O'Neill v Rankine [2015] NTCA 3

PARTIES:	O'NEILL, Wayne
	v
	RANKINE, Quinton
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 2 of 2015 (21400638)
DELIVERED:	20 NOVEMBER 2015
HEARING DATES:	16 NOVEMBER 2015
JUDGMENT OF:	RILEY CJ, KELLY & BLOKLAND JJ
APPEAL FROM:	BARR J

CATCHWORDS:

STATUTORY INTERPRETATION – Implied powers of the Court of Summary Jurisdiction – *Justices Act* – Powers of magistrates to dismiss matters prior to the charges being put to the defendant on non-compliance with pre-trial directions – Whether power is required for the effective performance of the Court's functions – ss 64, 67, 68 and 69 provide a mandatory scheme requiring charges to be put to defendant and on a not guilty plea for the matter to be heard and determined – Limited express powers for dismissing charges without a hearing on the merits in ss 63 and 182 – Alternative means of enforcing compliance with procedural orders available – Power to dismiss charges for failure to comply with pre-trial directions not required for the effective performance of the court's functions – No implied power – Appeal allowed

Criminal Code s 21
Justices Act ss 44(f), 63, 64, 67, 68, 69, 201A

Grassby v The Queen (1989) 168 CLR 1; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, applied

Bynder v Gokel (1998) 8 NTLR 91; *Consolidated Press Holdings Ltd v Wheeler* (1992) 84 NTR 42; *Police v Long & Long* [2004] SASC 381; followed

Barton v The Queen (1980) 147 CLR 75; *Breedon v The Queen* (1995) 124 FLR 328; *Chin v Teague* [2014] NTCA 05; *Director of Public Prosecutions v Shirvanian and Anor* (1998) 44 NSWLR 129; *Gaffee v Johnson* (1996) 90 A Crim R 157; *Jago v The District Court of New South Wales & Ors* (1989) 168 CLR 23; *Munday v Gill* (1930) 44 CLR 38; *Police v McLeod* [2011] SASC 160; *R v Ulman-Naruniec* (2003) 143 A Crim R 531; *Rona v District Court of South Australia and Anor* (1995) 63 SASR 223; *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487, referred to

REPRESENTATION:

Counsel:

Appellant:	S Robson
Respondent:	A Wyvill SC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Central Australian Aboriginal Legal Aid Service Inc

Judgment category classification:	B
Number of pages:	12

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

O'Neill v Rankine [2015] NTCA 3
No. AP 2 of 2015 (21400638)

BETWEEN:

WAYNE O'NEILL
Appellant

AND:

QUINTON RANKINE
Respondent

CORAM: RILEY CJ, KELLY & BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 20 November 2015)

THE COURT:

[1] There is one issue on this appeal. Does a magistrate dealing with a charge on complaint under the *Justices Act* have jurisdiction to dismiss the complaint prior to any hearing on the merits?

[2] On 6 January 2014 the appellant charged the respondent with four charges on complaint. The details of charges are not relevant.[1]

[1] The respondent was also charged on information with aggravated assault, but no issue arises in relation to that charge on this appeal.

Procedural history

[3] The charges against the respondent were mentioned in the Court of Summary Jurisdiction at Alice Springs on 6 January 2014, at which time pleas of not guilty were indicated and the case listed for a contest mention on 13 February 2014. The magistrate made orders as to the service of the prosecution brief of evidence by 30 January 2014.

[4] On 13 February 2014 the charges were again mentioned in the Court of Summary Jurisdiction. It was noted that the orders made on 6 January 2014 had not been complied with. The case was adjourned to 27 February 2014 for further mention. The magistrate ordered that the brief of evidence be served on the defendant by 21 February 2014.

[5] On 27 February 2014 the charges once more came before the Court of Summary Jurisdiction. The full brief of evidence had still not been served and the learned magistrate dismissed the charges "for want of proper prosecution".

Appeal to the Supreme Court

[6] The appellant appealed to the Supreme Court. The appellant contended that the magistrate had no jurisdiction to dismiss the charges because the charges had not been put to the defendant pursuant to s 67 of the *Justices Act*, this being a statutory condition precedent to the magistrate being able to exercise jurisdiction in the particular case.

[7] The appeal was heard by Barr J who dismissed the appeal, finding that "a magistrate sitting in the Court of Summary Jurisdiction at the pre-trial stage has implied power to dismiss a complaint in circumstances where the complainant fails to comply with court orders and directions."[2] That finding was based in part on an interpretation of s 44(f) of the Act which provides:

> In any case, whether the matter of complaint is or is not directed or required to be heard by 2 or more Justices, a single Justice may do all or any of the following:
>
> …
>
> (f) do all other acts and matters preliminary to the hearing.

[8] His Honour held that this provision should be given a wide and practical interpretation, which would include a power in a magistrate when dealing with a matter on complaint "to make an order requiring evidence or relevant material in the possession of a complainant to be served by a complainant within an appropriate time frame to ensure a fair trial for a defendant". In determining that the magistrate did have power to dismiss the charges, his Honour said:

> I have concluded that a magistrate sitting in the Court of Summary Jurisdiction at the pre-trial stage has implied power to dismiss a complaint in circumstances where the complainant fails to comply with Court orders and directions. I consider that the dismissal of a complaint in those circumstances is a matter of practice and

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2 *O'Neill v Rankine and Westphal v Foster* [2015] NTSC 24 at [30]

> procedure,[3] and hence in the discretion of the Court.[4] The implied power is required for the effective exercise of the pre-trial jurisdiction expressly conferred,[5] to ensure compliance with the Practice Direction, and ultimately to ensure a fair hearing … Not only is the implied power required to ensure a fair hearing for the defendant, but it is also required to ensure that justice is administered efficiently in the public interest.

[9] His Honour referred to *Gaffee v Johnson*.[6] It was assumed in argument before his Honour that s 44(f) was, in effect, a grant of power. This may not be the case as it seems that the purpose of s 44 is to state what powers – mostly of a facultative, administrative nature – may be exercised by a single justice (rather than two justices or a justice who is a magistrate). However, it is not necessary for the purposes of this appeal to decide this issue because, whatever the source of the power may be, it is not disputed that a magistrate has power to do all acts and matters preliminary to a hearing.

Appeal to this Court

[10] The appellant has appealed to this Court against that decision.

[11] The argument proceeded with a somewhat different emphasis in the hearing before this Court. Counsel for the appellant, Mr Robson, contended that the *Justices Act* ss 64, 67, 68 and 69 provide for a scheme under which, where

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3 His Honour referred to *Consolidated Press Holdings Ltd v Wheeler* (1992) 84 NTR 42 at 47.30.

4 His Honour referred here to *Justices Act*, s 201A(4) which provides that, subject to the Act and Regulations, the practice and procedures of the Court in relation to a proceeding within its jurisdiction are in the discretion of the Court.

5 His Honour was referring to *Justices Act*, s 44.

6 (1996) 90 A Crim R 157

both parties appear, the magistrate must put the charges to the defendant;[7] and where the defendant pleads not guilty the Court must hear and determine the matter.[8] The appellant contended that these provisions are mandatory, relying on the wording of ss 67, 68 and 69 (specifically the use of the word "shall") and also on South Australian authority to that effect.[9] (The judge who heard the appeal at first instance was not referred to these South Australian cases.) The appellant contended that the only power possessed by a magistrate to dismiss a charge other than following a hearing and determination on the merits was that expressly conferred by the Act.[10]

[12] Mr Wyvill SC for the respondent submitted that it was necessary to imply a power of dismissal of the kind exercised by the magistrate for the effective exercise of the jurisdiction which has been expressly conferred, and that his Honour was correct to so find. Mr Wyvill relied upon s 44(f), and on s 201A, both of which were referred to by his Honour in dismissing the appeal at first instance.

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7 Section 64 provides that "if both parties appear before the Court … then the Court shall proceed to hear and determine the matter of the complaint." Section 67(1) provides that "when the defendant is present at the hearing the substance of the complaint shall be stated to him" and (essentially) he will be asked to plead. *[emphasis added]*

8 Section 68 provides that "if the defendant does not admit the truth of the complaint the Court shall proceed to hear" the evidence. Section 69 provides that "when the parties and their evidence have been heard, the Court shall consider and determine the whole matter" *[emphasis added]*.

9 *Police v Long & Long* [2004] SASC 381 at [23]; *Police v McLeod* [2011] SASC 160 at [148]

10 There is express power to dismiss a complaint:

(a) if the complainant fails to appear [s 63];

(b) if the complaint fails to disclose any offence or matter of complaint [s 182]; or

(c) if there is a defect on the complaint or a variance between the complaint and the evidence and the defendant has been prejudiced by the defect or variance [s 182].

(d)

[13] Section 201A(1) provides that for the purpose of exercising the jurisdiction conferred on the court, the chief magistrate may make rules and give practice directions (inter alia):

(a) regulating the practice and procedures of the court; and

(b) regulating the enforcement of an order of the court.[11]

[14] As his Honour noted,[12] on 4 October 2010 the chief magistrate issued a Practice Direction pursuant to s 201A(1) *Justices Act*, entitled "Court of Summary Jurisdiction Procedure for the Listing of Summary Offences Hearings". This Practice Direction provides for a system of "contest mentions" at which, among other things, directions may be made in relation to the timing of delivery of the prosecution brief and the disclosure of certain matters. The directions made by the magistrate (referred to in [3] and [4] above) were made at a contest mention pursuant to this Practice Direction. The appellant does not challenge the validity of this Practice Direction, or the power of the magistrate to make the directions in question for delivery of the brief of evidence.

[15] The Practice Direction does not spell out the consequences of failure to comply with such directions. Mr Wyvill submitted that in those circumstances the provisions of s 201A(4) would apply and it would be a

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11 Section 201A(a) and (b)

12 *O'Neill v Rankine and Westphal v Foster* [2015] NTSC 24 at [5], footnote 1

matter for the magistrate to determine the consequences as a matter of practice and procedure. (His Honour held that the power to summarily dismiss a matter was a matter of practice and procedure,[13] relying on the judgment of Mildren J in *Consolidated Press Holdings Ltd v Wheeler*.)[14]

[16] The appellant argued that both the power to make Practice Directions and the power of the court to determine its own procedure are subject to the Act and cannot confer on the court a power to dismiss a matter on complaint inconsistent with the express, mandatory provisions of ss 64, 67, 68 and 69. The respondent countered that a power to dismiss a complaint before embarking on a hearing of the merits was no more inconsistent with those sections than the (undoubted) implied power to grant a permanent stay of proceedings in appropriate circumstances was inconsistent with those sections. In both cases, despite the mandatory word "shall" appearing in each section, the court, for good reason, does not in fact "proceed to hear and determine the matter".

[17] It is well established that lower courts have the power to grant a stay of proceedings to prevent an abuse of the process of the court.[15] It is accepted by both parties that default on the part of the prosecution in pre-trial procedures, including failure to comply with directions, might be so

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13 *O'Neill v Rankine and Westphal v Foster* [2015] NTSC 24 at [27]

14 (1992) 84 NTR 42

15 *Jago v The District Court of New South Wales & Ors* (1989) 168 CLR 23 at 31 and *Director of Public Prosecutions v Shirvanian and Anor* (1998) 44 NSWLR 129 at 137

prejudicial to a defendant as to render a fair trial impossible and warrant the grant of a permanent stay of proceedings to prevent an abuse of process.[16] However, as his Honour pointed out, the authorities establish that the power to order the stay of a criminal prosecution will be used only in exceptional cases.[17]

[18] In addition, the respondent made a somewhat broader submission – that the power to dismiss a matter for failure to comply with the court's procedural directions must be implied from the general grant of jurisdiction to the court.

[19] As a court created by statute, the powers of the Court of Summary Jurisdiction must be found in the powers and functions conferred upon it by the *Justices Act* (or other legislation conferring powers on the court). The court does not have inherent powers, but it does have implied power to do that which may be necessary for the exercise of the jurisdiction and powers expressly conferred.[18] As Dawson J observed in *Grassby v The Queen*:[19]

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16 *Jago v The District Court of New South Wales & Ors* (1989) 168 CLR 23 per Deane J at 57; *Rona v District Court of South Australia and Anor* (1995) 63 SASR 223 per King CJ at 227

17 *Barton v The Queen* (1980) 147 CLR 75 at 111 per Wilson J; cited by Mason CJ in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34; *R v Ulman-Naruniec* [2003] SASC 437; (2003) 143 A Crim R 531 at [16] per Bleby J; at [205] per Sulan J. See also *Breedon v The Queen* (1995) 124 FLR 328 at 332-3; see also the express power in s 21 of the *Criminal Code* for staying vexatious or oppressive proceedings.

18 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-4 per Deane J (Mason CJ, Wilson and Dawson JJ agreeing); *Grassby v The Queen* (1989) 168 CLR 1 at 16-17, per Dawson J; *Bynder v Gokel* (1998) 8 NTLR 91 at 95-97 per Bailey J (Kearney and Priestley JJ agreeing); *Consolidated Press Holdings Ltd v Wheeler* (1992) 84 NTR 42 at 45-47

19 (1989) 168 CLR 1 at 17; *Bynder v Gokel* (1998) 8 NTLR 91 at 97

> It would be unprofitable to attempt to generalise in speaking of the powers which an inferior court must possess by way of necessary implication. Recognition of the existence of such powers will be called for whenever they are required for the effective exercise of a jurisdiction which is expressly conferred but will be confined to so much as can be "derived by implication from statutory provisions conferring a particular jurisdiction".

[20] The issue for this Court, as it was for his Honour, is whether a magistrate constituting the Court of Summary Jurisdiction has implied power to dismiss a complaint other than in accordance with the express provisions of the *Justices Act*. Is such a power required for the effective exercise of the court's jurisdiction?

[21] Mr Wyvill argues that it is. "The power to give directions necessarily carries with it a power to refuse to countenance non-compliance."[20] Any court must have implied power to ensure that its orders are not ignored.

[22] Mr Robson for the appellant submitted that there were alternative mechanisms available to ensure compliance with the court's orders, and that the emphasis should be on ensuring a fair trial, not on punishing recalcitrant prosecutors who fail to comply with directions. Mr Robson contended that the court could simply set the matter down for hearing on the material presently available, put the charges to the defendant in accordance with s 67, and proceed on what may well be incomplete material.[21] That course may not remedy the situation where the prosecutor has failed to provide the

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[20] *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487 per Gleeson CJ at 493; Gleeson CJ noted that this principle applied to both civil and criminal jurisdictions.

[21] For an example of this procedure, see *Chin v Teague* [2014] NTCA 05.

defence with material it has been ordered to provide, to the prejudice of the defendant's ability to conduct his case. However, Mr Robson submitted that the ultimate sanction for failure to comply with the court's directions, where such failure has produced irremediable prejudice to the defendant, is the grant of a permanent stay of proceedings. More, he contends, is not necessary. Another mechanism is the one expressly referred to in *State Pollution Control Commission v Australian Iron & Steel Pty Ltd*:

> A power to direct that certain steps be taken in relation to adducing evidence necessarily carries with it a power to refuse to permit a party to adduce evidence otherwise that in accordance with those steps.

Similarly, the Court of Summary Jurisdiction would be empowered to refuse to allow the complainant to adduce evidence where there has been prejudicial non-disclosure in breach of pre-trial directions by the court.

[23] In our view, the Court of Summary Jurisdiction does not have implied power to dismiss proceedings for failure to comply with pre-trial directions. The inherent jurisdiction of the Supreme Court does not extend to the power to dismiss criminal proceedings properly on foot before it for failure to comply with pre-trial directions, so it cannot be said that it is necessary, arising by implication from the general grant of criminal jurisdiction, for all courts to have such a power.

[24] Of course the Court of Summary Jurisdiction dealing with matters on complaint is in a different position from the Supreme Court conducting a

trial before a judge and jury. The jurisdiction is a summary one. As Dixon CJ said in *Munday v Gill*:[22]

> There is, however, a great distinction in history, in substance and in present practice between summary proceedings and trial upon on indictment. Proceedings upon indictment, presentment, or ex officio information are pleas of the Crown. A prosecution for an offence punishable summarily is a proceeding between subject and subject. The former are solemnly determined according to a procedure considered appropriate to the highest crimes by which the State may be affected and the gravest liabilities to which a subject may be exposed. The latter are disposed of in a manner adopted by the Legislature as expedient for the efficient enforcement of certain statutory regulations with respect to the maintenance of the quiet and good order of society.

[25] Mr Wyvill submitted that the nature of summary determination is such as to make a power to dismiss for non-compliance with procedural orders an appropriate one. No doubt it would be convenient for the Court of Summary Jurisdiction to have such a power at its disposal as part of its "armoury" to ensure compliance with its directions. However, that is not the test. The respondent has not shown that such a power is <u>required</u> for the effective performance of the court's functions, or that such a power is "derived by implication from statutory provisions conferring [its] jurisdiction". Rather, the apparently mandatory nature of the scheme set out in ss 63, 67, 68 and 69, and the provision in the legislation of limited express powers to dismiss without a hearing on the merits, as well as the availability of other mechanisms to enforce compliance with procedural orders, all point to there being no such implied power.

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22 (1930) 44 CLR 38 at 86

[26] The appeal is allowed.