Megson v The Queen [2006] NTSCFC 15

PARTIES:	MEGSON, Ashley Joseph v THE QUEEN
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20515013
DELIVERED:	28 February 2006
HEARING DATES:	13 February 2006
JUDGMENT OF:	ANGEL, MILDREN & RILEY JJ

CATCHWORDS:

CRIMINAL LAW – whether offence is a simple offence or a crime – unlawful entry with intent to commit a simple offence with circumstances of aggravation – maximum penalty 4 years – whether s 38E of Interpretation Act applies

Supreme Court Act, s 21, s 21(1); *Criminal Code*, s 3, s 3(4), s 188(2), s 189, s 189(2)(b), s 213, s 213(1), s 213(2), s 213(3), s 213(4), s 213(5), s 339(1)(a); *Interpretation Act*, s 38E; *Justices Act*, s 121A, s 122A, s 131A

Birkeland-Corro v Tudor-Stack (2005) 15 NTLR 208; *R v Kurungaiyi* (2005) 15 NTLR 70; referred to

R v Sena (unreported, Supreme Court of the Northern Territory, SCC 20004796 and 20012933, 7 September 2001); over-ruled

REPRESENTATION:

Counsel:	
Plaintiff:	R. Coates
Defendant:	J. Tippett QC
Solicitors:	
Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission
Judgment category classification:	B
Judgment ID Number:	Mil 06367
Number of pages:	8

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

Megson v The Queen [2006] NTSC 15
No. 20515013

BETWEEN:

ASHELY JOSEPH MEGSON
Plaintiff

AND:

THE QUEEN
Defendant

CORAM: ANGEL, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 28 February 2006)

[1] This is a reference to the Full Court pursuant to s 21(1) of the Supreme Court Act.

[2] The accused was committed for trial upon an information that he did at night time unlawfully enter an occupied dwelling with intent to commit a crime therein, namely assault, contrary to s 213 of the Criminal Code, and was further committed on a count of stealing. Subsequently, the indictment presented contained only one count in the following terms:

> "On or about 23 June 2005 at Palmerston in the Northern Territory of Australia, unlawfully entered a building, namely 26 Phineaus Court, with intent to commit an offence therein, namely assault

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the building was a dwelling house, and

(ii) that the unlawful entry occurred at night-time.

Section 213(1), (2) & (5) of the Criminal Code."

[3] The maximum penalty for an offence against s 213(1) with the circumstances of aggravation alleged is imprisonment for four years.

[4] The matter came before Angel J on 9 February 2006. Pursuant to s 339(1)(a) of the Criminal Code the accused sought to quash the indictment as being defective on the grounds that the offence charged is a simple offence and that there is no power to charge a simple offence on indictment.

[5] Reliance was placed upon an unreported decision of Bailey J in *R v Sena* of 7 September 2001. The Crown submitted that the offence charged was a crime by virtue of s 38E of the Interpretation Act due to the fact that applicable maximum penalty exceeds two years. The Crown further submitted that the decision of Bailey J to the contrary should not be followed.

[6] Angel J referred the matter to the Full Court pursuant to s 21 of the Supreme Court Act. After hearing submissions, the Court made an order dismissing the defendant's application. We indicated that we would provide our reasons at a later time. These are those reasons.

[7] Section 213 provides as follows:

> "213. Unlawful entry of buildings
>
> (1) Any person who unlawfully enters a building with intent to commit any offence therein is guilty of an offence.
>
> (2) If he does so with intent to commit a simple offence therein he is guilty of a simple offence and is liable to imprisonment for one year; if the building is a dwelling-house he is liable to imprisonment for 2 years.
>
> (3) If he does so with intent to commit therein a crime for which the maximum punishment is not greater than 3 years imprisonment, he is guilty of a crime and is liable to imprisonment for 3 years; if the building is a dwelling-house he is liable to imprisonment for 5 years and, if it is actually occupied at the time of his entry, he is liable to imprisonment for 7 years.
>
> (4) If he does so with intent to commit any other crime therein he is guilty of a crime and is liable to imprisonment for 7 years; if the building is a dwelling-house he is liable to imprisonment for 10 years.
>
> (5) If he commits an offence hereinbefore defined at night-time he is liable to twice the punishment prescribed for that offence.
>
> (6) If he commits an offence defined by this section when armed with a firearm or any other dangerous or offensive weapon, he is liable to imprisonment for 20 years; if the building is a dwelling-house he is liable to imprisonment for life."

[8] Section 3 of the Criminal Code divides offences into three kinds namely crimes, simple offences and regulatory offences. Section 3 provides as follows:

"3. Division of offences

(1) Offences are of 3 kinds, namely, crimes, simple offences and regulatory offences.

(2) A person charged with a crime cannot, unless otherwise stated, be prosecuted or found guilty except upon indictment.

(3) Unless otherwise stated, a person guilty of a simple offence or a regulatory offence may be found guilty summarily.

(4) An offence not otherwise designated is a simple offence."

[9] Counsel for the accused submitted that the offence charged in the indictment is a simple offence and that there is no power to charge a simple offence upon indictment. Mr Coates, the Director of Public Prosecutions, submitted that the offence was a crime. It was not contended that offences other than crimes were indictable offences: see *Birkeland-Corro v Tudor-Stack* (2005) 15 NTLR 208 at 226-227 per B.R. Martin CJ.

[10] The argument of the accused commences with the proposition that s 213(1) of the Criminal Code creates the offence which is a simple offence. Section 213 subsections (2), (3), (4) and (5) are circumstances of aggravation and do not create separate offences. For those propositions reliance is placed upon the decision of the Court of Criminal Appeal in *R v Kurungaiyi* (2005) 15 NTLR 70. It was submitted that the wording of s 213(2) of the Code confirmed that the count is to remain a simple offence because the provision specifically so provides. Further it was submitted that the wording of s 213(5) coupled with s 213(2) confirmed that the offence was to remain a

simple offence because all it did was increase the punishment. It was put that the draughtsman in contrast with the course adopted by s 188(2) of the Criminal Code did not seek to provide that in circumstances where s 213(1), s 213(2) and s 213(5) were relied upon the accused had committed a crime.

[11] However, as Mr Coates points out in his submission, s 213 creates some basic offences with various circumstances of aggravation which results in a very large number of possible combinations. In fact there are 20 possible combinations of the basic offence and aggravation provisions. If, for example, the defendant had unlawfully entered a dwelling at night with intent to commit assault and he did so when armed with a firearm or any other dangerous or offensive weapon he was liable to life imprisonment. As Mr Coates pointed out, if the accused's argument were correct and an offence carrying a maximum penalty of life imprisonment was merely a simple offence which could only be dealt with summarily before a magistrate, the accused would be deprived of his right to trial by jury. Such a result would also be inconsistent with s 121A and s 122A of the Justices Act in that it is not envisaged that a person charged with an indictable offence against s 213 for which a maximum penalty of life imprisonment is imposed can be dealt with summarily and the power of the Court of Summary Jurisdiction constituted by a magistrate to conduct a preliminary examination in relation to the offence under s 122A depends upon the Court dealing with an offence which is an indictable offence.

[12] Counsel for the accused relied upon the unreported judgment of Bailey J in *Sena*. In that case, the defendant had been charged with two counts of unlawful stalking, contrary to s 189 of the Criminal Code. Count 1 in the indictment was subject to a maximum penalty of two years imprisonment, but count 2 was subject to a maximum penalty of five years imprisonment pursuant to s 189(2)(b). It was submitted before Bailey J that neither offence was an indictable offence and that the two charges should have proceeded in the Court of Summary Jurisdiction on complaint.

[13] Bailey J considered the effect of s 38E of the Interpretation Act which provides as follows:

> 38E. Certain offences crimes
>
> Where an Act provides for a penalty of imprisonment for a period of more than 2 years for an offence by an individual against a provision of or under the Act, the offence is a crime (whether committed by or imputed to a body corporate or committed by an individual) unless expressed to be otherwise.

[14] Bailey J said:

> "However, section 38E is subject by its terms to apply, 'unless expressed to be otherwise'. In this context I consider that section 3 of the Criminal Code expressly displaces the prima facie provision of section 38E of the Interpretation Act by expressly providing for a division of offences on a basis other than the maximum available penalty. It follows, in my view, that there is nothing in section 38E to detract from applying section 3 of the Criminal Code to section 189 of the Code.
>
> Accordingly both charges of stalking against the applicant are simple offences, notwithstanding the difference between them in terms of maximum penalty."

[15] Mr Coates referred the Court to the history of s 38E. That section was inserted into the Interpretation Act by the Interpretation (Criminal Code) Amendment Act which was one of a number of Acts which were introduced to give effect to the passage of the Criminal Code Act in 1984. Thus it was submitted that s 38E was intended to be read with s 3(4) of the Criminal Code. Mr Coates submitted that there was no inconsistency between the two provisions.

[16] We consider that the argument of Mr Coates is correct and that the decision of Bailey J is incorrect and should be overruled. In our opinion, the two provisions were intended to be read together and can be so read. Section 3(4) of the Criminal Code is not confined in the manner submitted by Mr Tippett QC. In our opinion, an offence which carries a maximum penalty in excess of two years imprisonment has been designated by s 38E of the Interpretation Act to be a crime and therefore is not an offence "not otherwise designated" within the meaning of s 3(4) of the Criminal Code. It is to be borne in mind that s 3 of the Code applies to all Statutes which create offences and is not confined to the offence provisions of the Code. Reading s 3(4) with s 38E of the Interpretation Act does not result in s 3(4) being redundant because the result is that an offence of two years or less is a simple offence and not, for example, a regulatory offence unless the relevant statute otherwise provides.

[17] Further there is nothing in the decision of in *R v Kurungaiyi* which compels a different result.

[18] Section 213(1) merely states the offence and the circumstances of aggravation indicate the level of penalty. Whilst there is some attraction in the argument of Mr Tippett QC in that s 213(2) provides that if one unlawfully enters a building with intent to commit a simple offence one is guilty of a simple offence, whereas if one does so with intent to commit a crime one is guilty of a crime, we do not think that this can compel the result when it is plainly open on the defendant's construction for there to be a simple offence carrying sentences of four years, 20 years or life depending upon the circumstances of aggravation alleged.

[19] In *Birkeland-Corro v Tudor-Stack*, supra, B.R. Martin CJ considered whether s 131A of the Justices Act was capable of conferring summary jurisdiction in respect of serious offences which attracted significant sentences of imprisonment. His Honour said, at para 101 that he was not prepared to infer that the legislature intended to deprive a defendant of a right to trial by jury in respect of the serious offences identified in s 131A in the absence of plain wording to that effect.

[20] Similarly we do not think that an accused facing serious charges against s 213 of the Criminal Code carrying the kind of penalties to which we have referred should be deprived of the right to trial by jury unless there are specific words in the provisions compelling that result.