The Queen v Wunungmurra [2009] NTSC 24

PARTIES:	THE QUEEN v WUNUNGMURRA, Dennis
TITLE OF COURT:	THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL JURISDICTION
FILE NO:	SCC No. 20824528
DELIVERED:	9 June 2009
HEARING DATES:	29 May 2009
DECISION OF:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – Sentencing – Evidentiary Ruling – Objection to Evidence about customary law and cultural practice being tendered for the purpose of establishing the objective seriousness of criminal offences – moral culpability – application and interpretation of s 91 of *Northern Territory National Emergency Response Act 2007* (Cth).

Northern Territory National Emergency Response Act 2007 (Cth) s 91; *Sentencing Act* (NT) s 104A.

Baker v The Queen (2005) 223 CLR 513; *Byrnes v The Queen* (1999) 199 CLR 1; *Fardon v Attorney–General (Queensland)* (2004) 223 CLR 575; *Hales v Jamilmira* (2003) 13 NTLR 14; *Nicholas v The Queen* (1998) 193 CLR 173; *Potter v Minahan* (1908) 7 CLR 277; *R v GJ* (2005) 196 FLR 233; *R v Glennan* (1970) 91 WN (NSW) 609; *R v Way* (2004) 60 NSWLR 168, referred to.

REPRESENTATION:

Counsel:

The Crown:	MP Grant QC, Solicitor General for the Northern Territory
The Defendant:	R Wild QC

Solicitors:

The Crown:	The Office of the Director of Public Prosecutions
The Defendant:	North Australian Aboriginal Justice Association

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

The Queen v Wunungmurra [2009] NTSC 24
No. SCC 20824528

BETWEEN:

THE QUEEN

AND:

DENNIS WUNUNGMURRA
Defendant

CORAM: SOUTHWOOD J

REASONS FOR DECISION

(Delivered 9 June 2009)

Introduction

[1] The defendant has been charged with two counts on an indictment dated 25 February 2009. Count 1 charges that contrary to s 177 of the *Criminal Code* (NT), on 8 September 2008 at Galiwinku, he, with intent to cause serious harm, caused harm to Wendy Manamawuy Garrawarra. The alleged victim is the defendant's wife. Count 2 charges the defendant with the aggravated assault of his wife on 17 August 2008.

[2] The defendant has informed the Court that he intends to plead guilty to the crimes charged on the indictment. However, he has not been arraigned as yet.

[3] The defendant seeks to read an affidavit of Mrs Rose Laymba Laymba, which was sworn on 30 April 2009, in support of his plea on sentence for the following purposes: to provide a context and explanation for the defendant's crimes; to establish the objective seriousness of the defendant's crime; to establish the offender does not have a predisposition to engage in domestic violence and it is unlikely the offender will re-offend; to establish the offender has good prospects of being rehabilitated; and to establish the defendant's character.

[4] The prosecution objects to the affidavit of Ms Laymba Laymba being read for the purpose of establishing the objective seriousness of the crimes committed by the defendant. The prosecution argues that s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) ("the *Emergency Response Act*") prevents the affidavit of Ms Laymba Laymba being read for that purpose.

[5] The prosecution does not object to the affidavit of Mr Laymba Laymba being read for the other purposes identified by the defence.

[6] Ms Laymba Laymba is a senior member of three Aboriginal clan groups at Milingimbi. She is one of nine Jungaya for the Gamaalanga, Malarra and Gorryindi clan groups. She is knowledgeable about customary law and cultural practices of the Yolngu people who live at Milingimbi. She is a distant relative of the defendant. She calls him "Guthara". Her affidavit has been filed in accordance with 104A of the *Sentencing Act* (NT).

[7] The defendant comes from the Yidditja and Dhalwangu clan groups at Milingimbi. He is a Dalkaramirri.

[8] In her affidavit Ms Laymba Laymba deposes to certain traditional Aboriginal laws that apply to women who are married to Yidditja men and the circumstances when according to traditional Aboriginal law a man who comes from the Yidditja and Dhalwangu clan groups and is a Dalkaramirri may inflict severe corporal punishment on his wife with the use of a weapon. It is her opinion that the defendant acted in accordance with traditional Aboriginal law when he engaged in the behaviour which is the subject of the counts charged on the indictment. Ms Laymba Laymba states the defendant was carrying out his duty as a responsible husband and father and he was acting in accordance with his duty as a Dalkarra man.

[9] According to Ms Laymba Laymba, in Yolngu culture a man who is a Dalkaramirri is said to have a role similar to a judge or magistrate. He sings ceremonial songs, runs funeral ceremonies and decides what to put in the death chamber of a deceased person. A Dalkaramirri is also a team leader. He is the senior person. Part of the role of a Dalkaramirri is to enforce traditional Aboriginal law. He is required to enforce the law and act as a role model.

[10] Mr Wild QC submitted that the affidavit of Ms Laymba Laymba was relevant to the level of the objective seriousness of the criminal behaviour of the defendant because it contained information about the factors operating on the

defendant at the time in question and the circumstances which caused the defendant to act in the way he did. I anticipate that the defence would like to use the some of the evidence contained in Ms Laymba Laymba's affidavit as the basis of a submission that because the defendant was doing his cultural duty and acting in accordance with traditional Aboriginal law his level of moral culpability and thereby the level of objective seriousness of his criminal behaviour is lessened.

The legislative context

[11] The wider context in which the *Emergency Response Act* was enacted may be gleaned from s 5 of the Act and the Explanatory Memorandum.

[12] The *Emergency Response Act* was part of a package of legislation that facilitated the Australian Government's intervention in the governance of Aboriginal people and their communities in the Northern Territory with the aim of improving the safety and wellbeing of Aboriginal people and children in particular who are living in those communities. Section 5 of the Act states the object of the Act is to improve the well being of certain communities in the Northern Territory.

[13] The Explanatory Memorandum for the Northern Territory National Emergency Response Bill that was circulated by the authority of the Minister for Families, Community Services and Indigenous Affairs stated:

> This bill will provide the new principal legislation for the Australian Government's response to the national emergency confronting the Welfare of Aboriginal children in the Northern Territory.

[14] The *Emergency Response Act* has six main parts: Part 2 of the Act introduced measures to modify the *Liquor Act* (NT) in order to give effect to restrictions on the possession, consumption, sale and transportation of liquor in the Northern Territory, particularly on land in areas prescribed in the Act; Part 3 of the Act introduced a scheme of accountability intended to prevent, and detect, misuse of publicly funded computers located in the prescribed areas within the Northern Territory with the aim of preventing access to pornography and the misuse of computers for other illegal purposes; Part 4 of the Act introduced arrangements for the acquisition of five year leases over certain Aboriginal townships in the Northern Territory and the forfeiture of certain leases known as town camps; Part 5 of the Act recognises that continuing and improving services that are provided by community services entities in those areas defined in the Act to be business management areas is a necessary step towards effectively addressing other problems experienced in these areas (These services include basic community needs such as housing construction and maintenance, community services and various types of municipal services such as waste collection and road maintenance.); Part 6 of the Act amends Northern Territory law in relation to granting bail to Aboriginal people and sentencing Aboriginal offenders; and Part 7 of the Act introduced a new licensing regime that applies to persons who operate community stores in indigenous communities and ensures the delivery of the income management regime.

[15] The precise mischief that s 91 of the *Emergency Response Act* is intended to remedy is unclear. However, statements about the purpose of s 91 of the Act are to be found in the Explanatory Memorandum.

[16] The relevant provisions of the Explanatory Memorandum state:

> Part 6 amends Northern Territory law to prohibit the relevant authority, when exercising bail or sentencing discretion in relation to Northern Territory offences, from taking into consideration any form of customary law or cultural practice to lessen or aggravate the seriousness of the criminal behaviour of offenders and alleged offenders. Part 6 also strengthens Northern Territory bail provisions to better secure the safety of victims and witnesses in remote communities.
>
> On 14 July 2006, the Council of Australian Governments agreed that no customary law or cultural practice excuses, justifies, authorises, requires or lessens the seriousness of violence or sexual abuse. All jurisdictions agreed that their laws would reflect this, if necessary by future amendment. The Council of Australian Governments also agreed to improve the effectiveness of bail provisions in providing support and protection for victims and witnesses of violence and sexual abuse.
>
> The Commonwealth implemented the Council of Australian Governments decision through the Crimes Amendment (Bail and Sentencing) Act 2006 (the Bail and Sentencing Act) which applies to bail and sentencing discretion in relation to Commonwealth offences. The Bail and Sentencing Act amended the Crimes Act 1914 (the Crimes Act) to preclude consideration of customary law or cultural practice from sentencing discretion and bail hearings as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence or alleged offence relates. The amendments also preclude consideration of customary law or cultural practice as a reason for aggravating the seriousness of criminal behaviour to which the offence relates.
>
> Northern Territory legislation lists the factors a court shall have regard to in sentencing an offender. This list refers generally to any aggravating or mitigating factor concerning the offender and the

> extent to which the offender is to blame for an offence, but does not specifically refer to customary law or cultural practice.
>
> The [Australian] Government wishes to ensure that the decisions of the Council of Australian Governments, as implemented by the Bail and Sentencing Act, apply in relation to bail and sentencing discretion for Northern Territory offences.
>
> Section 122 of the Constitution provides the Commonwealth with a very broad power to make laws directly regulating Territory matters, including in relation to bail and sentencing. The Commonwealth provisions in Part 6 will prevail over any inconsistent Territory laws.
>
> Clause 91 expressly prohibits a court from taking into account customary law or cultural practice as an excuse or justification for criminal behaviour when sentencing a person for having committed a Northern Territory offence, thus preventing a court from reducing the sentence imposed on an offender on the basis of customary law of cultural practice. This clause also precludes a court taking into account customary law or cultural practice as a reason for aggravating the seriousness of criminal behaviour, thus preventing a court from increasing the sentence imposed on an offender on the basis of customary law or cultural practice.

[17] At the time the *Emergency Response Act* was assented to by the Australian Parliament sentencing courts in the Northern Territory, in appropriate cases, took traditional Aboriginal law and cultural practices into account when such laws or cultural practices were relevant in determining the objective seriousness of an offence or the level of moral culpability of an offender and on occasion sentencing courts held that the moral culpability of an offender was lessened because he or she had acted in accordance with traditional Aboriginal law or cultural practices. Such matters were taken into account in

accordance with established sentencing principles and the sentencing purposes and guidelines contained in the *Sentencing Act* (NT)[1].

Section 91 of the *Northern Territory National Emergency Response Act* (Cth)

[18] Section 91 of the *Emergency Response Act* states:

> In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:
>
> (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
>
> (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

[19] Section 3 of the *Emergency Response Act* defines criminal behaviour to include:

> (a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
>
> (b) any fault element relating to such a physical element.

[20] In my opinion s 91 of the *Emergency Response Act* is clear in its terms. On a plain and strict reading[2] of the section, the scope of the preclusion enacted by s 91 of the *Emergency Response Act* is that in determining the sentence to be

[1] The relevant principles and some of the relevant authorities are discussed by the Court of Criminal Appeal of the Northern Territory in *R v GJ* (2005) 196 FLR 233 and *Hales v Jamilmira* (2003) 13 NTLR 14.
[2] Penal statutes should be read strictly *R v Glennan* (1970) 91 WN (NSW) 609.

passed on an offender, a court must not take into account customary law or cultural practice as a reason for:

- excusing the criminal behaviour;
- justifying the criminal behaviour;
- authorising the criminal behaviour;
- requiring the criminal behaviour;
- lessening the seriousness of the criminal behaviour; or
- aggravating the seriousness of the criminal behaviour

[21] By enacting these provisions the Australian Parliament intended to alter the well established sentencing principles applying in the Northern Territory accordingly. So much is irresistibly clear[3] from the express terms of s 91 of the *Emergency Response Act* and the context in which the legislation came to be enacted. Such an alteration in sentencing principles appears to have been agreed by the Australian Government and all State and Territory Governments.

[22] The words "lessening the seriousness of the criminal behaviour" and "aggravating the seriousness of the criminal behaviour" which are contained in s 91 of the *Emergency Response Act* are synonymous with determining the

[3] *Potter v Minahan* (1908) 7 CLR 277 at 308.

gravity or objective seriousness of the offence at some lower or higher level than would otherwise have been the case.

[23] The effect the preclusions against taking into account customary law or cultural practice as a reason for either lessening or aggravating the seriousness of the criminal behaviour when determining the sentence to be passed on an offender and the definition of criminal behaviour in s 3 of the *Emergency Response Act* is that a court cannot take into account customary law or cultural practice when determining the gravity or objective seriousness of a crime committed by an offender. Ordinarily when a sentencing court determines the gravity or objective seriousness of an offence the court takes into account:[4] the actus reus or physical elements of the offence; the consequences of the criminal behaviour in question; the mens rea, or the fault elements of the offence, and those factors which might properly be said to have impinged on the mens rea of the offender; and the reasons for the commission of the offence. Some of the relevant circumstances which might properly be said to have impinged on the mens rea include the motivation of the offender (for example duress, provocation, robbery to feed a drug addiction), the mental state of the offender (for example, intention is more serious than recklessness), and any mental illness or intellectual disability suffered by the offender. All of these factors affect the extent or degree of moral culpability of the offender. While they are matters which are personal

[4] *R v Way* (2004) 60 NSWLR 168 at pars [83] to [92].

to the offender they are taken into consideration because of their causal connection with the commission of the offence.

[24] I accept the Solicitor General's submissions that it follows that s 91 of the *Emergency Response Act* precludes a sentencing court from taking into account customary law or cultural practice as a basis for finding that an offender who acted in accordance with traditional Aboriginal law is less morally culpable because of that fact. That would be a consideration going to the criminal behaviour constituting the offence. To take into account customary law or cultural practice in that way would be for the purpose of justifying or lessening the seriousness of that criminal behaviour.

[25] The fact that legislation might be considered unreasonable or undesirable because it precludes a sentencing court from taking into account information highly relevant to determining the true gravity of an offence and the moral culpability of the offender, precludes an Aboriginal offender who has acted in accordance with traditional Aboriginal law or cultural practice from having his or case considered individually on the basis of all relevant facts which may be applicable to an important aspect of the sentencing process, distorts well established sentencing principle of proportionality, and may result in the imposition of what may be considered to be disproportionate sentences, provides no sufficient basis for not interpreting s 91 of the *Emergency*

Response Act in accordance with its clear and express terms. The Court's duty is to give effect to the provision.[5]

[26] Parliament may preclude a court from taking particular matters into account for sentencing purposes. Such a course is little different to parliament prescribing the sentence to be imposed for a particular offence or stipulating what are the aggravating and mitigating circumstances in relation to a particular offence.

[27] The effect of s 91 of the *Emergency Response Act* is that when sentencing courts are determining the objective seriousness of an offence in cases in which the section is applicable, proportionally greater weight will be given to the physical elements of the offence and the extent of the invasion of the rights of the victim of the offence. Less weight will be given to the reasons or motive for committing the offence.

Ruling

[28] I rule that the affidavit of Ms Laymba Laymba may not be read for the purpose of determining the objective seriousness of the crimes alleged against the defendant.

[29] The affidavit of Ms Laymba Laymba may be read for the other purposes referred to in para [3] above. The relevant principle to be applied in the interpretive process is that s 91 of the *Emergency Response Act* may only be

[5] *Nicholas v The Queen* (1998) 193 CLR 173 at [37]; *Baker v The Queen* (2005) 223 CLR 513 at [6]; *Fardon v Attorney–General (Queensland)* (2004) 223 CLR 575 at [23]; *Byrnes v The Queen* (1999) 199 CLR 1 at 33–4.

construed to encroach upon general sentencing principles so far as a strict reading of the provision would allow. Penal statutes should be read strictly and courts must only apply the actual commands of the legislation.

The purpose and operation of s 91 of the Act is not to remove all consideration of customary law and cultural practice from the sentencing process.

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