Knight v Littman [2006] NTSC 73

PARTIES:	KNIGHT, Bradley John
	v
	LITTMAN, Andrew Kevyn
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	71/2006 (20617070)
DELIVERED:	14 July 2006
HEARING DATES:	13 July 2006
JUDGMENT OF:	THOMAS J

CATCHWORDS:

CRIMINAL LAW – PRACTICE AND PROCEDURE – APPLICATION FOR STAY OF PROCEEDINGS – ABUSE OF PROCESS – whether decision of magistrate not to accept plea of guilty to lesser charge and proceed to committal on more serious charge amounts to abuse of process – application dismissed

REPRESENTATION:

Counsel:

Appellant:	B Cassells
Respondent:	G Bryant

Solicitors:

Appellant:	Northern Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200613
Number of pages:	13

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

Knight v Littman [2006] NTSC 73
No. 71/2006 (20617070)

BETWEEN:

KNIGHT, Bradley John
Plaintiff

AND:

LITTMAN, Andrew Kevyn
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 14 July 2006)

[1] This is a summons on originating motion dated 29 June 2006 seeking the following order:

An order permanently staying proceedings pursuant to an information for an indictable offence laid 27 June 2005 wherein the defendant alleges that the plaintiff unlawfully caused grievous harm to one Matthew Benjamin Dix.

[2] This application on summons, heard by this Court on Thursday 13 July 2006, was dealt with as an urgent matter as the proceedings were listed for a committal hearing in the Court of Summary Jurisdiction on Monday 17 July 2006. Mr Bryant, on behalf of the respondent, informed me that a number of

witnesses had been organised to give evidence at the committal proceedings and they would need to be advised if the committal was stayed. The plaintiff is a juvenile.

[3] On 14 July 2006, I made the following order:

> "The order of the Court is that subject to the undertaking having been given by the Crown and referred to in paragraph 12 of the affidavit of Gerard Bryant sworn 5 July 2006, I refuse the application made on behalf of the plaintiff for an order permanently staying proceedings pursuant to an information for an indictable offence laid 27 June 2005 wherein the defendant alleges that the plaintiff unlawfully caused grievous harm to one Matthew Benjamin Dix."

I now provide written reasons for the making of that order.

[4] Mr Cassells, on behalf of the applicant, relied on the following affidavit material in support of the application.

1. Affidavit of Brian Cassells sworn 10 April 2006 (Annexure "F" was not attached) but I was made aware of its content.
2. Affidavit of Brian Cassells sworn 29 June 2006.
3. Affidavit of Brian Cassells sworn 7 July 2006.
4. Facsimile copy of an affidavit of Stephen Geary sworn 7 July 2006.

[5] Mr Bryant, on behalf of the respondent, relies on the following affidavit material:

1. Affidavit of Gerard Robert Bryant sworn 5 July 2006.

[6] There has been no challenge to the admissibility of these affidavits. I accept the matters that are set out in these affidavits either as fact or belief at the time the affidavits were sworn.

[7] This matter was initially listed for a committal hearing in the Court of Summary Jurisdiction on 11 October 2005. The co-accused, Rudi Kurt Muller, indicated through his solicitor Mr Ian Rowbottom that he would enter a plea of guilty to the charge. A plea of guilty was entered on the basis of agreed facts. Mr Muller was subsequently committed to the Supreme Court for sentence.

[8] Mr Geary details, in his affidavit sworn 7 July 2006, certain concerns he had about the charge with respect to Bradley John Knight. These concerns included difficulty in contacting or ensuring the attendance of, a number of witnesses and inconsistencies in the statements of the co-accused, Mr Muller, who offered to give evidence against Mr Knight.

[9] Mr Geary sets out the reasons why he accepted an offer from Mr Cassells, who represented Mr Knight, that Mr Knight would plead guilty to the less serious charge of aggravated assault causing bodily harm. Mr Geary deposes to the fact he consulted with senior members in his office and with the victim and the victim's mother before proceeding to agree to accept the offer of a plea of guilty from Mr Knight to the lesser charge.

[10] On 11 October 2005, Mr Geary for the Crown and Mr Cassells for Mr Knight, appeared before Mr Trigg SM. The transcript of proceedings

before Mr Trigg SM on that date indicate that following the plea of guilty by Mr Knight, Mr Trigg SM raised a query as to why this matter should not be heard together with the charge against Mr Muller which had proceeded before Dr Lowndes SM. Both Mr Cassells and Mr Geary submitted that because the facts against each were different, it would be preferable the matters be heard by different magistrates. Mr Trigg SM agreed to proceed to hear the charge against Mr Knight. The facts as alleged against Mr Knight were read by Mr Geary. The facts were admitted by Mr Cassells who advised the learned stipendiary magistrate of this and also stated that his client had no recollection of the events and was relying on statements to police by other witnesses. The learned stipendiary magistrate found Mr Knight guilty of the offence to which Mr Knight had pleaded guilty.

[11] Mr Trigg SM indicated that he was considering a term of imprisonment for the offence. As is required under the provisions of the Juvenile Justice Act when the magistrate is considering a gaol sentence, his Honour requested a pre-sentence report. He adjourned the matter to 10.00am on 22 November 2005 for submissions and sentence. Mr Knight was released on bail.

[12] On 21 October 2005, Mr Trigg SM called the matter back before himself. He stated the reasons for this was because his attention had been drawn to an article which had appeared in the NT News on 12 October 2005. The article was a report of the case. The article apparently stated both Mr Knight and Mr Muller had entered a plea of guilty to a charge of cause grievous harm and described the involvement of Mr Knight which did not

accord with the agreed facts in the charge against Mr Knight, but did reflect the facts that were put forward with respect to the matter of Mr Muller. Mr Geary states in his affidavit sworn 7 July 2006 that the NT News' story about the plaintiff was inaccurate. Mr Trigg SM disqualified himself from hearing the matter further. He stated in the course of his reasons for disqualifying himself (tp 3-4):

> "It is in my view, an unfortunate circumstance whereby the Crown named Mr Knight specifically in one matter, alleging that he has committed very serious kicks to the face and body of a person who suffers substantial facial injuries and yet in the other matter in which he is to be sentenced, they leave out those very important facts.
>
> The matter that Mr Knight has kicked the victim in the face is now a matter of public record, has been alleged specifically in the matter of Muller and is in the NT News and in the public domain. It therefore in my view leaves me in an impossible and ambiguous position in terms of sentencing in that any sentence which I would impose, if I did not take those matters into account, would be in my view inadequate.
>
> It is not permissible for me to sentence him based on those matters because they are not agreed. I therefore feel this court is compromised and therefore no circumstances I disqualify myself from further dealing with the matter and I can see the only proper course is to refer both matters to Mr Lowndes. He can resolve the matter himself. Either the facts in relation to Mr Muller's matter alleging what Mr Knight did would have to be publicly withdrawn from the record or the matter will need to go to a contested facts hearing for the truth to be resolved. But in my view it creates an impossible position for the court and opens this court up to unwarranted criticism if the court sentences two different people in relation to the same incident on different facts.
>
> In those circumstances I think that because I have now had my attention drawn to that – and as I say, I wouldn't have read it if it hadn't been from NAALAS themselves. I think that I can't honestly now divorce those matters out of my mind because they are of such a serious nature. I don't believe I can deal with Mr Knight any further.

> I disqualify myself from further dealing with this matter. Mr Lowndes is next sitting in Juvenile Court on 1 November. So I propose to adjourn this matter to 1 November 2005 before Mr Lowndes and have him sort it out one way or the other, hopefully he can come to a resolution."

[13] The matter was then adjourned before Dr Lowndes SM on 1 November 2005. A transcript of the proceedings shows the matter came before Dr Lowndes SM on 27 October 2005.

[14] Dr Lowndes SM expressed his concerns about the way in which the matter had proceeded, in particular, that it could give rise to a perception that it is contrary to the administration of justice and bring the Court into disrepute. Dr Lowndes SM requested counsel to return with authorities on this issue. The matter was adjourned to 4 November 2005. On that date counsel made submissions. The matter was further adjourned to 22 November 2005.

[15] On 22 November 2005, Dr Lowndes SM stated he thought the matter should proceed as a contested hearing. It was listed for a summary hearing, which his Honour noted could convert to a committal, or alternately if the juveniles were found guilty, they could be committed to the Supreme Court for sentence.

[16] Dr Lowndes SM stated (tp 8) the reason why he was taking this course was because "the Court is not bound by any agreement on the facts. The Court can reject any agreed set of facts, so basically that is the effect of my decision".

[17] On 7 March 2006, the matter came before Mr Trigg SM for case management purposes. A hearing on 6 and 7 April 2006 was confirmed.

[18] On 6 April 2006, the matter came before Mr Luppino SM. At the outset of the hearing, Mr Cassells outlined the history of the matter. He then advised his Honour that 2–3 days ago the Crown had advised they intended to proceed against his client on the charge of assault causing grievous harm. Mr Cassells submitted that until 2-3 days prior to 6 April 2006, he understood from the indication given by Dr Lowndes SM on 22 November 2005, that the matter was to proceed as a contested facts hearing. Mr Cassells then indicated he sought an adjournment of the proceedings in the Magistrates Court to enable him to make an application to the Supreme Court for a stay of proceedings.

[19] Mr Luppino SM then asked Mr Bryant appearing for the Crown the following question (tp 5):

> "Mr Bryant do you confirm that it was only the last couple of days that prosecution notified defence that the grievous harm would proceed?"

[20] Mr Bryant for the Crown replied to his Honour as follows (tp 5):

> "Well they confirmed the matter was going to proceed as a grievous harm charge. My understanding from my instructors is that Mr Lowndes booked the matter in for hearing. It was booked in on the basis of a charge proceeding against grievous bodily harm or bodily harm in the alternative and that that's the way in which the Crown understood the matter was going to proceed. They're my instructions and we are in a position to proceed today. We have had witnesses flown up from Victoria, but my instructions are that if they defence

> wish to have the matter reviewed by the Supreme Court not to oppose that application. It's a matter for your Honour as to how the matter proceeds today."

[21] There were further submission made as to how the matter should proceed. The matter was adjourned to enable Mr Cassells to make a stay application. Mr Luppino SM stated that the matter should commence as a committal hearing on the following day 7 April 2006. He had determined the matter was too serious to be dealt with in the Juvenile Court.

[22] On 6 April 2006 Mr Cassells applied for and obtained an interim order from the Supreme Court to stay the committal hearing.

[23] On 13 April 2006, the application for a stay of the committal hearing was made by summons on originating motion seeking a permanent stay of the proceedings. These proceedings were pursuant to an information for an indictable offence laid 27 June 2006 wherein the first defendant alleges that the plaintiff unlawfully caused grievous harm to one Matthew Benjamin Dix. The application was heard by Justice Riley.

[24] On 24 April 2006, Justice Riley delivered his reasons for judgment. His Honour refused to extend the stay of proceedings. In the concluding paragraph of his reasons for judgment, Justice Riley said:

> "… If there is to be any interference by the court with the right of the Crown to proceed further it will lie in the realm of the inherent jurisdiction of the court to stay proceedings for abuse of process. Whether or not such a course is available in the circumstances of this matter has not been addressed by the parties. …"

[25] On 28 April 2006 the matter came before the Court of Summary Jurisdiction for mention. The proceedings were adjourned for committal hearing on 17 and 18 July 2006. The matter was mentioned before the Court of Summary Jurisdiction on a number of occasions as the plaintiff's legal advisers had advised on 16 May 2006 that they were considering a new application to seek a stay of the committal proceedings.

[26] On 30 June the Court of Summary Jurisdiction was advised that a new appeal had been filed to the Supreme Court.

[27] Mr Bryant deposed to the fact that in the interim the defendant had re-served most of the witnesses to be called at the committal proceedings listed for 17 and 18 July 2006.

[28] Mr Bryant further deposed to the fact that the co-accused, Mr Muller, had recently been re-arrested at Brisbane Airport and extradited to Darwin.

[29] I was advised that Mr Muller was scheduled to plead guilty to certain charges before another judge of this Court on a date in July 2006.

[30] Mr Bryant deposes in his affidavit to the fact that he believes Mr Muller was willing to cooperate with the police and would give evidence at a committal hearing directly implicating the plaintiff in the offence of cause grievous harm. He further states that this witness was not available to testify at the time the negotiations took place between Mr Cassells and Mr Geary with respect to Mr Knight entering a plea of guilty to the lesser charge.

[31] Mr Bryant further deposed as follows (par 12):

> "The Plaintiff cannot show detriment of the type complained of in paragraph 16 of its affidavit as the Prosecution have undertaken not to use any admission implicit or explicit arising out of the plea or any material surrounding the presentation of the information previously pleaded to, the plea entered or any circumstances surrounding the presentation of that information and the plea entered. An undertaking, which was noted by Justice Riley in his decision at paragraph 26 of his reasons."

[32] The basis for Mr Cassells' application is that there has been an abuse of process. In his affidavit dated 29 June 2006, Mr Cassells set out some background matters which are not in dispute. At paragraph 13 he stated as follows:

> "The application for a stay came on for hearing before Justice RILEY who delivered a judgment on 24th April 2006 refusing the application. His Honour took the view that it was not a matter of "*autre convict*' as the Plaintiff had submitted and that the Plaintiff's only avenue for relief was on the basis of abuse of process which had not been argued before him."

[33] Mr Cassells stated in his affidavit sworn 10 April 2006, he considered Mr Knight had acted to his detriment in that he has now admitted to being a person responsible for assaulting Mr Dix and thereby causing him bodily harm. In view of the undertaking that has been given and referred to by Mr Bryant in his affidavit (paragraph 12) that cannot be considered to be a consideration.

[34] In the final paragraph of his affidavit sworn 29 June 2006, Mr Cassells deposes as follows:

> "Not only has the Plaintiff suffered detriment the entire system of criminal justice will suffer detriment if the Defendant is permitted to resile from a formal plea arrangement after completion thereof by the Plaintiff. Parties to matters in the criminal sphere will be unable to negotiate and agreed and appropriate outcome."

[35] In his affidavit dated 7 July 2006, Mr Cassells asserts that the evidence to be given by Mr Muller will be of little weight given his prior inconsistent statements. Annexed to the affidavit is a copy of a statement made by Mr Muller dated 3 May 2005. Mr Cassells annexed two further statements made by witnesses Victor Godinho and Michael Francis. He asserts that there has been no change in the evidentiary material available to the prosecution at any time after the plea negotiations were finalised and/or plea entered.

[36] I do not consider a stay of proceedings should be granted. I do not accept there has been an abuse of process. The decision not to accept a plea of guilty and deal with the matter in the Juvenile Court but rather to proceed to a committal hearing pursuant to s 106A of the Justices Act was suggested by Dr Lowndes SM when the matter came before him on 27 October 2005.

[37] The matter ultimately came before Mr Luppino SM on 6 April 2006. Mr Luppino SM quite independently of any previous proceedings determined on hearing the alleged facts as read by the Crown Prosecutor that the matter should proceed as a committal hearing and that it was too serious a matter to be dealt with in the Juvenile Court.

[38] This decision cannot be categorised as an abuse of process.

[39] The essential submission made by Mr Cassells is that the Crown, having agreed to accept a plea to a lesser charge in October 2005, had no further evidentiary material to present when the matter came before Mr Luppino SM on 6 April 2006 and should not have sought to proceed to hearing on the more serious charge of grievous harm.

[40] There does seem to have been some misunderstanding between the representatives for the Crown and Mr Cassells when the matter came back to Court on 6 April 2006. Mr Cassells thought the committal hearing was on the basis the Crown would proceed with a charge of aggravated assault cause bodily harm. Mr Bryant stated the Crown position was that the committal hearing would proceed on the basis the Crown alleged an offence aggravated assault cause grievous harm, or in the alternative bodily harm. Whatever offence the Crown may allege it is for the magistrate at the conclusion of the committal hearing to decide on what, if any, charge the defendant should be committed.

[41] Mr Trigg SM having disqualified himself from further hearing the matter, after making a finding of guilt, it was obvious that the matter would have to start afresh before another magistrate.

[42] On 6 April Mr Luppino SM sought advice from Mr Cassells as to whether Mr Knight would consent to the jurisdiction and have the charge of grievous harm heard in the Magistrates Court. Mr Cassells indicated that he would be seeking a stay of proceedings on the grounds that the prosecution elected to

proceed on a certain basis which the defendant accepted and the prosecution should not be permitted to resile from that position.

[43] Mr Luppino SM stated the would not order a stay of proceedings for two reasons: (1) he was not satisfied that it would be appropriate; and (2) he did not consider he had the power to grant a stay.

[44] Mr Bryant then read out the facts as alleged by the Crown. Mr Luppino SM noted that no plea is taken at a committal hearing. He stated he intended to proceed with the matter as a committal hearing. The matter was adjourned to commence as a committal hearing on 7 April 2006.

[45] Subsequently, the plaintiff made two applications to the Supreme Court to stay the proceedings as I have already outlined.

[46] On 14 July 2006, I determined there had been no abuse of process and no reason to stay the committal proceedings before Mr Luppino SM which were scheduled to commence on 17 July 2006.

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