case makes no reference to the *SFNT Act* and focuses upon the earlier *Emergency Response Act*. The second case is *Rosas v Cahill*³ which relates to whether s 75(1)(a) of the *Liquor Act* remained a regulatory offence. It was not concerned with the operation of s 86.

- [18] The reasons for decision of the Local Court Judge also focused on the “draconian result” of the defence under s 86 not being available. His Honour considered the fact that the offence under s 75B of the *SFNT Act* replaced the offence under s 75 of the *Liquor Act* for the duration of the *SFNT Act* was significant and concluded :

Without a clear indication by the Commonwealth of an intention to do away with s 86 applying to Alcohol Protection Areas s 86 should be read to apply to s 75B offences where they are in the same terms and temporarily replace s 75(1) of the NT *Liquor Act*.

- [19] This is to ignore the plain meaning of the words in s 86 that the defence is not general in nature but rather applies specifically to “an offence under section 75(1)”.

- [20] The situation is different from that which applied when *Turley v Byrne*⁴ was decided. That case related to the relationship between the *Liquor Act* and the *Emergency Response Act*. The *SFNT Act* had not then been introduced. In

³ [2013] NTSC 65.

⁴ [2009] NTSC 22 at [11] - [12].

determining that the s 86 defence remained available it was observed in that case that:

[11] Section 12 of the *Emergency Response Act* provides that "offences against Subsection 75(1)" of the *Liquor Act* will be replaced by the identified provisions contained within s 12. Reference to s 86 of the *Liquor Act* makes it clear that it "shall not be an offence under section 75(1)" where the person is transporting liquor to a destination outside a general restricted area. In the present case, if the appellant establishes that he was transporting liquor to a destination outside the identified general restricted area, he will not be committing an offence for the purposes of s 75 of the *Liquor Act* and, therefore, s 12 of the *Emergency Response Act* will not be activated.

[12] Reference to the Explanatory Memorandum to the *Emergency Response Act* makes it clear that this result was intended. The Explanatory Memorandum includes the following:

Part 2 modifies the Liquor Act of the Northern Territory. Although the Liquor Act is modified by this bill, the new obligations, offences, penalties and requirements have effect as Northern Territory law. **The Liquor Act will continue to operate in areas that are not prescribed areas and its provisions as modified will also apply to prescribed areas. For example, section 86 of the Liquor Act currently allows people to transport liquor across a general restricted area. The modifications will mean that people travelling around the Northern Territory by road are able to carry liquor across a prescribed area provided they do not consume or dispose of the liquor in that area as provided for by section 86 of the Liquor Act.** Similarly, aircraft that land in a prescribed area are able to carry liquor provided the liquor is not consumed while the aircraft is on the ground and the final destination is not a prescribed area.

[21] The changes introduced by the *SFNT Act* were not effected by replacing offences against subsection 75(1) of the *Liquor Act* but, rather, by introducing a new Division into that Act which provided for a new offence, albeit in very similar terms to s 75(1) of the *Liquor Act*. The Legislature

having allowed for the continued operation of the defence under s 86 of the *Liquor Act* when introducing the *Emergency Response Act* and having not done so when introducing the *SFNT Act* it would seem the omission was intentional. Nothing in the Explanatory Memorandum indicates otherwise.

- [22] Counsel for the respondents made reference to the following passage in the Explanatory Memorandum:

The burden of proving defences, at least on the balance of probabilities, provided for in the new Division 1AA of Part V111 rests with the defendant. While this seems to be contrary to usual principles, it is consistent with similar provisions in the Liquor Act. It is not intended that it should be easier, or harder, for a person to raise defences to the offences in new Division 1AA of Part V111 than it is for similar offences already existing in the Liquor Act.

However, it is readily apparent this refers to the reversing of the onus rather than to any suggestion that s 86 has continuing application.

- [23] In my opinion the defence available under s 86 of the *Liquor Act* is limited to offences under s 75(1) of the Act and does not have application to an offence under the inserted provisions and, in particular, s75B.

- [24] This conclusion is supported by s 9 of the *SFNT Act* which provides that the Northern Territory *Liquor Act* continues to apply while the *SFNT Act* is in operation with the specific exclusion of s 75. There is no attempt to equate s 75 with s 75B or to make the defence available under s 86 available under that section.

- [25] Counsel for the respondents emphasised the requirement to look at the purpose or object of an Act for the purposes of interpretation but was unable

to identify any ambiguity in the words used in the Act and was unable to explain why the unavailability of a s 86 defence would be inconsistent with the purpose or object of either the *SFNT Act* or the *Liquor Act*. The purposive approach to statutory interpretation does not assist in this case.

[26] It was submitted that the Legislature “inadvertently overlooked the need to clearly provide for the passing through defence” but that submission is not supported by the history of the legislation as described above.

[27] In my opinion the learned Local Court Judge did err in holding that s 86 of the *Liquor Act* provided a defence to a charge pursuant to s 75B of the Act.

Ground 2. The learned Local Court Judge erred in holding that the mental element of the charge, s 75B(1) of the *Liquor Act*, had not been proved beyond reasonable doubt

[28] The Local Court Judge found, in the alternative, that the requisite fault elements were not made out “where an intention to bring, possess or control liquor in an Alcohol Protected Area is for the purpose of transporting it to a destination outside the area”. This finding is also the subject of appeal.

[29] The elements of the charge against each of the respondents was that (a) they brought liquor into an area and (b) the area is an alcohol protected area. The evidence revealed that each respondent knew they had liquor in the vehicle and knew that Charles Creek Camp was an alcohol protected area. They each meant to engage in transporting the liquor into the Charles Creek Camp. The fact that they intended to subsequently transport the alcohol to a destination

outside the area does not detract from the existence of the necessary intention.

[30] In my opinion his Honour erred in the approach to the issue of intention.

[31] The appeal is allowed. The verdicts of acquittal of the respondents by the Local Court are set aside and findings of guilt substituted. Consistent with the agreement of counsel, the matter is referred to the Local Court for sentence.
