Toohey v Peach [2003] NTCA 17

PARTIES:	PAUL LESLIE TOOHEY
	v
	DAVID NICHOLAS PEACH
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 5 of 2003 (20216932)
DELIVERED:	11 December 2003
HEARING DATE:	2 December 2003
JUDGMENT OF:	MILDREN, THOMAS & BAILEY JJ

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC
Respondent:	M Carey

Solicitors:

Appellant:	Geoff James
Respondent:	DPP

Judgment category classification:	C
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Toohey v Peach [2003] NTCA 17
No. AP 5 of 2003 (20216932)

BETWEEN:

PAUL LESLIE TOOHEY
Appellant

AND:

DAVID NICHOLAS PEACH
Respondent

CORAM: MILDREN, THOMAS & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 11 December 2003)

THE COURT:

[1] On 19 November 2002 in the Court of Summary Jurisdiction at Darwin the appellant pleaded guilty to an offence, namely that on 13 November 2002 at Wadeye (Port Keats) in the Northern Territory, he entered Aboriginal land without having been issued with a permit to do so, contrary to s 4 of the *Aboriginal Land Act*. The maximum penalty for this offence is a fine of $1,000.

[2] The learned magistrate found the appellant guilty and without recording a conviction, ordered the charge be dismissed pursuant to s 7(a) of the *Sentencing Act*.

[3] The respondent (Crown) appealed against that disposition, firstly on the ground that the learned magistrate wrongly exercised his discretion under s 8(1) of the *Sentencing Act* and, secondly, that the learned magistrate's order was manifestly inadequate in the circumstances of the case.

[4] On 30 May 2003, Angel J allowed the Crown's appeal, quashed the order of the learned magistrate and in substitution therefor ordered that a conviction be recorded and discharged the appellant.

[5] The appellant has appealed against the judgment of Angel J on the grounds:

1. The learned appellate judge erred in concluding that the decision of the learned magistrate was wrong.

2. The learned appellate judge erred in failing to properly apply the provisions of s 8 of the *Sentencing Act* in circumstances where he had concluded that he was entitled to exercise the sentencing discretion afresh.

[6] The learned appellate judge described the background and circumstances of the offence in the following terms:

> "[4] Following the (appellant's) plea of guilty on 19 November 2002 the following admitted Crown facts were read to the court:
>
> > 'On the morning of Wednesday 13 November this year, Wadeye Community was holding a funeral for a local man who had died during an incident approximately two weeks before.

The incident that the male died in was the subject of media interest and the defendant in the matter was one of many journalists who contacted the Kardu Numida Community Government Council requesting permission to enter Wadeye Community in relation to the matter.

The council, out of respect for the deceased's family and community feelings, advised all those who inquired for these reasons that they, as the issuing body under the *Aboriginal Land Act*, would not give permission for them to attend Wadeye Community.

The defendant recontacted members of the council on several further occasions for comment on the incident or for permission to and on each occasion he was advised that they did not wish to speak to him and that they would not give him permission to enter the community.

On the day of Wednesday 13 November this year the defendant drove to Port Keats Community in a hire vehicle and upon attendance at the community took photographs and attempted to interview members of the deceased's family immediately after the funeral.

The family of the deceased became upset at the defendant attempting to interview them and made a complaint to members of the council about the defendant being in the community. The council then contacted police and advised that they wished to lay a complaint under the *Aboriginal Land Act* of the defendant being in the community without a permit and requested the defendant be prosecuted.

Police located the defendant driving along the main street of the community. He was apprehended and taken to the police station. He was asked why he had entered Aboriginal land without a permit. He stated that he believed it was necessary to do so in order to obtain the story. He also admitted to not having a permit. He was charged, bailed and escorted from the community and the bail conditions were immediately to leave the community.

Wadeye Community is approximately 200 ks within the Daly River Aboriginal Land Reserve which is gazetted Aboriginal

land. The defendant was in Wadeye Community without a permit.'

[5] The (appellant) was born in 1963. He is a journalist of some 23 years experience with no relevant previous record. At the time of the offence he was a senior journalist with The Australian newspaper, a national publication for which he had worked for some 3½ years. He was a person of good character and high standing in his professional life. He was a Walkley Award winner with a national profile for writing articles concerning violence on Aboriginal communities.

[6] On 23 October 2002 at Wadeye an Aboriginal man sustained a bullet wound in the chest and died during a confrontation between fighting members of two opposing Aboriginal clans when three Port Keats Police officers intervened. Public statements were made to the effect that the Coroner would investigate the incident and that the bullet which killed the deceased came from a 40 calibre Glock semi–automatic Police pistol. The incident received much publicity in the media. Subsequently, on 6 November 2002, the Court of Summary Jurisdiction in Darwin cancelled its proposed sittings at the Port Keats Court scheduled to commence on Monday 11 November 2002. A Police spokesperson made a public statement to the effect that Police could not guarantee the safety of members of the Court party travelling to and from Port Keats, even between the airport and the Court House. It was further said that not only was the situation 'severe' but likely to escalate. On 8 November 2002 The Australian newspaper published a story by the (appellant) concerning these matters and particularly the cancellation of the Court sittings and the apprehension of continuing violence in the community at Port Keats."

[7] On behalf of the appellant, it was submitted to the learned magistrate that the appellant was a professional man of high standing who was "performing, in the manner of his profession, his public duty: reporting matters that ought properly be the subject of public scrutiny, and indeed have been the subject of public scrutiny". It was submitted that having regard to all the

circumstances, including the appellant's undisputed good character, professional standing and early plea, the appellant's situation justified the exercise of the court's discretion pursuant to ss 7 and 8 of the *Sentencing Act* to find the offence proved without proceeding to conviction and to dismiss the charge.

[8] On behalf of the respondent, it was submitted that the appellant had deliberately flouted the law after being refused a permit on several occasions. It was also submitted that the appellant had had no respect for the feelings of the deceased's relatives. In the respondent's submission, the nature of the breach and the need for general deterrence warranted a conviction.

[9] In his reasons for disposition, the learned magistrate said, inter alia:

> "I have already said and I can't simply enter into some artificial catharsis and pretend that I arrived in Australia for no reason at all. I left South Africa because of many of the things that Mr James has adverted to and of course much more. I lived in a society where the freedom of the press was simply circumscribed by a ruthless government which oppressed all political views other than those which it found favour with.
>
> I guess for that reason I am biased at least in relation to the function that I must discharge here today. There are matters in respect of which Mr James has adverted to which in my private capacity I have a great deal of sympathy with. I don't propose however to usurp my function as a magistrate by allowing that ability to use this opportunity to make any comment in relation to – or of a political nature in relation to the permit system. Those who feel the concern are recorded by Mr James, people will have to make their own minds up about that.
>
> However, ***undoubtedly it is the case that the existence of the system in relation to this matter*** and the employment of the powers under the system in relation to this matter did in fact ***potentially***, albeit in the case of breach that was not so, ***served to keep the Australian***

public in the dark as to whatever it was that occurred in Port Keats, not only when these three men were injured but thereafter.

Obviously in light of what I said to begin with, that is repugnant to me. I cannot conceive why in this wonderful country anybody should be free from the scrutiny of the press and the agencies of the lawful authorities in the Northern Territory and anywhere else in the Commonwealth of Australia. Nevertheless, as I said to Mr James in any event, that is a matter for the legislature, it is not a matter for the courts.

………………

I am persuaded that in the circumstances in which Mr Toohey found himself were such that it almost would have been a dereliction of his duty as an investigative journalist to allow to go unpublished, unrevealed and unventilated the events which gave rise to the unfortunate death of this young man.

……………..

In the event, I'm clearly in the circumstances intending to act as I now do, I find that Mr Toohey is guilty of the offence with which he was charged. I do not proceed to convict him and I do not impose any other penalty." (emphasis added)

[10] The decision whether or not to record a conviction is prescribed by s 8(1) of the *Sentencing Act* as follows:

"(1) In deciding whether or not to record a conviction, a court ***shall have regard to the circumstances of the case*** including –

(a) the character, antecedents, age, health or mental condition of the offender;

(b) the extent, if any, to which the offence is of a trivial nature; or

(c) the extent, if any, to which the offence was committed under extenuating circumstances." (emphasis added)

[11] The primary focus of attention in considering whether or not to record a conviction is upon all the circumstances of the case, the enumerated factors

being some of them (cf *Cobiac v Liddy* (1969) 119 CLR 257). The result of declining to record a conviction and dismissing a complaint is to free the offender of the immediate legal consequences of his having committed the offence (per Windeyer J in *Cobiac v Liddy*, supra at 274). Before considering the exercise of the discretion, there must be found some mitigating aspect arising from the circumstances of the case, whether by reference to one or more of the factors enumerated in s 8(1) or otherwise. The opening words of s 12(2) of the *Penalties and Sentences Act 1992* (Qld) are drafted in a similar way to s 8(1) of the Territory Act, albeit the enumerated matters are in a different form. In *R v Brown, ex parte Attorney–General* [1994] 2 Qd R 182 Macrossan CJ held at p 185:

> "Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s 12(2) of the Act say so and then there follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight."

[12] With respect, we are of the opinion that the same approach applies to s 8(1) of the *Sentencing Act*.

[13] In allowing the Crown's appeal, the learned appellate judge said:

> "[9] The learned magistrate did not expressly advert to s8(1) *Sentencing Act*. He did not discuss whether in his view the offence was of a trivial nature. He appears to have treated the (appellant's) 'duty as an investigative journalist' as a significant extenuating circumstance largely determinative of the outcome.

[10] …

[11] …

[12] The conduct of the (appellant) can not reasonably be said to be of a trivial nature. His offence was constituted by a deliberate contravention of the statute committed in full knowledge that he was not welcome at Wadeye on the day of the funeral.
The (appellant's) duty as a journalist was to act lawfully, not unlawfully in contravention of the provisions of the *Aboriginal Land Act* (NT). The (appellant) had unsuccessfully applied for a permit on more than one occasion and was informed that he could not travel into the Port Keats community on the day of the funeral. The refusal to grant a permit was confined to the day of the funeral. The (appellant) had every reason to think he would be granted a permit some time shortly following the day of the funeral when he could conduct his business as a journalist.
No reason was advanced why his attendance at Port Keats on the day of the funeral would achieve anything that could not be achieved on a day thereafter. As the (respondent) submitted, a funeral and its immediate aftermath is ordinarily a private affair to which the media can be invited, or for that matter, from which the media can be excluded. The funeral was but a temporary interruption to the continuing media coverage of events at Port Keats, which, given an inquest, were in no danger of going 'unpublished, unrevealed and unventilated.' In these circumstances the (appellant's) 'duty as an investigative journalist' referred to by his Worship does not constitute an extenuating circumstance for the purposes of s 8 of the *Sentencing Act* (NT). The (appellant's) offence, if not a typical example of a breach of the section, is more serious in that it was wilful and calculated.

[13] The learned magistrate, I think, erred in his taking account of 'the Australian public' being kept 'in the dark', and his appreciation of the salient facts, the Wadeye Community's lawful right and strong desire to exclude the media (including the (appellant)) on the day of the funeral, and the lack of any justification for the offending which was quite deliberate. In the circumstances, even taking account of the positive good character of the (appellant) and his antecedents and age the learned magistrate's exercise of his discretion miscarried and he ought to have recorded a conviction."

[14] In our view, the learned appellate judge's emphasis on the fact that the appellant's conduct could not reasonably be said to be of a trivial nature was misplaced. It was never suggested on behalf of the appellant that his offence was "trivial". Counsel for the appellant before the learned magistrate freely acknowledged that the appellant had visited Wadeye on the day of the funeral well knowing that he had been refused a permit and would not be welcome.

[15] The learned appellate judge acknowledged that his Worship treated the appellant's "duty as an investigative journalist" as "a significant extenuating circumstance largely determinative of the outcome". However, his Honour concluded that "no reason was advanced why (the appellant's) attendance at Port Keats on the day of the funeral would achieve anything that could not be achieved on a day thereafter" and that given an inquest was to be held, there was no danger of events at Port Keats going "unpublished, unrevealed and unventilated". In the circumstances, the learned appellate judge found that the appellant's "duty as an investigative journalist" did not constitute an extenuating circumstance for the purposes of s 8 of the *Sentencing Act*. The learned appellate judge held that his Worship had erred in taking into account "the Australian public" being kept "in the dark" and the "lack of any justification for the offending which was quite deliberate".

[16] With respect, we cannot agree with these conclusions. The justification for the appellant's breach of the permit law, put to the learned magistrate, included a belief by the appellant that he had a duty to report not just the

circumstances of the death of the man shot by police at Wadeye, but all events arising out of that death, including anything which might happen at or immediately after the deceased's funeral. On the day before the funeral, the Northern Territory Police Media Unit confirmed that extra police would be sent to Wadeye for the funeral. On the day of the funeral, the deceased's father had issued a press release claiming the deceased had been killed unlawfully whilst acting heroically and courageously to disarm a man. The press release called for the police officer responsible for the death to be charged with the unlawful killing of the deceased.

[17] We are satisfied that the learned magistrate had before him significant material which from the appellant's standpoint as an investigative journalist provided him with very strong, even compelling, reasons to travel to Wadeye on the day of the funeral. It is important to emphasise that the justification put forward on behalf of the appellant was advanced not as a defence, but as extenuating circumstances. Opinions may well vary as to the strength of such extenuating circumstances and the weight to be given to such circumstances under s 8 of the *Sentencing Act*. The learned magistrate unequivocally placed a great deal of weight on the circumstances which had led the appellant to travel to Wadeye. He said that:

> "… it almost would have been a dereliction of his duty as an investigative journalist to allow to go unpublished, unrevealed and unventilated the events ***which give rise to*** the unfortunate death of this young man" (emphasis added)

[18] The learned magistrate's choice of words was unfortunate. It is clear from his reasons as a whole that his Worship was addressing events **surrounding** the unfortunate death, not merely those which give rise to it. The learned appellate judge concluded that the funeral was but a temporary interruption to continuing media coverage of events at Wadeye and that there was no danger of those events going "unpublished, unrevealed and unventilated". Such conclusions might well be correct if "events" were confined to the circumstances giving rise to the death of the deceased. However, from the appellant's perspective there was very good reason to think that "events" of public interest might occur at or immediately after the funeral at Wadeye. The appellant's purpose was to provide press coverage of events as they unfolded on the day of the funeral. This could not be achieved by delaying his visit to Wadeye to some later date.

[19] In *Cobiac v Liddy*, supra, Windeyer J identified the key question as whether in a particular case there were facts which justify a magistrate exercising his discretion by declining to record a conviction. His Honour also stressed that the question is not whether any of the members of an appellate court would have taken the course that the learned magistrate took:

> "The question is not what we would do, but what could he lawfully do. The discretion was his. He could exercise it as he thought expedient, provided that in the circumstances it was open to him to exercise it at all."

[20] The learned magistrate did not refer to the relevant provisions of s 8(1) of the *Sentencing Act* when he gave his oral reasons for decision at the

conclusion of submissions. However, a reading of the transcript of proceedings in the Court of Summary Jurisdiction makes it clear that those criteria were addressed in submissions and in discussions between the Bench and counsel appearing for both parties. The learned magistrate was well aware of other matters which he must have taken into consideration in coming to his conclusion to exercise a discretion not to impose a conviction.

[21] These matters are largely not in dispute and may be summarised as follows:

- The appellant was a 39 year old investigative journalist who had been in this occupation for 22 years.
- For most of this time he has worked in the Northern Territory. He was and still is a senior journalist with "The Australian" newspaper.
- He has two convictions for minor traffic offences, the first over twenty years ago and the second twelve years ago. Apart from these matters he is before the Court without prior conviction.
- He is a person of positive good character. He has had considerable success as a journalist. He is a winner of a Churchill Fellowship. He won a Walkley Award. A professional testimonial from the Editor of "The Australian" was tendered before the learned magistrate.
- The appellant has had a long standing interest in reporting on Aboriginal issues. There was an uncontradicted submission put to the learned magistrate by his then counsel, Mr James, as follows (AB 6):

> "Now it would also be appropriate to mention that for the last two years Mr Toohey has distinguished himself by diligent journalism on the subject of violence. In particular Mr Toohey has received significant accolades around the community for his dedication to the literary exposure of wilful violence in the community, particularly concerning violence towards Aboriginal females.
>
> But violence in general is a matter against which he has set his professional face and material written by him regularly appears in national journals, in particular The Australian, exposing and providing the facts underlying violent incidents in the community. Commonly his stories relate to violent incidents in remote Aboriginal communities.
>
> Now in today's plea, sir, I am going to be submitting that it's necessary for the court in consideration of whether there are extenuating circumstances present in this matter, it's going to be necessary for the court to reconcile two social principles: (1) the very important principle of freedom of the press and the vital interest that the public and sections of the public, including the indigenous public, have in being fully informed as to matters of current concern occurring from time to time in society.
>
> As contrasted to another principle which is rooted in the law of trespass, being the provisions contained in section 4 of the *Aboriginal Land Act* which I'm sure Your Worship's aware is the provision that appears on first glance to be analogous to a private property provision".

- Very complete details were put to the learned magistrate as to the background to the dispute at Port Keats which was of particular interest to the appellant. It was described as "interclan rivalry" which led to the death of Robert Jongmin whose funeral was scheduled for 13 November 2002, the date of the offence. There was an allegation by his father Ambrose Jongmin that his son had been shot by a police officer. There was a subsequent statement to the effect that the Coroner would investigate the matter.

- A submission was made to his Worship that on 8 November 2002, “The Australian” newspaper published a national story by the appellant concerning the cancellation of a court sittings at Port Keats and the apprehension of continuing violence in the community of Port Keats.

- The day before the funeral of Robert Jongmin, the Northern Territory Police Media Unit confirmed that extra police would be sent to Port Keats for the funeral but did not say how many and in what capacity.

- All these matters were submitted to the learned magistrate as being the background facts which created a situation whereby Mr Toohey considered it his duty to go to Port Keats to gather information in order to discharge the duty of a journalist to provide the public with information relevant to its welfare and the welfare of society at risk.

- It is not in dispute that Mr Toohey had a genuine belief that he had a duty as an investigative journalist to travel to Port Keats and that it was for this reason he defied the statement of Mr Seaninger who had advised him there would be no permit issued for him to visit Port Keats that day.

- The appellant arrived in Port Keats after the funeral had concluded. There is no suggestion he behaved inappropriately or that he did or said anything that was insensitive to the feelings of the mourners at the funeral or anyone at Port Keats.

- The appellant attempted to speak with Mr Ambrose Jongmin, the father of the deceased young man. Mr Ambrose Jongmin indicated he did not want to speak with Mr Toohey. Mr Toohey accepted that and left.

- Subsequently, Mr Toohey drove to a deserted oval. He took photos of an electricity substation that had been daubed with graffiti. He then drove to the top of a hill past the police station where he was intercepted by police and asked if he had a permit. He advised that he did not and gave police his name.

- The appellant was arrested, fingerprinted, held in custody for a period of about one hour, then bailed and escorted by police out of Port Keats. He was charged with an offence under s 4 of the *Aboriginal Land Act* (NT) which does not carry a gaol sentence as a penalty.

- An audio tape that he was carrying, with nothing relevant on it, was retained and the film he had shot at the electricity substation was destroyed (AB 10).

- A reading of the transcript of proceedings before the Court of Summary Jurisdiction reveals that in the course of submissions by counsel, the learned magistrate made mention of s 8(1) of the *Sentencing Act* and to the High Court decision in *Cobiac v Liddy* (1969) 119 CLR 257 as being relevant to his powers to exercise a discretion not to proceed to conviction (AB 13).

[22] We consider that there were facts in the appellant's case which could justify the learned magistrate exercising his discretion to not record a conviction. We do not agree with the respondent's contention that such a disposition was manifestly inadequate in all the circumstances of the case. Similarly, we do not consider that there is any substance in the submission on behalf of the respondent that the learned magistrate's exercise of discretion was swayed by idiosyncratic views as to the importance of freedom of the press or the merits or otherwise of the permit system applying to Aboriginal land. His Worship having made some observations about such matters expressly recognized that the policies relevant to such matters was a matter for the legislature. The learned magistrate expressly put aside such considerations as relevant to the exercise of his discretion. There is no basis to suggest he acted otherwise. Criticism might justifiably be made that the learned magistrate did not expressly refer to s 8(1) of the *Sentencing Act* and provide comprehensive reasons for his decision not to record a conviction. However, any deficiencies in that regard did not result in any substantial miscarriage of justice.

[23] We allow the appeal. We set aside the order of Angel J and restore the orders of the learned magistrate.

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