Highway & Ors v Tudor-Stack [2006] NTCA 04

PARTIES:	HIGHWAY, Stuart INDER-SMITH, Robert Paul MEYERHOFF, Gary William v TUDOR-STACK, Paul Francis
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 12/04 (20207648); AP 13/04 (20207624); AP 15/04 (20207623)
DELIVERED:	10 May 2006
HEARING DATES:	22 February 2006
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & THOMAS JJ
ON APPEAL FROM:	*Inder-Smith & Ors v Tudor-Stack* [2004] NTSC 48

CATCHWORDS:

CONSTITUTIONAL LAW – Parliamentary Powers – appeal against conviction – disturbing the Legislative Assembly whilst in session – freedom of speech

Act Against Tumultuous Petitioning 1661 (13 Car 2, st 1, c 5); *Bill of Rights 1688*, article 5, article 9; *Colonial Laws Validity Act 1865 (Imp); Criminal Code (NT)*, s 1, s 31, s 34, s 61, s 61(a); *Interpretation Act*, s 59; *Legislative Assembly (Powers and Privileges) Act 1992*, s 3(3), s 5, s 6, s 25, s 26;

Northern Territory (Self-Government) Act 1978 (Cth), Part III Division I (ss 6-12); *Parliamentary Privileges Act 1987 (Cth)*, s 16; *Seditious Meetings Act 1817 (Imp)* (Geo 3, cap XIX s 23); *Sentencing Act (NT)*, s 40(6); *Sources of Law Act 1985*, s 2, s 3; *Statute of Westminster 1931 (Imp)*, s 2(1); *Statute of Westminster Adoption Act 1942 (Cth); Strodes Act 1512* (4 Henry VIII, c 8); *The Constitution of Australia*, s 122

A C Castles, *An Australian Legal History*; Sydney, Law Book Company, 1982; Enid Campbell, *Parliamentary Privilege*, Sydney, Federation Press, 2003; Limon and McKay (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed, London, Butterworths, 1997; McGee, *Parliamentary Practice in New Zealand*, 2nd ed, Wellington New Zealand, GP Publications, 1994; Odgers' *Australian Senate Practice*, 9th ed, Canberra, Department of the Senate, 1999; Pettifer (ed), *House of Representatives Practice*, Canberra, Australian Government Publishing Service, 1981; Richard L Perry and John C Cooper, *Sources of Our Liberties*, Alabama, Legal Classics Library edition, 1990; Sir William Holdsworth, *A History of English Law*, Vol 6, London, Sweet & Maxwell, 1937

R v Bernasconi (1915) 19 CLR 629; *R v Wright; ex parte Klar* (1971) 1 SASR 103; *Wake and Anor v NTA and Anor* (1996) 5 NTLR 170; (1996) 109 NTR 1; applied

The Queen v Richards; ex parte Fitzpatrick and Browne (1955) 92 CLR 157; distinguished

Bradlaugh v Gossett (1883-1884) 12 QBD 271; followed

Coleman v Power (2004) 220 CLR 1; *Dietrich v The Queen* (1992) 177 CLR 292; *Erglis v Buckley* (2004) 2 Qd R 599; *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520; *Laurance v Katter* (2000) 1 Qd R 147; (1996) 141 ALR 447; *Levy v Victoria* (1997) 189 CLR 579; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321; *R v Eliot, Hollis and Valentine* (1629) 3 St Tr 293; *Rowley v O'Chee* (2000) 1 Qd R 207; (1997) 150 ALR 199; *Johnson v Johnson* (2000) 201 CLR 488; *The Union Steamship Co of New Zealand Limited and Anor v The Commonwealth and Anor* (1925) 36 CLR 130; referred to

REPRESENTATION:

Counsel:

Appellants:	Self-represented
Respondent:	A Elliott

Solicitors:

Appellants:	Self-represented
Respondent:	Office of the Director of Public Prosecutions

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

Highway & Ors v Tudor-Stack [2006] NTCA 04
No. AP12/04 (20207648); AP 13/04 (20207624); AP 15/04 (20207623)

BETWEEN:

STUART HIGHWAY
ROBERT PAUL INDER-SMITH
GARY WILLIAM MEYERHOFF
Appellants

AND:

PAUL FRANCIS TUDOR-STACK
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 10 May 2006)

Martin CJ:

[1] I agree that the appeal should be dismissed for the reasons given by Mildren J. The decision of Angel J on appeal from the learned Magistrate was plainly correct and each of the grounds of appeal is without substance.

Mildren J:

[2] On 23 May 2003, each of the appellants was found guilty by the Court of Summary Jurisdiction of intentionally disturbing the Legislative Assembly whilst it was in session on Tuesday 14 May 2002, contrary to s 61(a) of the Criminal Code (NT). The appellants Inder-Smith and Meyerhoff were each

sentenced to 21 months imprisonment, suspended after serving five months, with a two year operative term for the purposes of s 40(6) of the Sentencing Act. The appellant Highway was sentenced to 18 months imprisonment suspended after serving five months also with a two year operative term.

[3] The appellants, as well as another person also convicted at the same time, each appealed against their convictions to the Supreme Court. In addition, the appellant Meyerhoff appealed against an order of the Court of Summary Jurisdiction setting aside a subpoena issued against the Commissioner of Police. These appeals having been dismissed by Angel J, the appellants have appealed to this Court on a large number of grounds. (There is no appeal by the appellant Meyerhoff relating to the order setting aside the subpoena.)

[4] The appellants have also each appealed against his sentence. Those appeals have still to be disposed of by the Supreme Court and are not properly before us.

The facts

[5] The learned Magistrate found that on Tuesday 14 May 2002 the Legislative Assembly of the Northern Territory was in session. Not long before noon on that day, a number of persons including the appellants entered the Chamber of the Assembly. None of the appellants were members of, officials of, or invitees of the Assembly. At this time, one of the members of the Assembly was addressing the house in a debate concerning a bill relating to witness

protection. A voice was heard which seemed to be that of the appellant Meyerhoff and the appellants then entered the Chamber.

[6] Seeing that strangers had entered the Chamber, the Speaker suspended proceedings and instructed all members to leave the Chamber. Some obeyed, but others did not and remained in the Chamber. The effect of the entry into the Chamber was to disturb the Legislative Assembly whilst it was in session. The disturbance was such that proceedings ceased for a while until order was restored. Each of the appellants was associated with a group called the Network Against Prohibition. This was not a formal organisation with a constitution but rather a loose group of individuals led by the appellants Meyerhoff and Highway, who were opposed to the criminalisation of the use of marijuana. The business before the Legislative Assembly that day included a bill to amend the Misuse of Drugs Act. The Network Against Prohibition opposed the Act and the proposed amendments to it contained in the Bill.

[7] When the appellants, together with others, entered the Chamber, the appellant Meyerhoff called out, deprecating the Northern Territory as a police state and the appellants proceeded to walk around the Chamber holding up placards. The learned Magistrate concluded that the appellants, when they entered the Chamber, intruded to draw attention to their cause by disturbing the Assembly. Their acts, he found, were calculated to disturb the Assembly whilst it was in session as a means of publicising their cause.

Ground 1 – the Court of Summary Jurisdiction had no jurisdiction to try the appellants

[8] The appellants' first contention was that the jurisdiction to prosecute and decide whether an offence had occurred against the Legislative Assembly is exclusively vested in the Legislative Assembly, *vide* s 5, s 25 and s 26 of the Legislative Assembly (Powers and Privileges) Act 1992. The Legislative Assembly has, by virtue of s 25 and s 26 of that Act, the power to impose a penalty not exceeding imprisonment for six months, for "an offence against the Assembly". Section 5 provides that conduct does not constitute an offence against the Assembly "unless it amounts, or is intended to amount, to an improper interference with the free exercise of the Assembly… of its authority or functions, or with the free performance by a member of the member's duties as a member". Subsection (3) of s 3 provides:

> "In this Act, a reference to an offence against the Assembly is a reference to a breach of the privileges or immunities, or a contempt, of the Assembly or of its members, committees or officers."

[9] The privileges and immunities of the Assembly, its members, committees and officers are declared by the other provisions of the Act.

[10] There is nothing in the Act which specifically provides that conduct which is an offence against the Assembly confers exclusive jurisdiction in the Assembly to deal with offences committed whilst within the precincts of the Assembly and cannot also be the subject of a charge against a provision of the Criminal Code. The appellants submitted nevertheless that the doctrine of separation of powers deprives the courts of the ability to decide whether

the Assembly has been improperly interfered with, or "to punish persons exercising their right of freedom of expression within the Legislative Assembly".

[11] As Angel J pointed out, correctly in my view, it is within the competence of the Legislative Assembly to enact legislation creating an offence at law a matter which might equally be adjudged to be a breach of privilege or contempt. All the leading text-book writers his Honour cited support that proposition: Pettifer (ed), *House of Representatives Practice*, 1981 at 663; Limon and McKay (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed, 1997 at 139; Odgers' *Australian Senate Practice*, 9th ed, 1999 at 61-2; McGee, *Parliamentary Practice in New Zealand*, 1994 at 473; Enid Campbell, *Parliamentary Privilege*, 2003 at 199.

[12] In *The Queen v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, Dixon CJ, who delivered the judgment of the Court, said at 162:

> "…it is for the courts to judge the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge the occasion and of the manner of its exercise."

[13] However, that cannot be taken as meaning that the legislature cannot create an offence which is capable of being dealt with by the Courts, even if that conduct would also amount to a breach of privilege. The argument that the doctrine of separation of powers has that consequence must be rejected. In *The Queen v Richards* (supra) it was argued that the doctrine had the

opposite consequence, i.e. that it was the exclusive provenance of the courts to try and punish offences. The Court held that the power of the legislature to deal with breach of privilege was incidental to its legislative function (see at p 167). However, unlike the Federal Constitution which reposes the judicial power of the Commonwealth solely in the courts described by Chapter III of the Constitution, there is no similar division of power arising in the Northern Territory. In the first place, Territory courts are not Chapter III courts: *R v Bernasconi* (1915) 19 CLR 629. The powers of the Legislative Assembly are conferred by Part III, Division I (ss 6-12) of the Northern Territory (Self-Government) Act 1978 (Cth). The source of power for that Act rests upon the Territories power contained in s 122 of the Constitution. That source of power has been held to be plenary, subject, perhaps, only to certain other constitutional limitations derived from other provisions of the Constitution: see *Wake and Anor v NTA and Anor* (1996) 5 NTLR 170; (1996) 109 NTR 1. It follows that the doctrine of separation of powers does not apply to limit the powers of the Legislative Assembly in the manner contended for by the appellants.

[14] Next, the appellants referred to the historical circumstance which led to the passage of an Act Erecting a High Court of Justice in 1649, by which King Charles I, as well as a number of his adherents, were tried with treason. It is difficult to see how the circumstances which then applied have any bearing on the matter. Indeed, it is to be observed that King Charles was tried not by

the Parliament or by one of the Houses of Parliament, but by a Court especially established by an Act of Parliament for that purpose.

[15] Next the appellants submitted that s 61 of the Criminal Code conflicted with two Imperial Acts, an Act Against Tumultuous Petitioning, 1661 (13 Car 2, st 1, c 5) and the Seditious Meetings Act 1817 (3 Geo 3 cap XIX, s 23). It is extremely doubtful if the Act Against Tumultuous Petitioning was ever part of the received law of the Northern Territory. Not all British statutes in force prior to 28 December 1836, when South Australia was established, are part of Northern Territory received law: see A C Castles, *An Australian Legal History*, p 427; and Sources of Law Act 1985, s 2 and s 3. The test is whether the Act in question was suitable to the condition of the Province of South Australia as at that date: *R v Wright; ex parte Klar* (1971) 1 SASR 103 at 108 per Bray CJ; at 120 per Chamberlain J; at 123 per Zelling J. The statute required that no petition to the King or either House of Parliament for alteration of matters established by law in Church or State (unless the contents thereof had been previously approved in the country by three justices of the peace or the grand jury of the county and in London by the Lord Mayor, aldermen and common council) should be signed by more than 20, or delivered by more than 10, persons, under penalty in either case of a £100 fine and three months' imprisonment. It is difficult to see how that provision could have applied in South Australia in 1836. As to the Seditious Meetings Act 1817 (Imp) (1817 Geo 3, cap XIX s 23) plainly that provision was not part of the received law, because, by its terms, it applied only to

public meetings and assemblies within the City of London, the County of Middlesex or within one mile of the gate at Westminster Hall.

[16] In any event, there is no doubt that after the Colonial Laws Validity Act 1865 (Imp) the colonial parliaments could repeal any British statute applying to a colony unless it was a Statute which applied to that colony or to colonies generally by express words or by necessary implication. The Acts in question clearly do not possess this character. The Colonial Laws Validity Act 1865 applied to the Commonwealth when it was initially formed in 1901: see *The Union Steamship Co of New Zealand Limited and Anor v The Commonwealth and Anor* (1925) 36 CLR 130. So far as the Commonwealth is concerned, any restrictions placed upon the Commonwealth by the Colonial Laws Validity Act 1865 (Imp) disappeared with the repeal of that Act by s 2(1) of the Statute of Westminster 1931 (Imp) which was adopted by the Statute of Westminster Adoption Act 1942 (Cth) retrospectively to 3 September 1939. Consequently, when the present Legislative Assembly was established by the Northern Territory (Self Government) Act 1978 (Cth) there were no restrictions upon the Commonwealth (or the Northern Territory) which restricted the ability of the Northern Territory Legislative Assembly to pass laws which were in conflict with Imperial Acts, whether those Acts applied to the Northern Territory by paramount force or otherwise. There is therefore no substance to the submission that s 61 of the Criminal Code is invalid on this ground. In any event, it is my opinion that there is no conflict, as the various statutory

provisions deal with different subject matters and are capable of operating each within their own spheres.

[17] Similarly, arguments presented by the appellants based upon alleged inconsistency with the Bill of Rights 1688, article 5, which provides for the right of every citizen to petition the monarch, have no merit. There is in any event no inconsistency. Section 61 of the Code does not make it unlawful to petition the monarch.

[18] Next it was submitted that s 61 of the Code was inconsistent with article 9 of the Bill of Rights 1688, which, by virtue of s 6 of the Legislative Assembly (Powers and Privileges) Act 1992 (NT) applies in relation to the Assembly. Section 6(2) provides that "proceedings in Parliament" (as those words appear in article 9 of the Bill of Rights 1688) means "all words spoken and acts done in the course of, or for the purposes of, or incidental to, the transacting of the business of the Assembly…" Article 9 provides "that the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament".

[19] There are three submissions made by the appellants. First, that on a literal meaning to Article 9, the appellants' right to freedom of speech could only be impeached by the Assembly itself. Thus s 61 was impliedly repealed by s 6 of the Legislative Assembly (Powers and Privileges) Act 1992 (NT). I do not accept this contention. In my opinion Article 9 is not directed at

permitting strangers to the House entering the Chamber and interrupting its proceedings by demonstrating with placards or by exercising their collective or individual rights of free speech in any other manner. Such a construction is not supported by the context of s 6 of the Act, which finds its place in an Act relating to the powers, privileges and immunities of the Legislative Assembly.

[20] Moreover, it is not supported by the history of Article 9 of the Bill of Rights, which was designed to end a long standing struggle between the Parliament and the monarch over parliamentary privileges relating to the rights of the members to freedom of speech. The history of the provision is dealt with by Richard L Perry and John C Cooper, *Sources of Our Liberties*, Legal Classics Library edition, 1990 at 233-235; Sir William Holdsworth, *A History of English Law*, Vol 6, pp 93-98. From the time of the reign of Elizabeth I, Members of Parliament who discussed forbidden topics or who protested against royal prohibition of such topics were committed to the Tower. This was in direct violation of Strodes Act 1512 (4 Henry VIII, c 8) which condemned all forms of punishment imposed upon Members for debating bills and other matters in Parliament. In 1629 proceedings were taken in the King's Bench against three members of the House of Commons, who were charged with seditious speeches, contempt of the King in resisting the adjournment of the House and with conspiracy to keep the Speaker in the chair by force. All pleaded to the jurisdiction, but the Court held that the Members had no privilege to speak seditiously or behave in a disorderly

manner: *R v Eliot, Hollis and Valentine* (1629) 3 St Tr 293. Subsequently the convictions were overturned by the House of Lords in 1666. In *Bradlaugh v Gossett* (1883-1884) 12 QBD 271 at 283-284, Stephen J, discussing *R v Eliot, Hollis and Valentine*, observed that there is "no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice" and in my opinion that must be so whether the crime is committed by a Member of the House or by a stranger. Holdsworth, op cit, at 98 accepted this proposition as correct, citing inter alia *Bradlaugh v Gossett*. Cooper, op cit, at 235 concludes:

> "The Bill of Rights confirmed the principles for which the Commons had been struggling by its declaration that speeches and debates in Parliament could not be brought into question outside that body."

[21] Before leaving this topic, I note in passing that s 6 of the Act is based upon s 16 of the Parliamentary Privileges Act 1987 (Cth). For a discussion of the history of s 16, see *Laurance v Katter* (2000) 1 Qd R 147 at 157, 203; (1996) 141 ALR 447 at 452, 489; *Rowley v O'Chee* (2000) 1 Qd R 207 at 218-219; (1997) 150 ALR 199 at 206-208. However, as those cases also show, the purpose of Article 9 of the Bill of Rights was to ensure that members of the legislature and witnesses before committees could speak freely without fear that what they may say could be held against them in the courts: see *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 334; *Rowley v O'Chee* (2000) 1 Qd R 207 at 218; (1997) 150 ALR 199 at 206; *Erglis v Buckley* (2004) 2 Qd R 599 at para [59].

[22] Next, the appellants submitted that s 61 of the Criminal Code was invalid because it burdened freedom of speech by a means which was inappropriate to serve legitimate ends: see *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1. The tests as originally expressed in *Lange* (supra) at 567-568 were as follows:

> "When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by s 7, s 24, s 64 or s 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively "the system of government prescribed by the Constitution"). If the first question is answered "yes" and the second is answered "no", the law is invalid." (Footnotes omitted)

[23] In *Coleman v Power* (supra) at 51, McHugh J (with whom Gummow, Kirby and Hayne JJ agreed) said that the test as formulated by Kirby J in *Levy v Victoria* (1997) 189 CLR 579 at 646 accurately stated the second limb of the *Lange* test:

> "A universally accepted criterion is elusive. In Australia, without the express conferral of rights which individuals may enforce, it is necessary to come back to the rather more restricted question. This is: does the law which is impugned have the effect of preventing or controlling communication upon political and governmental matters *in a manner which is inconsistent* with the system of representative government for which the Constitution provides? (Emphasis added)"

[24] The starting point is to construe s 61 to see if it can convey the meaning contended for by the appellants, namely, that it is so wide in its terms that there is nothing to limit its reach to a member of the public who disturbs the Legislative Assembly. It was submitted that a member of the Assembly could be referred to the criminal courts for standing when ordered to sit down by the Speaker. Thus it was submitted that s 61 could impose a drastic burden on free speech and was therefore invalid.

[25] There are a number of answers to this submission. First, it is my opinion that s 61 is not directed to the conduct of a Member of the Assembly in the circumstances suggested, but it may be that it could catch other conduct by a Member or Members. Moreover, to the extent that s 61 was inconsistent with s 6 of the Legislative Assembly (Powers and Privileges) Act, the latter provision must prevail as being passed later in time. There is therefore no restriction on the freedom of speech of Members of the Assembly. Even if this is wrong, it is plain that s 61 is designed to protect the Legislative Assembly from those who would disturb its proceedings. It is impossible to say that such a law has such an effect on preventing or controlling communication on political and government matters in a manner inconsistent with the system of representative government for which the Constitution provides; on the contrary, the law enhances communication on political and government matters by punishing those who would disturb the Assembly whilst it is in session. Finally, even if s 61 did go further than is strictly necessary to achieve its legitimate ends, in so far as it impinged on

the rights of Members of the Assembly, for example, s 59 of the Interpretation Act requires s 61 to be construed so as not to exceed the legislative power of the Legislative Assembly and to the extent that the provision would, but for s 59, have been construed as being in excess of that power, "it should nevertheless be a valid Act to the extent to which it is not in excess of that power".

[26] There can be no doubt that s 61, to the extent that it operated in the circumstances of this case to prevent the appellants from entering the Chamber whilst the House was in session is valid, as it plainly would not offend the second limb of the *Lange* test as reformulated in *Coleman v Power*.

[27] I would therefore reject the appellants' first ground of appeal.

Ground 2 – The appellants were unrepresented and were not adequately advised of their rights

[28] The first submission was that "despite numerous applications to have the matter adjourned to enable the Appellants to raise funds to obtain legal representation, (the Magistrate) forced them to go ahead with a hearing". Angel J held that none of the appellants at the outset of the hearing on 31 October 2002 sought an adjournment to obtain legal advice for legal representation. Having read the transcript for myself, I agree, so far as these appellants are concerned.

[29] Next it was complained of that the bail conditions prevented the appellants from associating with each other. This, one may presume (although no details are given), in some way inhibited the appellants in their defence. I note that the bail conditions were amended on the first day of the hearing so as to overcome this problem: Tr p 12. There was no further complaint or application then made and the proceeding continued.

[30] It was complained that the appellant Meyerhoff made an application to adjourn to get advice on a particular question which had arisen which the Magistrate ignored. The reference given is on 19 February 2003 at p 85. In fact the Court did adjourn shortly afterwards. There is nothing in this submission.

[31] Complaint was made that the appellants' conduct of their own defence was so flagrantly incompetent as to occasion a miscarriage of justice. The cases which support this proposition are cases where the defence was conducted by counsel, not by the accused acting in person. In any event, there is no reason to suppose that the accused did not get a fair hearing before the learned Magistrate.

[32] Next we were directed to the fact that the accused were self-represented, apparently because legal aid had been refused and they were indigent. As Angel J correctly pointed out the principles established in *Dietrich v The Queen* (1992) 177 CLR 292 do not apply to summary proceedings.

[33] Next there were a number of complaints about police attending the proceedings to intimidate the appellants or their witnesses. There is no evidence to support this submission and none to show that the appellants were in any way prevented from putting their case.

[34] In my opinion ground 2 is not made out.

Ground 3 – 'The politicisation of the hearing was evident. Political bias."

[35] In my opinion, this ground was adequately dealt with by Angel J. There is no evidence of apparent bias by the learned Magistrate (let alone actual bias). The fact that his Worship's rulings often went against the appellants does not show bias or apparent bias. There is no evidence that the hearing was "politicised" such that the appellants did not get a fair trial.

[36] One matter raised by the appellants relates to a complaint made that on 27 September 2002 the Attorney-General during a radio interview made comments said to amount to a contempt of court. The appellants did attempt to raise this (but not until 17 February 2003) (see Tr p 15 ff), but as part of a grab-bag of submissions to vacate the hearing date for that day. It was not put that the appellants felt they were unable to pursue their defences, although there were complaints of a general kind about harassment and intimidation. The learned Magistrate did not proceed to investigate whether a contempt had been committed. The matter was not properly before him. There was no proper evidence as to what was said on the radio. The

appellants so constantly raised irrelevant issues it was difficult for the Magistrate to keep the proceedings focused. That said, I do not consider that even if a contempt had been committed, the trial miscarried.

[37] The appellants also complain that the Magistrate refused to allow them to pursue their "defences" of justification and provocation. It is not clear what "defence" the appellants had by way of justification. Angel J correctly held that the appellants had no defence based on s 31 of the Code merely because they were unaware of the existence of the offence at the time of the offence. Ignorance of the law is no defence. The intention to disturb, as found by the learned Magistrate, was open on the evidence. As to provocation, this was simply not available as a defence. Section 34 is only available if the "act was committed because of provocation upon the person… who gave him that provocation…" Provocation is defined to mean "any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person, to deprive him of the power of self-control" (s 1). So far as allegations of police persecution are concerned they cannot amount to provocation because the "act" in this case was the disturbance of the Assembly not any act against "the police". Thus the only relevant provocation would be an act of the Assembly itself. It beggars belief that the Assembly, in the course of debating bills before the House, can have committed a wrongful act or insult. The learned Magistrate was right to reject evidence going to this supposed "defence".

[38] Next it was alleged that video evidence was withheld and tampered with and not made available to the appellants until very late in the proceedings and should not have been admitted into evidence. There is no evidence that the video evidence was tampered with. As Angel J pointed out, the complaint of delayed access is without substance. The video evidence was of no significance. The appellants did not deny that they entered the Chamber of the Assembly as alleged. There was something of a complaint that the Hansard monitor who operated the cameras which made the video recording which was tendered did not capture everything which occurred during the disturbance. That may be so, but in this case that is of no significance.

[39] The appellants submitted that the prosecution was somehow tainted because the prosecution was politically motivated. Alternatively, it was put that the appellants' offending was of a political character. I do not doubt that the offending was of a political character and to that extent the prosecution was necessarily political. This issue was dealt with by Angel J and it has not been demonstrated that his Honour was wrong. The fact that a prosecution is in this sense political does not make it improper or an abuse of process. Some of the most heinous crimes ever committed could be said to be political and the prosecutions of the perpetrators could be said to be political as well. Although the trial of such matters cause difficulties not normally present in criminal cases that does not mean that those who break the law for political purposes should escape punishment. Ground 3 must be dismissed.

Ground 4 – The Constitution has not been correctly interpreted in the light of Mabo and other changes in Australia's social and legal framework since its inception

[40] No argument was advanced to support this ground and it must therefore be dismissed.

Ground 5 – A Parliament that presides over a racist and corrupt state has fewer rights under the Constitution than people who protest such racism and corruption

[41] There is no evidence that the Northern Territory is a racist or corrupt state and even if it were, this is not relevant to the appellants' innocence or guilt.

Ground 6 – The sentencing was manifestly excessive and ignored the circumstances of the appellants

[42] The appeal against sentence has not yet been deal with by Angel J. It is therefore not yet open to the appellants to raise this question at this time before this Court.

Ground 7 – Evidence of 'selective prosecution' on political grounds

[43] This is not a relevant matter to be taken into account in deciding whether or not the learned Magistrate erred in finding the appellants guilty, even if the allegation is true (which I do not find to be the case).

Ground 8 – Section 61 of the Criminal Code breached the appellants' implied right to freedom of speech and access to Government as implied in the Australian Constitution

[44] This point has already been dealt with under Ground 1, paras [16] to [21].

Ground 9 – The "War on Drugs" and subsequent "tough on drugs" and

zero tolerance legislation are illegal and breach international law

[45] There is no substance to this ground. The suggestion that the appellants are entitled to be treated as prisoners of war demonstrates that the appellants are as misguided as they are wrong. In any event, none of this is in the slightest bit relevant to the question of whether or not the learned Magistrate erred in convicting the appellants in this case.

Ground 10 – The appellants have available to them the provisions of the Geneva Convention

[46] There are no circumstances which give rise to the applicability of the Geneva Convention in the circumstances of this case. This ground must be dismissed.

Ground 11 – The learned Magistrate displayed overwhelming bias against the appellants

[47] Apart from one matter, the complaints under this head really amount to this: that the appellants' numerous submissions going to the admissibility of evidence and their liability to be tried on legal or constitutional grounds were rejected by the learned Magistrate and therefore he was biased against them. There is no substance to that submission. It has not been shown that the learned Magistrate erred in rejecting the appellants' contentions; nor that he displayed any actual bias towards the appellants. On the contrary, the learned Magistrate showed great patience and courtesy to the appellants.

[48] One matter, said to be of "particular concern" was "the relationship" between the prosecutor and the learned Magistrate. There is nothing in the

relationship which shows actual bias, but to succeed on this ground the appellants need only show that there was the reasonable apprehension of bias. The test to be applied is whether a fair-minded lay observer might reasonably apprehend that the magistrate might not bring an impartial and unprejudiced mind to the resolution of the question the magistrate was required to decide: *Johnson v Johnson* (2000) 201 CLR 488 at 492 (para 11).

[49] No particular submission was made in support of this ground except as one might gather from the very detailed, if at times somewhat rambling, written submissions lodged by the appellants. The appellant Highway raised objection to the prosecutor, who is both a legal practitioner as well as a serving police officer, prosecuting him because the prosecutor was a witness against him in another case heard by the same magistrate some years previously. The magistrate on that occasion preferred the evidence of the prosecutor to that of Mr Highway. Mr Highway claimed that the prosecutor had then perjured himself. There was no suggestion in the proceedings before the Magistrate that the Magistrate should disqualify himself on that ground. The submission was that the prosecutor should be disqualified. The Magistrate had no power to disqualify the prosecutor even if what Mr Highway said about the prosecutor was true. There was, apart from Mr Highway's assertions from the bar table, no evidence of the truth of the assertions which were irrelevant in any event.

[50] Next there were assertions made to the Magistrate that there was "bias within the judiciary in terms of magistrates". These were no more than mere

allegations made about two other magistrates. As the learned Magistrate pointed out, that was not relevant to the question of whether there was bias or the appearance of it by the learned Magistrate in question.

[51] Next, an application was made to the learned Magistrate to disqualify himself on the basis of his personal relationship with the prosecutor. The application was made on 17 February at Tr p 54. Mr Highway read to the Magistrate what the Magistrate had said in open court in 1994 (in the case involving Mr Highway when the prosecutor gave evidence) about his relationship with the prosecutor. Included was the fact that the Magistrate then said he had a favourable impression of the prosecutor. Mr Highway then referred obliquely to other matters, the details of which are not able to be discerned from the transcript. He submitted that these matters demonstrated apparent bias towards the police. Of course the prosecutor was not a witness in the case. It is not infrequently the case that counsel who appear are well-known to and even personal friends of the judicial officer hearing a case. That does not support a claim for disqualification. Nor does the fact that the Magistrate may have on other occasions believed the evidence of police officers prove or suggest he had, or may be perceived to have in the mind of a fair-minded lay observer, a pro-police bias. It may be expected that a magistrate who has served in that capacity for many years will have believed the evidence of police officers on numerous occasions. There is no substance to this ground of appeal which must be dismissed.

Ground 12 – "Concerns about the decision of Angel J due to the number of mistakes he has made in his decision"

[52] In each of the matters relied upon, the appellants assert that Angel J erred in deciding a ground of appeal against them, which said ground appears as a separate ground, or a sub-ground of a separate ground which I have dealt with already under grounds 1-11. As none of these grounds have been made out, it follows that it has not been demonstrated that Angel J had erred in dismissing the appeal.

New ground

[53] Since reserving our decision the appellants have sought leave to raise a further ground to the effect that the appellants did not consent to the matter being disposed of summarily by the learned Magistrate. It is asserted that, whilst the learned Magistrate offered to the appellants the option of committal for trial to the Supreme Court, they did not know that this option enabled them to choose trial by jury. Elsewhere in their submissions the appellants assert that "due to the Attorney-General's comments [referred to earlier in para [35] above] the applicants felt (subjectively) that any jury would be biased by a false belief that the applicants are criminal drug dealers…"

[54] The learned Magistrate made it clear to the appellants on 31 October 2002 (Tr pp 66-68) how a jury would arrive at findings of fact. The learned Magistrate further stated on a number of occasions, when announcing why he considered that there was a case to answer, that there was "evidence

which a jury could accept…" or some similar phrase. Plainly the appellants well knew that trial in the Supreme Court meant trial by jury.

[55] As there is simply no substance to this submission, which I note was not raised before Angel J and now can be raised only by leave, I would refuse leave to amend the grounds of appeal to raise this issue. There is therefore no need to consider whether a committing Magistrate has such a duty in any event.

Conclusion

[56] In my opinion, the appeals against conviction should be dismissed with costs.

Thomas J:

[57] I have read the draft reasons for judgment prepared by Mildren J. I agree this appeal should be dismissed for the reasons stated by Mildren J.
