CITATION:	*The King v Hinks* [2024] NTSC 16
PARTIES:	THE KING v HINKS, Laura Adele
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22215355
DELIVERED:	18 March 2024
HEARING DATE:	18 March 2024
JUDGMENT OF:	Grant CJ

REPRESENTATION:

Counsel:

Crown:	I Read SC with L Spargo-Peattie
Accused:	G Mohammed

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Direct brief

Judgment category classification:	C
Judgment ID Number:	GRA2403
Number of pages:	15

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

The King v Hinks [2024] NTSC 16
No. 22215355

BETWEEN:

THE KING

AND:

LAURA ADELE HINKS

CORAM: GRANT CJ

REASONS FOR DECISION
(Delivered *ex tempore* on 18 March 2024)

[1] This is an application for an order permanently staying criminal proceedings against the accused in the exercise of the court's inherent jurisdiction and, or in the alternative, pursuant to ss 21 and 339 of the *Criminal Code 1983* (NT).

The charges on indictment

[2] The accused is charged by indictment dated 15 March 2024 with the commission of two separate offences.

[3] Count 1 is that between 7 and 19 August 2022 the accused took a female child under the age of 16 years out of the custody or protection of the child's father and against the will of the father contrary to

s 202(1) of the *Criminal Code*. The indictment pleads that the abduction was aggravated by the facts that the accused was an adult and the child was under the age of 14 years, namely five years.

[4] Count 2 is that on 7 August 2022 the accused attempted to take a male child under the age of 16 years out of the custody or protection of that child's father and against the will of the father contrary to s 202(1) of the *Criminal Code*, read with s 277 of the *Criminal Code* (dealing with attempts to commit offences). The indictment pleads that the attempted abduction was also aggravated by the facts that the accused was an adult and the child was under the age of 14 years, namely 11 years.

The Crown case

[5] The Crown case may be summarised as follows.

[6] The accused is the mother of both children named in the indictment.

[7] On 17 February 2022, the Local Court made a protection order in relation to the male child giving his father short-term parental responsibility for a period of six months and permitting the accused not less than one access visit per week. That grant of parental responsibility included a right to custody of the male child.

[8] On 31 May 2022, the Federal Circuit and Family Court of Australia made an interim parenting order pursuant to the *Family Law Act 1975*

(Cth) granting sole custody of both children to their father. Under the terms of that order, the female child was only able to spend time with the accused as directed by and under the supervision of the Children's Contact Service run by CatholicCare NT. Under the terms of the order, the male child was only able to spend time and communicate with the accused as recommended by the child's treating medical practitioner or behavioural expert.

[9] On 7 August 2022, the accused was undertaking a supervised visit with her children at a CatholicCare facility in Darwin. During the course of that visit, the female child was forcibly removed from the facility by the accused and a co-offender without the consent of either the father or the Children's Contact Service. The accused and her co-offender also attempted to remove the male child from the facility, but were unsuccessful in that attempt due to the male child's resistance. The accused kept the female child in a number of different locations with a number of different co-offenders over the following 12 days.

[10] On 10 August 2022, the Federal Circuit and Family Court issued a recovery order pursuant to s 67Q of the *Family Law Act* directing police to find and recover the female child, and authorising police to search any premises, vehicle, vessel or aircraft in which there was reasonable cause to believe that the child may be found. The order also prohibited the accused from again removing or taking possession

of the child, and authorised the accused's arrest without warrant if she did so.

[11] On 19 August 2022, the accused turned herself and the child in to the Australian Federal Police. The accused was arrested and the child was returned to her father.

The grounds of application for a stay

[12] The accused seeks a stay on four independent grounds.

[13] First, the accused asserts that on a plain reading of s 202(1) of the *Criminal Code*, which is the provision under which both counts in the indictment are charged, an offence is committed only when a child is removed from the custody of its parents or some other person having the lawful care or charge of the child against the will of the parents or that other person. Accordingly, an offence cannot be committed where one parent removes a child from the other parent when that removal is not contrary to the will of the removing parent. That argument is founded on the proposition that under the terms of the provision the 'father' cannot be characterised as 'having the lawful care or charge of a child' under the terms of the parenting order made by the Federal Circuit and Family Court.

[14] Second, the accused asserts that she has suffered 'incurable prejudice' by reason of the Crown's withdrawal of consent for the Local Court to hear and determine the charges summarily pursuant to s 121A of the

Local Court (Criminal Procedure) Act 1928 (NT). That prejudice is said to arise from an imbalance between the respective positions of the Crown and the accused, and the delay since the abandonment of the summary hearing which was scheduled to commence on 24 July 2023.

[15] Third, the accused asserts that Count 1 is invalid by reason of inconsistency between Northern Territory and Commonwealth law. It is said that the *Family Law Act* covers the field in relation to parental care and custody, including the imposition of criminal sanctions for the breach of orders. Further, or in the alternative, it is said that s 202(1) of the *Criminal Code* is inconsistent with specific provisions of the *Family Law Act*. For those reasons, it is said that s 202(1) of the *Criminal Code* is invalid to the extent that it purports to criminalise conduct in breach of a parenting order made under the *Family Law Act*.

[16] Fourth, the accused asserts that Count 2 is 'ineffective' because the protection order made by the Local Court, which remained in force at the time of the alleged attempted abduction, did not prohibit the accused from removing the male child from the facility.

General principles governing the grant of a stay

[17] As the Court of Criminal Appeal has recently observed in *The King v Yovanovic* [2024] NTCCA 3, the authorities clearly establish that

criminal proceedings will only be permanently stayed in an 'extreme or exceptional case': see *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34; *R v Glennon* (1992) 173 CLR 592 at 605-606; *Agar v Hyde* (2000) 201 CLR 552 at [57]; and *Dupas v The Queen* (2010) 241 CLR 237 at [18], [35]. The court must be satisfied that there is a fundamental defect which goes to the root of the trial of such a nature that there is nothing the court could do to relieve against its unfair consequence. Although the categories of case in which the permanent stay of a criminal prosecution might be ordered are not closed, it is a step which has been described as 'exceptional' and 'rarely justified': see *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at [106]. In making such a determination, fairness to the accused must be balanced against the substantial public interest of having those charged with criminal offences brought to trial: see *Dupas v The Queen* (2010) 241 CLR 237 at [39]; and *R v RD* [2016] NSWCCA 84 at [53]-[56].

[18] The relevant test is whether the continuation of the proceedings would necessarily and inevitably involve unacceptable injustice or unfairness: see *Walton v Gardiner* (1993) 177 CLR 378 at 392; *R v Edwards* (2009) 255 ALR 399 at [23]-[24]. Each of the grounds on which a stay is sought falls to be addressed in conformity with those general principles.

The indictment does not disclose an offence

[19] As already described, the accused's contention on the first ground is that an offence cannot be committed where one parent removes a child from the other parent if that removal is not against the will of the removing parent. In its essence, the contention is that a non-custodial parent cannot abduct their biological child.

[20] That resolves to an assertion that the prosecution is oppressive because the alleged facts could not disclose an offence against s 202(1) of the *Criminal Code*. The third and fourth grounds on which the accused seeks a stay may be similarly characterised. As the Crown submits, that is a matter going to the merits of the case rather than anything which could constitute the illegitimate or oppressive use of the court processes so as to warrant the stay of the proceedings. Even were that not so, the construction argument pressed by the accused can be dealt with in short order.

[21] Section 202(1) of the *Criminal Code* provides:

> Any person who takes a child who is under the age of 16 years out of the custody or protection of that child's mother or father or other person having the lawful care or charge of the child and against the will of such mother or father or other person is guilty of an offence and is liable to imprisonment for 3 years.

[22] First, it is apparent from the terms of the section that the offence may be committed by 'any person', which on a plain reading would include a mother or father of the child.

[23] Second, a natural reading of the provision is that the phrase 'having the lawful care or charge of the child' qualifies the subjects 'mother', 'father' and 'other person'.

[24] Third, as the circumstances of this case demonstrate, the child's mother or father may not have the lawful care or charge of the child. The reference to 'mother or father' is plainly to a parent with 'custody or protection' of the child in accordance with the immediately preceding clause. That disjunctive formulation also recognises that one parent may have lawful care and custody of a child to the exclusion of the other parent. A subsequent amendment to the provision to omit 'child's mother or father' and insert 'child's parent' received assent on 26 May 2022, which was before the alleged commission of these offences, but did not commence until 20 December 2022, which was after the events in question. That amendment was made by and for the purposes of the *Surrogacy Act 2022* (NT), and was unrelated to this particular issue of construction. However, the terms of the amendment reinforce the conclusion that as a matter of objective legislative intention, the reference to the 'mother or father' at the material time was a reference to the parent or parents with lawful care or charge of the child.

[25] Finally, if the parent in question does not have lawful care or charge of the child, they cannot form part of that class against whose will the taking of the child is made. Accordingly, the fact that a parent

without lawful care or charge of the child may have wilfully taken the child provides no defence.

[26] The Australian legislative framework has long recognised and operated on the basis that a parent may lose the right to daily care and control of his or her child or children. Having regard to both the terms of the section and the legislative intention and policy underpinning of the provision, its proper construction is plainly that the offence can be committed by a parent who does not have the right of care and custody by taking a child from the parent or other person who does have the right of care and custody.

Withdrawal of consent to summary hearing and determination

[27] The second ground for the application is that the accused has suffered incurable prejudice by reason of the Crown's withdrawal of consent for the Local Court to hear and determine the charges summarily pursuant to s 121A of the *Local Court (Criminal Procedure) Act*. As already stated, the summary hearing was scheduled to commence on 24 July 2023. The trial on indictment is scheduled to commence on 11 November 2024.

[28] Section 121A of the *Local Court (Criminal Procedure) Act* permits both the prosecution and the defence to either consent or refuse consent to the summary hearing and determination of a charge. Both parties must consent and the court must consider it appropriate to do

so before the charge may be heard and determined summarily. The consent of both parties is a condition precedent to summary hearing and determination: see *Birkeland-Corro v Tudor-Stack* [2005] NTSC 23 at [82]. There is no doubt that consent can be withdrawn: see *Clayton v Hall & Anor* (2008) 184 A Crim R 440 at [21]-[23]; *Treloar v Richardson* (2020) 284 A Crim R 357 at [77].

[29] The prosecution decision to withdraw consent in this case was precipitated by two of the co-accused withdrawing consent and exercising their right to engage the committal processes. In circumstances where the witnesses and factual matrix are common for all five accused, the alteration in position by the co-accused gave rise to the prospect of a multiplicity of trials and potentially inconsistent verdicts, and a general fragmentation of the proceedings. In those circumstances, it cannot be said that the prosecution's withdrawal of consent constituted an illegitimate or oppressive use of the court processes so as to warrant the stay of the proceedings.

[30] The case of *Williams v Hand* (2014) 245 A Crim R 275 relied on by the accused (at [44]-[46]) is to no different effect. That case concerned judicial review of a magistrate's decision to terminate an already part-heard summary hearing in a manner which caused actual forensic prejudice to the accused by reason of his cross-examination of Crown witnesses in the manner of a contested hearing rather than as an accused would in committal proceedings.

[31] The only matter to which the accused points as constituting an abuse of process is the delay occasioned by the withdrawal of the consent and the committal for trial in the Supreme Court. Delay does not of itself constitute an abuse of process: see *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34, 41, 48-50, 53-54, 58-61, 71-72 and 78. Even were that not so, the delay in this case cannot be characterised as so excessive as to cause what is described in submission as 'incurable prejudice' to the accused.

Inconsistency between Northern Territory and Commonwealth law

[32] The third ground for the application is that Count 1 is invalid because either the *Family Law Act* covers the field in relation to the imposition of criminal sanctions for the breach of orders; and/or s 202(1) of the *Criminal Code* is inconsistent with specific provisions of the *Family Law Act*.

[33] Contrary to the accused's submissions, s 109 of the *Constitution* is concerned with the relationship between Commonwealth and State laws. It has nothing to say about the relationship between Commonwealth and Northern Territory laws. However, it is correct to say that as a general rule Territory laws will be invalid to the extent of any inconsistency with a Commonwealth statute: see *Northern Territory v GPAO* (1999) 196 CLR 553 at 576, 579-580, 581-2 and 630; *R v Kearney; ex parte Japanangka* (1984) 158 CLR 395 at 418.

[34] The power conferred on the Legislative Assembly of the Northern Territory by s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) 'to make laws for the peace, order and good government of the Territory' does not include power to make laws inconsistent with Commonwealth law, as that result would allow Territory law to alter or repeal Commonwealth law in a manner inconsistent with the underlying scheme of self-government. As there is no power to make such a law, it is unnecessary to identify an express constitutional or statutory provision similar to s 109 of the *Constitution* which would give Commonwealth law primacy over Territory law.

[35] Inconsistency of that nature can arise directly or indirectly. Direct inconsistency will result: (a) when it is impossible to obey both laws; or (b) when one law permits what the other law prohibits; or (c) when one law imposes an obligation or confers rights and the other law modifies that imposition or conferral. Indirect inconsistency will arise where there is an intention on the part of the Commonwealth to regulate exclusively the activity with which the law is concerned. The Commonwealth law in those circumstances is said to 'cover the field'. Although the accused's submissions make reference to both 'specific inconsistency' and an intention to 'cover the field', they would appear in substance to be confined to an assertion of indirect inconsistency.

[36] The first point to make in that respect is that the *Family Law Act* is clearly not intended to cover the field of parental responsibility. As

the Crown submits, if that were so the legislative schemes for the care and protection of children which operate in every Australian State and Territory would be invalid. Rather, s 69ZK of the *Family Law Act* provides expressly that it does not affect State and Territory child welfare laws. As the terms of the parenting order in this case conveniently demonstrate, the scheme under the *Family Law Act* and the care and protection of children regime operate in a tandem and complementary fashion. That has been the case since 1975. Similar observations may be made in relation to State and Territory adoption laws: see *Family Law Act*, ss 61E and 65J.

[37] The second point to be made is that s 70NFH of the *Family Law Act* provides expressly for the continued operation of State and Territory criminal laws which intersect with federal orders affecting children, including parenting orders, and provides protection against double conviction and punishment. That provision recognises that State and Territory criminal laws are not excluded or invalidated by the Commonwealth legislation: see, for example, *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at [40] and [50]; *Dunne v P* (2004) 29 WAR 232 at [30], [96], [157], [160], [166] and [170]. There may be an issue arising in the event of a direct operational inconsistency between Commonwealth and Northern Territory legislation, but no such inconsistency is identified in this case.

[38] The third point to be made is that to the extent that s 8 of the *Family Law Act* expresses an intention to cover a field by suppressing other laws, that field is limited to matrimonial causes, conjugal rights and separation orders.

No prohibition on removing the male child

[39] The fourth ground for the application is that Count 2 is 'ineffective' because the protection order made by the Local Court, which remained in force at the time of the alleged attempted abduction, did not prohibit the accused from removing the male child from the facility. This ground proceeds on a misconception of the effect of the protection order. To the extent that the order permitted the mother not less than one access per week, that permission did not extend to the assumption of custody and control, much less the forcible removal of the child from the site of an access visit. The grant of an access right did not operate to vest custody and control of the child in the accused during the period of that access.

Disposition

[40] For these reasons, the application for a stay of proceedings on each of those grounds is ill-founded. Accordingly, I make the following orders:

1. The application for a permanent stay of the criminal proceedings against the accused is dismissed.

2. The publication of these reasons for decision is restricted to the parties and their legal representatives until further order.

_____