

O'Brien v Nicholas [2015] NTSC 5

PARTIES: O'BRIEN, Edward

v

NICHOLAS, Sally

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: JA 34 of 2014 (21347423)

APPEAL FROM: COURT OF SUMMARY
JURISDICTION

DELIVERED: 21 JANUARY 2015

HEARING DATES: 15 AUGUST 2014

JUDGMENT OF: BLOKLAND J

CATCHWORDS:

APPEAL – Justice Appeal – Appeal against refusal to grant permanent stay of prosecution – Consideration of phrase “foredoomed to fail” – Submissions as to vexatious or harassing proceedings – Firearms – Licences and related matters – “Firearms dealer licence” under s 17(1) of *Firearms Act* – Appellant not issued with Firearms dealers licence – Requirement of “prescribed particulars” pursuant to s 12 *Firearms Act* – Photograph and date of birth of licence holder – Statutory interpretation of “is to contain” – Prescribed particulars held to be a mandatory requirement – Relevant purposes of firearms licencing regime – Proposition that omission of “prescribed particulars” frustrates objects of *Firearms Act* – Public inconvenience if firearms licence is void – Public inconvenience not

significant – Firearms licence void – Appeal allowed – Prosecution permanently stayed – *Firearms Act* (NT), s 12.

Criminal Code (NT), s 1, 21.

Firearms Act (NT), s 3, 12(a), 12(b), 17(1), 63(1)(a), 63(2)(a), 108(a).

Firearms Regulations (NT), reg 26.

Justices Act (NT), s 163(1).

Boddington v British Transport Police [1998] 2 WLR 639; *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39; *Donna Selby v Peter Adrian Penny's* [1998] WASCA 224, *English v R* [2014] NTSC 38; *Garrett v Nicholson* (1999) 21 WAR 226; *R v Austin* (1995) 84 A Crim R 374; *Osman v R* [2011] NSWCCA 62; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *R v Bourke* (2008) 22 NTLR 157; *Walton v Gardiner* (1993) 177 CLR 378, applied.

Bond v Work Cover Corporation SA (2005) 93 SASR 315; *Police v Conway* (2006) 95 SASR 83, referred to.

REPRESENTATION:

Counsel:

Appellant:	R Murphy
Respondent:	S Ledek

Solicitors:

Appellant:	Murphy and Associates Barristers and Solicitors
Respondent:	Office of the Director of Public Prosecutions

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

O'Brien v Nicholas [2015] NTSC 5
No. JA 34 of 2014 (21347423)

BETWEEN:

EDWARD O'BRIEN
Applicant

AND:

SALLY NICHOLAS
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 21 January 2015)

Introduction

- [1] The appellant was charged on complaint with one count against s 17(1) of the *Firearms Act*. Section 17(1) provides that the holder of a firearms dealer licence must ensure that all firearms possessed under the licence are stored in accordance with the safe keeping and storage requirements provided by the *Firearms Act* and with the safe keeping and storage requirements determined by the Commissioner of Police.
- [2] The offence was alleged to have been committed on 1 November 2012. The complaint was laid on 30 October 2013. The prosecution

commenced within the 12 month limitation period set by s 108(a) of the *Firearms Act*.

[3] Originally, Tex Gun Supplies and Vindicator Cast Projectiles Pty Ltd were charged jointly with the appellant. The appellant made an application to the Court of Summary Jurisdiction to have the complaint struck out as vexatious, pursuant to s 21 of the *Criminal Code*. The application was made after a series of adjournments, followed by representations made on behalf of the appellant to the respondent. After submissions seeking the stay were made to the Court below, the charge was withdrawn with respect to Tex Gun Supplies and Vindicator Cast Projectiles Pty Ltd, but was proceeded with against the appellant.

[4] The principal ground relied upon by the appellant in support of the stay application was that the charge was “doomed to fail” and was therefore vexatious.

[5] The learned Magistrate ultimately determined not to grant the stay. The decision to refuse to grant the stay is the subject of this appeal.

Applicable Principles

[6] Section 21 of the *Criminal Code* provides a discretionary power to a Court¹ “in any proper case” to order that proceedings brought be stayed

¹ Although s 21 of the *Criminal Code* uses the terms “judge or justice of the peace”, the power clearly applies to Magistrates. “Justice of the peace” is defined to include a Magistrate in s 1 of the *Criminal Code*.

on the ground that they are “vexatious or harassing”.

- [7] A permanent stay of a prosecution is made only in exceptional circumstances.² To determine whether criminal proceedings should be permanently stayed requires a weighing process to be undertaken of all relevant matters. Those matters include the interests of fairness to the accused, the legitimate public interest in the disposition of charges for serious offences, the conviction of those who are guilty of a crime and the need to maintain public confidence in the administration of justice.³
- [8] A proceeding is properly characterized as vexatious and constituting an abuse of process if it is clearly or manifestly foredoomed to fail.⁴ On being satisfied it is clear beyond argument that there is no evidence on an essential element of an offence, a trial judge can properly determine that the prosecution should be stayed as an abuse of process.⁵ If the offence is capable of being proved, even potentially being proved, the grounds for a stay on this basis will not be made out. It is not appropriate, for example, to grant a stay because a reasonable hypothesis consistent with innocence is capable of being inferred or if inferences remain open that are consistent with both innocence and guilt.⁶

² *R v Austin* (1995) 84 A Crim R 374.

³ *Osman v R* [2011] NSWCCA 62.

⁴ *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ); *R v Bourke* (2008) 22 NTLR 147 (Mildren J).

⁵ *English v R* [2014] NTSC 38 (Southwood J).

⁶ *R v Bourke* (2008) 22 NTLR 157.

[9] For a permanent stay to be granted, the prosecution case must not merely be viewed as incapable of success but must be clearly and manifestly foredoomed to fail.⁷ If the prosecution case is not clearly foredoomed to fail in the sense described, the greater public interest of ensuring offenders are prosecuted prevails and the case should proceed in the ordinary course to be heard on its merits.

Relevant Background

[10] The offence against s 17(1) of the *Firearms Act* was alleged to have been committed on 1 November 2012. As noted, the complaint was laid on 30 October 2013. A detailed submission was made on behalf of the appellant and the two former defendants, Tex Gun Supplies and Vindicator Cost Projectiles Pty Ltd, to the prosecution on 22 January 2014,⁸ setting out the legal issues on which the appellant and other defendants relied. The submission invited the prosecution to withdraw the complaint against all defendants.

[11] The case, involving all three defendants, was mentioned in the Court of Summary Jurisdiction on 24 January 2014 and adjourned for contest mention to 12 February 2014 to allow the prosecution time to consider the defence representations. On 12 February 2014, the matter was adjourned to 19 February 2014 to allow the prosecution time to take

⁷ *English v R* [2014] NTSC 38 (Southwood J).

⁸ Exhibit 1 on Appeal.

instructions. On 19 February 2014, the matter was then adjourned to 5 March 2014 for similar reasons.

[12] On 5 March 2014, an application was made by all defendants then listed on the complaint to stay proceedings, on the basis that the complaint was vexatious. At that time, the following materials were tendered to the Court:⁹

- The written representations made to the prosecution on 22 January 2014 in support of the application. (It was pointed out that the content of these representations were not and are not evidence of any fact; I have proceeded on that basis. The representations are in the nature of submissions).
- A photocopy of a firearm dealers licence no. 21208. (Although the photocopy is of a licence issued on 15 March 2013, I proceed on the basis as indicated by counsel and the court below that aside from the date, the copy of the licence is in precisely the same terms as the licence issued to the appellant at the time of the facts giving rise to the charge).
- Extracts of ASIC records, namely a Company Summary of Vindicator Cost Projectiles Pty Ltd and business name details of Tex Gun Supplies.

⁹ These materials are also before this Court.

- Authorities, including *Isles v McRoberts* [2011] NTMC 001 and *Walton v Gardiner* (1993) 177 CLR 378.

[13] After discussion of the prosecution’s anticipated submissions, the matter was adjourned to 21 March 2014 to enable the prosecution to prepare a response to the application to stay proceedings. On 21 March 2014 the prosecutor commenced submissions and tendered an “application for a dealer’s licence” under the hand of the appellant, dated 21 February 2012, and a copy of the police précis setting out the alleged facts.¹⁰ The prosecutor made submissions along the lines that the factual basis on which the appellant had made submissions was wrong, particularly with reference to the licence notation of “EJ O’Brien T/AS” (i.e. “trading as”). The point made was that the “trading as” made no difference to the identity of the licence holder. The prosecutor argued that the “application for a dealer’s licence” made under the hand of the appellant, was an individual who was also noted on the licence along with Tex Gun Supplies and the individual was personally before the court. Consequently, the argument was, the appellant was “the holder” of the licence for the purpose of the *Firearms Act*.¹¹

[14] The charge was then withdrawn against Tex Gun Supplies and Vindicator Cost Projectiles Pty Ltd and those two defendants were

¹⁰ These materials are also before this Court.

¹¹ Transcript, 21 March 2014, 15-16.

formally discharged. The learned Magistrate reserved the decision on the stay application in respect of the appellant until 16 April 2014.

Was the prosecution with respect to the appellant ‘foredoomed to fail’?

[15] In the Court below, and before this Court, the appellant relied upon two alternative basis to support the application to stay proceedings in respect of the appellant:

- The firearms dealer licence (‘the licence’) was not issued to the appellant; or
- If the licence was issued to the appellant, the licence was void as it did not contain the “prescribed particulars” or a recent photograph of the appellant, as required by the *Firearms Act* and *Firearms Regulations*.

[16] The appellant argued that if either basis were made out, the prosecution must fail.

[17] On 16 April 2014, the learned Magistrate accepted the Court had the power to stay proceedings that were foredoomed to fail.¹² In declining to grant the stay, it was noted that the argument of the appellant was that he did not hold the dealer’s licence and that other matters were required to be proven to make the charge out. The Magistrate

¹² Transcript, 16 April 2014, 2.

specifically addressed the question of whether there was evidence capable of proving the appellant was the “holder” of the licence, determining, on the basis of the material before the court that the charge was capable of being proven. The reasons state “there may well be evidence that could prove he (the appellant) is the holder of a licence”.¹³ The Magistrate did not specifically address the second basis on which the application was made, namely, that the licence was void as it did not comply with the *Firearms Act*.

[18] I agree with the submission made on behalf of the appellant that the Magistrate’s reasons do not sufficiently deal with the second basis upon which the stay application was made. It is possible the second basis was conflated with the first. I say this is because the reasons concluded: “... considering the matters that I have before me, and considering the submissions, the prosecution is not necessarily foredoomed to fail in relation to this particular matter on this particular charge and thus I decline to order the stay”.¹⁴

[19] In my opinion the learned Magistrate was clearly correct in respect of the decision in relation to the first basis argued. The available and agreed materials show there was and is evidence that the appellant applied for a “Dealers Licence”. Under the heading “Name of Dealership” the written words are: “Tex Gun Supplies (EJ O’Brien)

¹³ Transcript, 16 April 2014, 3.

¹⁴ Transcript, 16 April 2014, 3.

T/AS". Rather confusingly, in my view, under the heading "Nominee Surname", and "Given Name" and "Middle Name" the written words respectively, are "O'Brien", "Edward" and "John". Four names appear under "Persons Employed Under the Licence", including "Edward O'Brien", with the date of birth written as "28/01/1951" and "Dealer Nominees Licence Number" as "001216". The licence that was issued, contains the notations "Licence No: 21208" and "Licence Type: Dealer". It is headed "Tex Gun Supplies (EJ O'Brien T/AS)". Section 3(1) of the *Firearms Act* defines "holder", "in relation to a licence" as "the person to whom it is granted".

[20] Although the final result is by no means certain, the inference was and is well open, that the appellant was granted the licence in question. The first basis relied on by the appellant with respect to the stay application was, in my view, correctly dismissed by the Magistrate.

[21] To this extent I agree with the careful submissions made on appeal on behalf of the respondent. There was and is the physical existence of the licence (or purported licence) itself and the fact that the appellant was at least named in the "licence". If this was the only issue to be determined, I would agree with the respondent's argument that the case should have proceeded.

[22] The second basis relied on in support of the stay application is however, in an entirely different category. The second basis requires

consideration of the construction and the consequences of any non-compliance by the Commissioner's delegate of certain parts of the *Firearms Act* and the *Firearms Regulations*. None of these matters were dealt with in the Magistrate's reasons. They were clearly raised in submissions.

[23] It is an error of law to fail to provide adequate reasons to the parties to indicate why a decision was made. The reasons must be sufficient in order to allow the parties to exercise such rights as may be available to them. What is adequate is to be determined by the circumstances of the case and the issues in the case. Reasons must be sufficiently adequate to show the litigants and the appeal court why a decision was made in a particular way.¹⁵ Even bearing in mind the particular nature of, and latitude that might be given in summary proceedings, in this case, significant time was set aside to deal with the stay application and the decision was reserved. In all of the circumstances, the reasons were inadequate.

[24] Although the reasons in my view are not sufficient and the appeal could be allowed on this ground alone with the matter being remitted to the Court of Summary Jurisdiction, sufficient agreed material is before this Court, constituting sufficient foundational facts to determine the matter on the second basis argued. Essentially the issue involves a

¹⁵ See, eg, *Burnett v Director of Public Prosecutions* (2007) 21 NTLR 39, 120-121 [266] (Southwood J); *Garrett v Nicholson* (1999) 21 WAR 226, 237 [31] (Pidgeon J).

question of law as to whether the elements of the offence can be made out. There was no further evidence suggested that would shed light on the second basis on which the stay was sought. There were no further inferences suggested going either way that could assist to resolve the matter. I agree with the appellant's submission that the second basis argued falls to be determined as a matter of construction and application of the *Firearms Act* and *Firearms Regulations*. This is not a matter where further evidence could improve the prosecution case on this particular point.

[25] Section 17(1) of the *Firearms Act* provides:

- (1) The holder of a firearms dealer licence must ensure that all firearms possessed under the licence are stored in accordance with:
 - (a) the safe keeping and storage requirements under this Act;
and
 - (b) the safe keeping and storage requirements determined by the Commissioner.

Maximum penalty: 50 penalty units or imprisonment for
12 months.

[26] One of the questions is effectively whether the purported firearms dealer licence, held by the appellant was a valid licence within the

terms of the *Firearms Act*, or to analyse the issue another way, whether the purported firearms dealer licence was issued ultra vires of s 12 of the *Firearms Act*. Section 12 of the *Firearms Act* provides that a licence “is to contain”:

- (a) the prescribed particulars; and
- (b) if the holder is an individual – a recent photograph of the holder obtained in accordance with the approved arrangements.

[27] The *Firearms Regulations* set out the “prescribed particulars”.

Regulation 26 relevantly provides:

“For the purposes of section 12 of the Act, the prescribed particulars are –

- (a) the name of the holder;
- (b) if the holder is an individual, the date of birth of the holder;
- (c) the genuine reason for the licence;
- (d) the type of licence;
- (e)-(j) not reproduced.

[28] It is common ground that the appellant was an “individual” (as opposed to a corporate entity) at the time the purported licence was issued. Consequently, in order to comply with the *Firearms Act* the licence should have contained a photo of the appellant pursuant to s 12(b) of

the *Firearms Act*, and the appellant’s date of birth, being a “prescribed particular” pursuant to reg 26 read with s 12(a) of the *Firearms Act*.

[29] Clearly the licence issued by the Commissioner’s delegate does not comply with the *Firearms Act*. It is common ground that the licence, or (for the purposes of this discussion) the purported licence, did not contain the appellant’s photo or his date of birth.

[30] It is clear that an administrative act of this nature, purportedly granting a firearms dealer licence may be challenged in these proceedings, both before the Court of Summary Jurisdiction and on appeal to this Court. The validity of an instrument made in the discharge of the administrative function may be challenged in collateral proceedings.¹⁶ As to whether the statutory requirements of a photograph and the “prescribed particular” of a date of birth are mandatory requirements for a validly issued firearms dealer licence, the general approach to be taken was discussed by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*.¹⁷ McHugh, Gummow, Kirby and Hayne JJ observed:¹⁸

“An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether

¹⁶ *Boddington v British Transport Police* [1998] 2 WLR 639; *Donna Selby v Peter Adrian Penny’s* [1998] WASCA 224, especially Ipp J at 29.

¹⁷ (1998) 194 CLR 355; see also *Bond v Work Cover Corporation SA* (2005) 93 SASR 315; or in the context of the need for strict compliance with legislation governing drivers’ licence suspensions, see *Police v Conway* (2006) 95 SASR 83.

¹⁸ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 388-389 [91] (McHugh, Gummow, Kirby and Hayne JJ).

there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue”.

[31] The issue is to be determined by considering whether the *Firearms Act* evinces an intention that firearms licences should be invalid in the event of non-compliance with s 12 of the *Firearms Act* and/or regulation 26. The question to be asked is:¹⁹

“.....whether it was a purpose of the legislation that an act done in breach of the provision should be invalid ... In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute”.

[32] Furthermore, as McHugh, Gummow, Kirby and Hayne JJ said:²⁰

“Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act”.

[33] Although it is not by any means determinative of the final issue, it should be noted, the language used in s 12 of the *Firearms Act* is

¹⁹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390-391 [93] (McHugh, Gummow, Kirby and Hayne JJ).

²⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392 [97].

mandatory in nature: “is to contain”. It is not a matter of discretion for the Commissioner’s delegate to exclude the photograph or information required by s 12 with respect to licences issued to an individual. In particular, given the character and purpose of the *Firearms Act*: to regulate, control and provide for the registration of firearms, it would seem that the provision of a photograph in particular would be central, not only as a matter of strict compliance with s 12 but more generally to meet important objects of the *Firearms Act*.²¹

[34] Underlying the licencing regime is recognition of the paramount need for relevant authorities to accurately identify the person to whom a licence is being granted. This appears to be a crucial part of the regulatory scheme under Part III of the *Firearms Act*. It is essential that persons who have been found to be fit to hold particular firearm licences be able to be identified, to differentiate them from those who are unfit to hold such licences, otherwise the scheme would fail. Counsel for the appellant drew the court’s attention to the Second Reading speech of the Minister for Police Fire and Emergency Services when introducing the *Firearms Amendment Bill* (No. 2) of 2000:

“This is a significant piece of legislation and greatly increases our powers to ensure that firearms are only placed in the hands of those people who should be legitimately authorised to possess or use a firearm. These amendments to the *Firearms Act* will significantly improve the operation of the act and ensure that a number

²¹ The long title of the *Firearms Act* states “An act to provide for the regulation, control and registration of firearms, and for related purposes”.

of anomalies in the act will be addressed and provide a much fairer and more easily administered Firearms Act for all Territorians”.

[35] The omission of the photograph in particular, in my view, less so the omission of the date of birth (if in fact the photograph provision had been complied with) are not minor defects. Together those omissions, but particularly the omission of the photograph, has the potential to frustrate the objects of the *Firearms Act*.

[36] A further indicator is evident when considering the operation of s 96 of the *Firearms Act*. Section 96 requires a person in possession of a firearm to carry the licence relevant to the firearm and to produce the licence when requested by a police officer to do so. Without the photograph in particular, and in a similar way but less fundamentally the date of birth, it would be difficult for police acting in the course of their duties under s 96 to confirm, without other evidence, that the person concerned is the holder of the relevant licence. Similarly, the obligations on persons who sell or purchase firearms to ensure that the other party has the appropriate licence or authority would be frustrated.²² Without the photograph, the seller or purchaser could not readily make an appropriate identification. I agree with the submission that s 12 of the *Firearms Act* is a statutory safeguard designed to promote the objects of the *Firearms Act* and protect bona fide licence

²² As for example in s 63(2)(a) and s 63(1)(a) *Firearms Act*.

holders. Non-compliance with s 12 in respect of individuals increases the risk of inappropriate persons gaining access to firearms.

[37] This particular case demonstrates the confusion caused when s 12 of the *Firearms Act* is not complied with. On its face, there is a level of uncertainty as to who the firearms dealer was at the time of the alleged offence. As noted above, initially the appellant and two others, who were not individuals, were jointly charged. That confusion may result through lack of compliance is not fanciful. It was, and is apparent in this case.

[38] I have given consideration in accordance with *Project Blue Sky* to the question of public inconvenience should the issue of this licence be held to be *void ab initio*. It seems to me compliance in terms of the duties of the Commissioner's delegate is not onerous. The provision and display of photographs and dates of birth are items readily obtained and used for licensing purposes across a range of regulatory areas. The consequences of a ruling to stay this prosecution are not of the significant order that potentially would have arisen in the case of *Project Blue Sky*.

[39] In this situation I have significant sympathy for the respondent's argument that the appellant, as the "holder" of the licence has most likely benefitted financially from using it. Therefore, the argument suggests, he should not be able to claim invalidity. I have also noted

that the appellant filled out the application for the dealer's licence in rather confusing terms. Once again, almost instinctively, I have considered the idea that he ought not be able to benefit from a stay application if he has contributed to the issue of an invalid licence. After much consideration however, and with some hesitation and reluctance, I have concluded it would be an error to reason that way. The question of whether the statute has been complied with and the consequences of any non-compliance are questions of law. Any contribution by the appellant to the issue of an invalid licence may potentially be dealt with by other proceedings but that is not a matter that can influence this decision. I have concluded the issue of this "licence" was *void ab initio*. The prosecution is required to prove the appellant held a "firearms dealer licence". It cannot do so.

[40] As to whether the application for a stay, or the appeal from the decision to dismiss the application for a stay are premature, I have already expressed the view that there was no further evidence that could shed light on the question raised in support of the second basis put to the Court for the stay. The right of appeal to this court is couched in wide terms.²³ The right of appeal includes an "order" of the Court of Summary Jurisdiction, on a "question of law".

²³ *Justices Act*, s 163(1).

Orders:

- [41] 1. The appeal is allowed.
2. The order dismissing the application for a stay is quashed.
3. The prosecution of the complaint is stayed permanently, pursuant to s 21 of the *Criminal Code*.
4. I will hear the parties on the question of costs.