Voigt v Ryan [2001] NTSC 113

PARTIES:	PETER CHARLES VOIGT
	v
	CRAIG VICTOR RYAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 72 of 2001 (20101209)
DELIVERED:	13 December 2001
HEARING DATES:	29 November 2001, 7 and 11 December 2001
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	Mr R Goldflam
Respondent:	Ms G McMaster

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Voigt v Ryan [2001] NTSC 113

No. JA72 of 2001 (20101209)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against conviction in the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

PETER CHARLES VOIGT
Appellant

AND:

CRAIG VICTOR RYAN
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 13 December 2001)

[1] The appellant has been convicted of three offences arising out of events which occurred on 25 January 2001. On that occasion the appellant, who is effectively a one armed man, was observed by an off duty police officer to be driving a motor vehicle whilst seated in the passenger seat of the car and steering the vehicle from that location. There was no-one else in the vehicle. He drove along Gregory Terrace in Alice Springs around a roundabout at Hartley Street and then back down Gregory Terrace towards

the area of the Council Car Park. The vehicle was driven in an erratic manner and mounted both the footpath and the curbing of the roundabout. It narrowly missed colliding with other vehicles. The presiding Magistrate described the driving as "certainly crazy by any standards". The driving ceased when the vehicle came to a halt in the middle of what was described as a busy street. When the officer concerned, Constable Kinghorn, approached the vehicle the appellant got out of the vehicle and walked around to the driver's side and sat in the driver's seat. He then said that he had been there all the time. Constable Kinghorn described the appellant as "just looking into space, didn't appear to be all there … I formed the opinion then that he may be under some sort of drug or some psychotropic substance".

[2] Constable Kinghorn was familiar with the appellant and, given his actions and demeanour, concluded that he was under the influence of "something". Whilst talking to the appellant Constable Kinghorn saw a plastic bag protruding from his top pocket. He pulled it out and found eleven foils in it. He seized those foils and the powder within them was subsequently analysed and found to contain heroin. The sum of $200 cash was also located in the plastic bag.

[3] Other police attended the scene and the appellant was arrested at 10.30am. He was taken back to the watchhouse. At the watchhouse Senior Constable Steven held a tape recorded discussion with the appellant pursuant to s 140 of the *Police Administration Act*. He asked the appellant whether he wished

to have anyone informed that he was in custody and the appellant responded that he would like his son to be informed and that his son was there in the watchhouse. That was not the case and efforts to locate the son that day were unsuccessful. The watchhouse log revealed that "2 minutes" after the discussion with Senior Constable Steven the appellant was asleep and "he remained asleep during most of the period that the warrant and subsequent investigation carried on". The police then conducted a search of the residence of the appellant pursuant to a search warrant obtained that morning. During the course of that search a sum of $6000 was located and seized by police from a safe at the premises. Also found and seized were four additional foils that contained powder subsequently identified as containing heroin.

[4] Following a fully defended hearing the appellant was convicted of unlawfully possessing a trafficable quantity of heroin, possessing money ($6000) reasonably suspected of being the proceeds of selling heroin and possessing money ($200) reasonably suspected of being the proceeds of selling heroin. He now appeals against those convictions. In the event that the convictions are sustained there is no complaint as to the sentence imposed by his Worship.

The Search of the Residence

[5] The appellant claims that the learned Magistrate should have, in the exercise of his discretion, excluded the evidence that arose from the search

conducted at his residence. There was no challenge to the validity of the search warrant, however, the search was conducted in the absence of the appellant and it was submitted, conducted unlawfully and/or contrary to public policy. His Worship was referred to Police General Order 18.3 which is in the following terms:

> "Where practicable, the owner or occupier of the premises should be present when premises are searched under the authority of a Search Warrant. The owner or occupier shall, where practicable and appropriate be provided with a copy of the relevant search warrant prior to the commencement of any search".

[6] In this case the appellant says, and it is not in dispute, that the search was conducted in his absence and without him having been informed. The decision to not take the appellant along on the search was made by Senior Constable Steven who, when he was asked whether he noticed anything about the appellant, said:

> "Yes, the defendant appeared, to me, to be under the influence of an intoxicating or psychotropic substance. He was in a very excited and emotional state. He was talking rapidly and not making much sense at all. He appeared to me, what's commonly – he's whacked out, I would term it. He was under the influence of something".

[7] Senior Constable Steven expressed the view that at that time the appellant was not fit to attend the search. He said that he formed the view that it was not practicable for the appellant to be there "due to his condition". He reached that conclusion at the watchhouse and taking into account his discussions with the appellant at the scene. Senior Constable Humphris was present when Senior Constable Stevens spoke with the appellant at the

watchhouse. He described the appellant as "quite … out of it … talking slow and was confused … dazed type of thing". His Worship listened to the relevant tape and noted the appellant spoke "extremely quickly" at one point and "slowly" at another. The tape did not assist him in assessing the appellant's condition.

[8] When the search was conducted, Detective Senior Sergeant Nixon, who was then the Officer in Charge of the Alice Springs CIB, attended as an independent observer. He was otherwise not involved in the investigation. He was subsequently replaced by Senior Constable Guerin in that role. There was no suggestion that any officer acted improperly in the course of the search and there was no cross-examination directed to the issue of the finding of the various items which the police officers said were found at the address of the appellant.

[9] It was submitted by the appellant that there was a failure to comply with Police General Order 18.3. It was submitted that it was "practicable" for the appellant to be present when the premises were searched. Further it was submitted that Senior Constable Steven had not made reasonable inquiries as to the condition of the appellant and that there was insufficient indicia of incapacity to justify the decision made.

[10] Those submissions were also made to his Worship who ruled that there had been compliance with Police General Order 18.3. It was submitted that his Worship, in so deciding, had posed for himself the wrong test. It was

submitted that he fell into error in directing himself that the question of "practicability" fell to be determined by analysing whether the police, in the circumstances, had acted in "good faith".

[11] In the course of his reasons for decision his Worship indicated that if the obligation on the prosecution was to establish that the appellant was "so intoxicated that he could not have, in anyway been meaningfully present at the time his premises were searched, then I do not think I would be satisfied of that by the evidence I have heard". His Worship was not called upon to make that decision. The question for his Worship was whether it was "practicable" for the owner or occupier of the premises to be present when the premises were searched.

[12] His Worship was not satisfied that it had been established beyond reasonable doubt that the appellant was intoxicated at the time. His Worship dismissed a charge of driving a motor vehicle whilst under the influence of an intoxicating substance because he was unable to determine whether that was the case. He expressed the view that it was "very likely the case" but noted that there was "a lot of evidence in the case suggesting that Mr Voigt was addicted to drugs" and his Worship was unable to determine whether the appellant may have been under the influence of "one of his customary drugs" or, alternatively, that he may have been suffering from withdrawal of some kind. There is no challenge to that ruling.

[13] His Worship observed that there was not enough evidence for him to decide whether the appellant could have been part of the search. He went on to say:

> "But I do not know that I am really called upon to make that conclusion. It seems to me that the decision as to whether it was practicable for the purpose of this decision of excluding evidence really comes down, fundamentally, to the question whether or not I am satisfied that the police were acting in good faith. And particularly, Detective Steven, acting in good faith when he decided on what he had at the time that it was not practicable to have Mr Voigt along.
>
> If I am not persuaded that he was acting in bad faith in coming to his operational decision; his call, as he described it, then it would appear to me that none of the criteria from the *Bunning v Cross* type decision, as expanded by Kirby J in a decision quoted in turn by Thomas J, Kirby J remarks being in Swaffield. … None of those breaches really applies, unless I am satisfied that the police here were doing something that was wrong.
>
> And if the police have honestly come to the view that participation was not practicable then it seems to me it is impossible to characterise their subsequent conduct as being wrong, unlawful or even contrary to the General Orders, as the General Order, itself, specified practicability as a pre-condition for the presence of the owner or occupier."

[14] His Worship went on to indicate that he accepted the "sincerity and honesty" of Constable Steven in making his decision "because he thought that Mr Voigt was too intoxicated". His Worship accepted that the officers involved regarded the decision as appropriate although he noted that the factual basis for that reasonable decision "seems exiguous in the extreme". His Worship concluded that he was not satisfied that there had been any breach of the General Order.

[15] The first matter to be determined is whether the police acted in breach of the relevant General Order. If they did then the discretion to exclude the evidence must be considered in light of the guidance provided in authorities such as *R v Swaffield* (1998) 192 CLR 159 and *Bunning v Cross* (1978) 141 CLR 54.

[16] The question in relation to this particular General Order is whether it was practicable to have the accused present during the search of his residence. That is to be determined objectively on the basis of all of the information available to the decision maker at the time. Although the views of the officer who made the decision that it was impracticable to have the accused present will be a factor for consideration, it is not the only factor. The practicability must be considered in light of all the circumstances as they existed and were known to the decision maker at the time.

[17] The approach adopted by his Worship is not entirely clear. If, as appears to be the case, his Worship restricted himself to a consideration of whether the police acted in good faith in deciding that it was impracticable to have the accused present, his Worship posed the question before him too narrowly. However, if that be so, in my view it would not affect the outcome of these proceedings. There was ample evidence to show that the attendance of the appellant was impracticable at that time. The evidence before his Worship included the appellant's history of drug abuse, the observations of Constable Kinghorn of the "crazy" driving of the appellant and his observation that the appellant appeared to be "looking into space", and

appeared not to be "all there". It also included the observations of Senior Constable Steven who described the appellant as "whacked", an opinion which his Worship found to be honestly held. Both of these officers were experienced officers. Further there was the observation that the appellant was asleep within minutes of speaking to Senior Constable Steven and that he slept for much of the time that the search went on. In addition there was the evidence of Senior Constable Humphris that the appellant was "dazed", "confused" and "out of it". These observations are consistent with the fact that the police thought it inappropriate to interview the appellant because of his condition at that time and in fact did not do so. There was no evidence from or on behalf of the appellant that contradicted the expressions of opinion of the police officers as to his condition and lack of alertness at the time. Whilst it was suggested that additional steps may have been taken in relation to determining the condition of the appellant, there was no challenge in cross-examination or at all to the accuracy of the police observations. Their conclusions, and the underlying factual bases for those conclusions, remained unchallenged. His Worship accepted that the appellant was "off his head" but said that he was unable to determine whether that was because the appellant was "on something" or because he was "lacking something".

[18] In my view, considering all of the relevant material, the impracticability of taking the appellant along on a search of the premises at that time was

clearly established. The decision made by Senior Constable Stevens was appropriate.

[19] In the event that I am wrong in this regard, it is my view that a proper exercise of the discretion would have led to the evidence being admitted in any event. Although the appellant was available to be taken on the search if he was fit to proceed, it is not the case that the police acted in deliberate defiance of the General Order or for any improper purpose. His Worship found they thought they were acting in compliance with the General Order. If that was not so it was the result of their genuine but mistaken belief as to the condition of the appellant. His Worship found that the decision not to take the appellant along was made honestly and in good faith. It is not suggested that the presence of the appellant would have affected in any way the cogency of the evidence obtained. There is no suggestion that the evidence obtained in the search was in any sense unreliable. In the circumstances the conduct of the police was not contrary to or inconsistent with a right of the appellant which should be regarded as fundamental. This is not a case where the Court is giving effect to illegality or impropriety in a way which is incompatible with the functions of the Court. In my opinion it would be inappropriate to exclude the evidence in the exercise of a discretion based upon unfairness to the appellant or upon public policy grounds. In my view, assuming a failure to comply with General Order 18.3 was established, the admission of the evidence and the obtaining of a

conviction on the basis of that evidence was not bought at a price that is unacceptable having regard to contemporary community standards.

[20] It was submitted that if the appellant was at the search he would have been able to provide the police with information as to the source of the sum of $6000 found on that occasion. It was submitted that he had lost an opportunity to provide the police with an explanation. That is most unlikely given that the appellant would not then have been in an interview situation but rather would be observing the search. He would not have been invited to comment at that time. In any event the appellant was able to provide that information at any time up until the trial and at the trial if he chose to give evidence. He could have done so in an interview situation or through the legal representatives he had by then engaged. He declined to enter into a record of interview. He did not ever explain or seek to explain his possession of the $6000. I do not accept this submission.

[21] It was further submitted that the police should have postponed the search until the appellant was no longer intoxicated and that they should have obtained an independent assessment of the appellant's apparent state of intoxication. I reject both of those submissions, as did his Worship. The police did not want to postpone the search for very good reasons. There was an expectation that drugs would be found at the premises and any delay in searching those premises created a security risk in respect of those drugs. The premises were described as "a very easy target". At the time the

decision was made it could not be known how long the appellant might be so affected as to make it impracticable for him to be present.

[22] In relation to the suggestion that an independent assessment of the appellant's apparent state of intoxication should have been obtained I note there is no obligation upon the police to proceed in that way. In the course of argument Mr Goldflam, for the appellant, withdrew his submission that the police had acted unreasonably in failing to provide for a medical examination or to arrange an independent assessment in this case.

[23] In the circumstances and notwithstanding that a point raised in this ground of appeal might be decided in favour of the appellant I would dismiss the appeal on this ground on the basis that no substantial miscarriage of justice has actually occurred. I am satisfied that no miscarriage of justice has occurred.

The Seizure of the Plastic Bag

[24] The appellant complains that the learned Magistrate fell into error by admitting into evidence the items seized from the appellant without a search warrant in circumstances where the criteria established by s 119(1)(a) of the *Police Administration Act* had not been made out. The items seized from the appellant when he was searched included eleven foils of a powder subsequently shown to contain heroin and the sum of $200. The section permits a member of the police force, in circumstances of "such seriousness

and urgency as to require and justify immediate search", without a warrant to:

> "(a) search the person of, the clothing that is being worn by and property in the immediate control of, a person reasonably suspected by him to be carrying anything connected with an offence."

[25] It was submitted that the "reasonableness" of the suspicion held by Constable Kinghorn could not be determined from the evidence because no direct evidence was led of what that officer apprehended at the relevant time. Although not directly questioned on the topic, the basis for the suspicion held by Constable Kinghorn was spelt out in his evidence. He gave evidence of the appellant's unusual driving, his demeanour upon initial arrest, the fact that Constable Kinghorn knew the appellant from prior dealings and that the appellant's demeanour raised his suspicion about the presence of drugs. There was no direct evidence of Constable Kinghorn's suspicion but there was an available inference in that regard.

[26] It is to be noted that there was no challenge to the validity of the search and seizure until after Constable Kinghorn and several other witnesses had given their evidence and departed. It was only at a late stage in proceedings that counsel for the appellant informed the court that issue would be taken with the validity of the search. It is therefore not surprising that Constable Kinghorn was not asked direct questions regarding his state of mind. His Worship dealt with the matter in this way:

> "Even if Kinghorn's evidence is based only upon what it was before him – Kinghorn's suspicion was based on what was before him in relation to having seen the driving and the conduct of Mr Voigt at the time, it appears to me that there's every reason for me to infer that Kinghorn had in mind, perhaps there is some drugs in this bag, before he grabbed it. I am also told that Kinghorn had further knowledge of Voigt arising from the past, although exactly what I don't have any idea.
>
> Assuming such a suspicion to exist, and it seems to me that I ought to infer that from the circumstances, I certainly couldn't infer the contrary, his actions strikes me as being entirely warranted and exactly what one would expect of a police officer suspecting that someone has drugs in his or her pocket."

I see no error in the reasons provided by his Worship.

[27] It was submitted on behalf of the appellant that Constable Kinghorn was not authorised by s 119(1) of the *Police Administration Act* to proceed as he did because it did not occur "in circumstances of such seriousness and urgency as to require and justify immediate search". In my view the circumstances were such that justified an immediate search and seizure. Constable Kinghorn had a basis for believing that drugs were present in the pocket of the appellant. The appellant was in the condition that has already been described. To fail to act then and there was to risk the loss of the evidence in a situation of confusion that arose from the bizarre conduct of the appellant.

[28] The third and final ground of appeal was that the learned Magistrate fell into error in drawing an inference adverse to the appellant premised on the appellant's failure or refusal to participate in a record of interview. This

argument was abandoned by the appellant in the course of the hearing and it is unnecessary to address it.

[29] A further argument was presented under this ground of appeal and that was to the effect that the police could not reasonably have formed the view that the sum of $6000 seized from the residence of the appellant was the proceeds of an offence because they had not made enquiry of the appellant as to the origins of the money. That submission reflects a misunderstanding of the relevant offence. Under s 53(1) of the *Crimes (Forfeiture of Proceeds) Act* the resolution of the issue of whether the person charged with possessing money reasonably suspected of being the proceeds of an offence is guilty or not guilty is for the courts to determine. In this case, whether any police officer formed a view, at any time, reasonable or otherwise, is not to the point. His Worship made the relevant findings and there was an evidential basis upon which he could do so. There is no merit in this ground of appeal.

[30] The appeal is dismissed.

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