(tho94008)

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

No. 23 of 1992
(9207031)

BETWEEN:

THE QUEEN
Applicant

AND:

ANTON HOFSCHUSTER
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 10th March 1994)

I refer to written reasons for decision in this matter delivered on 1 November 1993. In particular the part of the decision which relates to quashing of an indictment pursuant to s339(1)(a) of the Criminal Code.

This is an application by the Crown to state a case for the opinion of the Court of Criminal Appeal pursuant to s408 of the Criminal Code.

The application is by summons issued in accordance with the provisions of Order 46 of the Supreme Court Rules.

The Director of Public Prosecutions applies for the reservation by way of case stated to the Court of Criminal Appeal for the consideration of the following questions of law:

"1. Whether in considering the effect of an acquittal in a criminal trial on a subsequent separate proceeding in which evidence given on the former trial will again be lead by the prosecution, the correct principle to be applied is:-

(a) that an accused should be given the full benefit of a verdict of acquittal (**R v Storey** (1977-78) 140 CLR 364)

OR

(b) that a collateral attack on the jury's verdict is not to be allowed (**Bryant v Collector of Customs** (1984) 1 NZLR 280)

OR

(c) that the accused might be placed in double jeopardy (**R v Humphrys** [1977] AC 1).

2. Whether as a matter of law any of these principles applied in the circumstances of the present case.

3. In the circumstances of this case, whether as a matter of law the indictment was calculated to prejudice or embarrass the accused in his defence to the charge in the sense in which that expression is used in the Code.

4. In the circumstances of the case, whether as a matter of law the indictment created an unfairness to the accused in that it infringed the principle of double jeopardy and thereby justified a permanent stay of the proceedings."

Section 408 of the Criminal Code states:

"408. RESERVATION OF POINTS OF LAW

(1) When any person is indicted for any offence the court of trial must, on the application of counsel for the accused person made before verdict and may, in its discretion, either before or after judgment, without such application, reserve any question of law that arises on the trial for the consideration of the Court.

(2) If the accused person is convicted and a question of law has been so reserved before judgment, the court of trial may either pronounce judgment on the conviction and respite execution of the judgment or postpone the judgment until the question has been considered and decided and may either commit the person convicted to prison or admit him to bail on recognizance, with or without sureties, and in such sum as the court of trial thinks fit, conditioned to appear at such time and place as the court of trial may direct to receive judgment.

(3) The judge of the court of trial is thereupon required to state, in a case signed by him, the question of law so reserved with the special circumstances upon which it arose and the case is to be transmitted to the Court.

(4) The judge of the court of trial may state, in a case signed by him, the question of law so reserved before the trial has concluded.

(5) Any question so reserved is to be heard and determined as an appeal by the Court and, in the discretion of the Court, may be heard and determined before the trial has concluded.

(6) The Court may send the case back to be amended or restated if it thinks it necessary so to do."

The Crown's position at the hearing of this application is that the Crown has no right of appeal or other remedy against the decision of this Court under s339 of the Criminal Code. It is the Crown's contention that the only way the Crown can contest the determination is by way of case stated under s408. It is the submission of Mr Wilde QC, counsel for the Crown, that the court has a discretion to grant or make the reservation on a question of law pursuant to s408.

It is contended by the Crown that s408 makes two separate provisions. The first is that the court must, on the application of counsel for the accused before verdict, state a case and, secondly, in any other case the court could state a case of its own volition, with or without application. The court does not require an application by counsel for the accused person for the court to exercise such discretion.

It is the second power that the Crown relies upon and submits that I should exercise the discretion that I have and state a case to the Court of Criminal Appeal.

The respondent objects to the application for the reservation of a case stated and submits there is no jurisdiction pursuant to s408 of the Criminal Code to consider the application. The respondent seeks a declaration from this court to that effect.

Mr McDonald, counsel for the respondent, argues firstly that s408(1) and (2) does not confer a power on the prosecutor to request the court to reserve a question for the consideration of the Court of Criminal Appeal. Secondly, counsel for the respondent argues that s408 is part of a statutory scheme and the Crown seeks, under s408(1), to obtain

a power by implication. Such power is not there by implication. The legislature provides for those occasions when a prosecutor can seek a court to reserve a question for the consideration of the Court of Criminal Appeal and that is set out in s409(1) of the Northern Territory Criminal Code. Counsel for the respondent referred to the inter-relationship between s408(1) and s408(2), stating that, in particular on the plain wording of s408, jurisdiction of the court to state a case to the Court of Criminal Appeal depends on:

(1) there being an application by the accused or the court of its own motion; and

(2) there must be a conviction.

The relevant provisions of the Supreme Court Rules are Order 64 and Order 46.02(1) which states:

"46.02 APPLICATION BY SUMMONS

(1) An application made on notice to a person shall be by summons, unless the Court otherwise orders."

Section 408 of the Northern Territory Criminal Code has apparently not been before the Northern Territory Supreme Court for consideration. However, similar sections have been considered in Western Australia and Queensland.

In the early Western Australian case of *R v Davis* (1904 - 1906) 7-8 WALR 78, a very similar section to s408 Northern Territory Criminal Code, s667 of the Western Australian Criminal Code (since repealed), was considered by the Full Court (Parker ACJ, McMillan, Burnside JJ). S667 in part reads as follows:

"When any person is indicted for any indictable offence, the court before which he is tried must, on the application of counsel for the accused person made before the verdict, and may in its discretion, either before or after judgment, without such application, reserve any

question of law which arises on the trial for the consideration of the Supreme Court."

Parker ACJ, after considering the words of that part of the section, came to the conclusion "that this mode of appeal provided by the Code was inserted for the benefit of the accused person." (p 79). He also noted that "judgment" in the section meant "sentence" as opposed to "verdict" and on that basis he states that this portion of the section clearly contemplates that the accused must be convicted before the learned judge who presides at the trial can state a case.

Further, Parker ACJ notes that there is no mention in the section of the counsel for the prosecution, and that s671 (which is similar to s409(1) Northern Territory Criminal Code) "is the only section which deals with the power of the court to state a case on the application of the counsel for the prosecution and that is only in cases where the accused person has been convicted and judgment has been arrested." (p 80)

The next portion of s667 (as it then was) is similar to s408(2) and reads as follows:

"If the accused person is convicted, and a question of law has been so reserved before judgment, the court may either pronounce judgment on the conviction and respite execution of the judgment, or postpone the judgment until the question has been considered and decided, and may either commit the person convicted to prison or admit him to bail or recognisance, with or without sureties, and in such sum as the court thinks fit, conditioned to appear at such time and place as the court may direct, and to render himself in execution or to receive judgment as the case may be."

In relation to this Parker ACJ (p 79) stated:

"That portion of the section, it seems to me, also clearly contemplates that the accused person must be convicted. If it contemplates the stating of a case where the accused person has been found not guilty, there is no provision that the accused person is to remain in custody or to be allowed on bail until this court considers the case stated by the learned judge who presides at the trial."

Burnside J, who agreed with the decision of Parker ACJ, stated at p 82:

> "Turning to the Criminal Code, it is worthy to observe that it does not confer any new rights on the Crown, and anyone who reads Section 667 of the Code would be struck immediately by the fact that the conviction of the person was a condition precedent to matters being reserved for the opinion of the court."

The case of *R v Davis* was cited in the Queensland case *R v Elliot* [1938] St R Qd 311. In that case, the material section of the Code was s668B which the Full Court stated was very similar to s667 of the Western Australian Criminal Code. As a result the Full Court (Blair CJ, Webb J, Hart AJ) found it impossible to distinguish the Western Australian decision and indicated that that case was rightly decided.

The Full Court held that the learned trial judge had no power to refer questions before verdict, and finding themselves in agreement with the decision of the Full Court of Western Australia in *R v Davis* (supra), they quoted the following passage:

> "It is a condition precedent to the exercise by the court before which a person is tried of the power conferred by s667 of the Criminal Code to state a case for the opinion of the Full Court on points of law arising at the trial, that the person tried shall have been <u>convicted</u> by the jury. If the jury acquitted the accused or fail to agree in a verdict, the Judge at the trial, whether at request of counsel for the accused or in the exercise of his own discretion, has no power under s667 to state a case. No case for the Full Court can be reserved under the Criminal Code at the instance of the prosecutor except as provided by s671. In the case here reported, the jury not having convicted the accused, the court declined to deal with the points of law raised in the case which had been stated." (Emphasis mine).

In *R v Parry* (1979-1980) 23 SASR 187, even though the case stated provision s350(1) of the *Criminal Law Consolidation Act (S.A.)* was worded differently to the relevant provisions in Western Australia and Queensland, Legoe J (with whom Zelling J and Jacobs J agreed), noted that the

cases of *R v Davis* and *R v Elliot* were nevertheless strongly persuasive in relation to a s350 case stated.

Legoe J (p 193 & 194) proceeded to quote from *R v Davis* and *R v Elliot* (similar to that quoted above) and held that in his opinion:

> ". . . for the reasons expressed by the court in *R. v. Davis* and confirmed in *R. v. Elliot*, I would hold that this court 'has no jurisdiction to consider the case stated' (per Parker A.C.J. in *R. v. Davis*). . . ."

Therefore the Queensland and Western Australian authorities have also received approval in a common law jurisdiction.

Finally, in *R v Bright & Others* [1980] Qd R 490 s72(1) of the *Judiciary Act* (similarly worded to s408(1) Northern Territory Criminal Code & s668B Queensland Criminal Code) was considered by the Full Court (D.M. Campbell, Andrews & Connolly JJ). In relation to this section, Campbell J (p 492) stated that s72(1) contemplated reservation of questions of law after conviction and a further indication that that is what was intended is gleaned from s72(2) *Judiciary Act* which is very similar in wording to s408(2) Northern Territory Criminal Code. In deciding this, Campbell J applied *R v Elliot*, in which it was held, as stated above, that a case could only be stated under s668B of the Criminal Code where the accused is convicted. (He noted s668B is in similar terms to s72(1) of the *Judiciary Act*).

Campbell J's view was further confirmed by Connolly J at p 497 where he stated:

> "At the beginning of argument our attention was directed to features of the *Judiciary Act* which make it more than doubtful whether questions of law can be reserved under s72 before verdict and conviction. Cf. *R v Elliot* [1938] St. R. Qd. 311."

In applying the above authorities which involve decisions in relation to sections in Western Australia, Queensland and

South Australia which are very similar to s408 of the Northern Territory Criminal Code, I would conclude that I have no jurisdiction under s408 to consider the application in the summons. It is clear from the authorities, that under s408 only the accused can apply for the reservation of a question of law, and not the prosecution. The prosecution has an avenue to reserve a case for the consideration of the Court of Criminal Appeal pursuant to s409(1) when a court, before which a person is convicted on indictment arrests judgment.

Further, for an application to reserve a question of law under s408(1) the accused must be convicted (also evidenced by s408(2)) which is not the case here.

Accordingly, I do not consider I have a discretion to reserve a question of law for the consideration of the Court of Criminal Appeal.

I agree with the submissions of counsel for the respondent. I make a declaration that in this matter the court does not have jurisdiction under s408 of the Northern Territory Criminal Code to reserve a question of law for the consideration of the Court of Criminal Appeal.