

PARTIES: **THE QUEEN**

v

**YUSOFF, Rolena**

TITLE OF COURT: FULL COURT OF THE  
SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: FULL COURT OF THE SUPREME  
COURT OF THE NORTHERN  
TERRITORY EXERCISING  
TERRITORY JURISDICTION

FILE NO: 21243700

DELIVERED: 1 August 2013

HEARING DATES: 30 July 2013

JUDGMENT OF: SOUTHWOOD ACJ, BLOKLAND AND  
BARR JJ

**CATCHWORDS:**

CRIMINAL LAW AND PROCEDURE – Reference to the Full Court of questions of law – court accepted the reference – is an offence against s 174FA of the *Criminal Code* (NT) limited to circumstances where the Crown can prove that the person subject to the incident was not killed immediately as a consequence of the incident – does the giving of any reasonable assistance to a person subject to an incident as provided by s 174FA(1)(b)(ii) require that it is possible for some assistance to be provided by the driver involved in such an incident – does the definition of ‘person’ as defined in s 1B of the *Criminal Code* (NT) apply to s 174FA of the *Criminal Code* – question 1 answered in the negative – question 2 answered in the affirmative but the answer is only relevant to a breach of s 175FA(1)(b)(ii) not a failure to stop – question 3 answered in the negative – *Criminal Code* (NT) s 1B and s 174FA

STATUTORY INTERPRETATION – *Criminal Code* (NT) s 1B and s 174FA  
– hit and run – duty to stop and give assistance – person killed immediately  
on impact with vehicle – duty to stop – duty to stop requires the driver to  
bring the vehicle to a halt, get out of the vehicle and assess the situation –  
no duty to give assistance to a person who is killed immediately on impact  
with a vehicle – impossible to give assistance – meaning of ‘person’ in  
s 1B *Criminal Code* (NT) not applicable to s 174FA(1)(b)(ii)

*Criminal Code* (NT) s 1B, s 174FA

*R v Adams* (1935) 53 CLR 563

*Alcan (NT) Alumina Pty Ltd v Commissioner of Revenue (Northern Territory)* (2009) 239 CLR 27

*Beckwith v The Queen* (1976) 13 ALR 333

*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg*  
[1975] AC 591

*Re Bolton; Ex parte Beane* (1987) 162 CLR 514

*Donaldson v Broomby* (1982) 40 ALR 525

*Re Fish; Ingham v Raynor* [1894] 2 Ch 83

*McLaughlin v Fosbery & Ors* (1904) 1 CLR 546

*Saed v Minister for Immigration and Citizenship* (2010) 84 ALJR 507

*Scott v Cawsey* (1907) 5 CLR 132

*Smith v Corrective Services Commission of New South Wales* (1980) 33 ALR  
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D Brown, *Traffic Offences and Accidents* 4<sup>th</sup> Ed (2006 LexisNexis  
Butterworths Australia)

Pearce and Geddes, *Statutory Interpretation in Australia* 7<sup>th</sup> Ed (2011  
LexisNexis Butterworths)

Spigelman CJ, “*The poet’s rich resource: issues in statutory interpretation*”,  
(2001) 21 Aust Bar Rev 224

**REPRESENTATION:**

*Counsel:*

Applicant: D Morters  
Respondent: M Burrows

*Solicitors:*

Applicant: Office of the Director of Public  
Prosecutions  
Respondent: Maleys

Judgment category classification: B  
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IN THE FULL COURT  
OF THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*The Queen v Yusoff* [2013] NTSC 43  
No. 21243700

BETWEEN:

**THE QUEEN**  
Applicant

AND:

**ROLENA YUSOFF**  
Respondent

CORAM: SOUTHWOOD ACJ, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 1 August 2013)

**THE COURT**

**Introduction**

- [1] This is a reference under s 21 of the *Supreme Court Act* (NT) to the Full Court of the Supreme Court about the interpretation of s 174FA of the *Criminal Code* (NT).
- [2] On 25 July 2013 Blokland J referred the following questions for consideration by the Full Court.
1. Is an offence against s 174FA of the *Criminal Code* (NT) limited to circumstances where the Crown can prove that the person subject to the incident was not killed immediately as a consequence of the incident?

2. Does the giving of any reasonable assistance to a person subject to an incident as provided by s 174FA(1)(b)(ii) require that it is possible for some assistance to be provided by a driver involved in such an incident?
3. Does the definition of a 'person' as defined by s 1B of the *Criminal Code* (NT) apply to s 174FA(1)(b)(ii) of the *Criminal Code*?

## **Background**

- [3] On 18 June 2013 an indictment was filed in the Supreme Court charging Rolena Yusoff (the accused) with one count against s 174FA of the *Criminal Code* (NT). The count pleads:

On 18 November 2012 at Humpty Doo in the Northern Territory of Australia, [Rolena Yusoff], being the driver of a motor vehicle which was involved in an incident that resulted in the death of Rikki Colosimo, failed to stop the vehicle at the scene of the incident and failed to give any assistance to Rikki Colosimo that was reasonable in the circumstances.

- [4] The accused applied to Blokland J under s 339 of the *Criminal Code* (NT) to quash the indictment on grounds that the indictment is defective as the crime charged cannot be made out as a matter of law because the deceased was killed immediately on impact with the accused's motor vehicle. In the alternative, the accused demurred under s 349 of the *Criminal Code* (NT).
- [5] It is an agreed fact that the deceased referred to in the indictment was killed immediately on impact with the accused's vehicle.
- [6] As the applications in the Supreme Court raised important questions about the interpretation of s 174FA of the *Criminal Code* (NT), Blokland J ruled

that in the interests of justice the above questions should be referred to the Full Court.

### **Section 174FA of the Criminal Code**

[7] Section 174FA of the *Criminal Code* (NT) states:

- (1) The driver of a vehicle is guilty of a crime if:
  - (a) the vehicle is involved in an incident that results in the death of, or serious harm to, a person; and
  - (b) the driver fails to:
    - (i) stop the vehicle at the scene of the incident; and
    - (ii) give any assistance to the person that is reasonable in the circumstances.

Fault elements:

The driver knows, or is reckless as to whether or not:

- (a) the vehicle is involved in an incident; and
- (b) the incident results in the death of, or serious harm to, a person.

Maximum penalty:

- (a) Imprisonment for 10 years if the incident results in the death of a person.
- (b) Imprisonment for 7 years if the incident results in serious harm of a person.

- (2) In this section:

***driver***, of a vehicle, includes a person who controls the vehicle (for example, the rider of a motorcycle).

***vehicle*** means any form of transport that can be used on a road or track (for example, a car, trailer, bicycle, horse or horse drawn carriage).

[8] Section 174FA was enacted by s 5 of the *Criminal Code Amendment (Hit and Run and Other Endangerment Offences) Act 2008* and commenced on 19 November 2008. In the second reading speech the Attorney-General, Dr Burns, stated:

The purpose of this bill is to amend the Criminal Code (NT) in two key areas. First, it creates a specific hit and run offence providing substantial penalties for drivers who leave the scene of an accident in which a person has been killed or seriously injured; and second [...]

[...] Recent incidents in the Northern Territory and other states have highlighted the desirability of enacting a specific offence targeting drivers **who leave the scene of an accident where someone has been killed or seriously injured and do not render assistance**. Failing to stop in these circumstances is cowardly **and falls short of what a humane society requires of its citizens** [emphasis added].

The bill creates section 174FA of the *Criminal Code* (NT) which makes it an offence for a driver of a vehicle that is involved in an incident causing death or serious harm to another person to fail to stop and give assistance in circumstances in which he or she knows or is reckless as to whether or not the vehicle has been involved in an incident and knows or is reckless as to whether or not the person has been killed or seriously harmed. Where the incident results in death, the maximum penalty for failure to stop and render assistance is 10 years imprisonment. Where the incident results in serious harm, the maximum penalty is seven years imprisonment.

The penalties mirror those for dangerous driving causing death and dangerous driving causing serious harm. This is deliberate. It not only reflects that the abandonment of a person who is dead, dying or seriously injured deserves serious punishment regardless of who is to blame for the accident, but also it importantly removes the incentive for those persons who think they might be charged with dangerous driving causing death or dangerous driving causing serious harm to escape from the scene. Specifically, it provides a strong deterrent against people who may choose to flee an accident scene to avoid a breath test.

- [9] The obvious purpose of the offence created by s 174FA of the *Criminal Code* (NT) is to ensure assistance for victims of serious vehicle incidents. Assistance may save a life, minimise injury, improve the prospect of recovery and alleviate suffering. Incidentally, the section also precludes any advantage accruing to a driver, who knows or is aware that there is a substantial risk that death or serious harm was occasioned by the incident, from fleeing the scene of an incident.
- [10] Section 174FA of the *Criminal Code* (NT) imposes two positive duties on drivers who are involved in serious vehicle incidents. The first duty is to stop at the scene of an incident if the driver knows or is aware that there is a substantial risk that the incident has resulted in the death of, or serious harm to, a person. The second duty is to give any assistance to the person that is reasonable in the circumstances. An offence against s 174FA is committed if a driver fails to stop at the scene of the incident or a driver stops at the scene of an incident but fails to give any assistance to the person that is reasonable in the circumstances. A person who did not stop at the scene of the incident is not excused from liability, or responsibility, under s 174FA by establishing that the victim died, or there is a reasonable possibility that the victim died, immediately on impact and therefore there was no assistance that could have been given to the victim. To construe the provision in that way would leave it devoid of an obvious application available on a plain reading of the text.

[11] Section 174FA of the *Criminal Code* is an offence of omission<sup>1</sup> to perform the physical elements prescribed in s 174FA(1)(b), namely to stop the vehicle **and** give assistance to the person that is reasonable in the circumstances. The conjunctive “and” used in s 174FA(1)(b) means that to discharge the duty imposed, the driver must perform both of the prescribed tasks. It follows that a failure to discharge either duty prescribed may be relied on by the Crown to prove the omission. In order to prove that a person committed an offence contrary to s 174FA of the *Criminal Code* (NT) the Crown must prove the following elements of the offence:

1. The driver’s vehicle was involved in an incident that resulted in the death of, or serious harm to, a person.

AND

2. (a) The driver of the vehicle failed to stop at the scene of the incident.

OR

(b) The driver failed to give any assistance to the person that was reasonable in the circumstances.

AND

3. (a) The driver knew that the vehicle was involved in an incident which resulted in the death of, or serious harm to, a person.

OR

(b) The driver was aware that there was a substantial risk that the vehicle was involved in an incident which resulted in the death of, or serious harm to, a person; and having regard to the

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<sup>1</sup> ‘Omission’ as defined in s 43AG of the *Criminal Code* (NT).

circumstances known to the driver it was unjustifiable for him or her to take the risk that such an incident did not happen.

[12] In the context of s 174FA of the *Criminal Code* (NT), “the duty to stop has a different meaning from stopping at a stop sign where the driver halts for a few seconds to see if it safe to proceed and then continues the journey”.<sup>2</sup> This is because under s 174FA the driver is also under a duty to give any assistance to the person that is reasonable in the circumstances. The term ‘stop’ in this context means to interrupt the driver’s journey and to remain at the scene of the incident until the driver has completed the duties imposed on the driver by s 174FA of the *Criminal Code* (NT). At the very least, this means that the driver must bring the vehicle to a halt, get out of the vehicle and remain at the scene of the incident until the driver has made an assessment about whether the person has been killed or seriously injured and made an assessment about whether the driver is able to give assistance to the person in the circumstances.<sup>3</sup> This is so by necessary implication. In order to be in a position to perform the second duty imposed by s 174FA, a driver must perform the preliminary duties to which we have referred.

[13] If the driver is able to give assistance to the person at the scene of the incident, then the driver must remain at the scene of the incident until he or she has given any assistance that is reasonable in the circumstances. If giving assistance to the person reasonably requires the driver to leave the

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<sup>2</sup> D Brown, *Traffic Offences and Accidents* 4<sup>th</sup> Ed. (2006 LexisNexis Butterworths Australia) at p 241.

<sup>3</sup> For a very helpful discussion of such accident duties see Chapter 12, D Brown, *Traffic Offences and Accidents* 4<sup>th</sup> Ed. (2006 LexisNexis Butterworths Australia).

scene of the incident to obtain assistance for the person, then the driver is not required to remain at the scene of the incident while he or she is seeking assistance for the person.

[14] In order to determine the content of the second duty imposed by s 174FA(1)(b)(ii) of the *Criminal Code* (NT), it is necessary to have regard to the meaning of ‘assistance’ and to whom a driver is required to give assistance. The relevant meaning of assist is to give support, help or aid to someone who is in distress. ‘Assistance’ is the act of supporting, helping or aiding someone. As there is no support or help or aid that can be given to a dead person because they are beyond help, there is no assistance that a driver can reasonably give to a dead person as opposed to a person who is dying or seriously injured at the scene of an incident.

[15] Under s 174FA(1)(b)(ii) it is the express duty of a driver to give assistance to the person. There is no duty imposed on a driver to assist the authorities. No mention is made in the text of the section about giving assistance to the authorities. Those duties are imposed by other regulatory provisions<sup>4</sup> which the legislature has not incorporated in s 174FA. Further, while it may be the sign of a good citizen, there is no duty to assist the family of the deceased person by, for example, taking steps to shield or cover the deceased. Such steps cannot be regarded as assisting the person in this sense. Nor does assistance to the person in this context include administering religious or cultural rites.

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<sup>4</sup> For example, r 19 *Traffic Regulations* (NT).

[16] The duty to stop and give assistance as prescribed only arises in a narrow but objectively serious set of circumstances. It must be proven that the driver's vehicle was involved in an incident which has resulted in serious harm or death to a person and the driver knew, or was reckless as to whether, his or her vehicle was involved in such an incident.

[17] In so construing the provisions of s 174FA of the *Criminal Code* (NT) we have given primary consideration to the text of the section and to ascertaining the actual command of the legislature. As the plurality of the High Court stated in *Alcan (NT) Alumina Pty Ltd v Commissioner of Revenue (Northern Territory)*:

The task of statutory construction must begin with a consideration of the text itself. Extrinsic materials cannot be relied upon to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention.<sup>5</sup>

[18] The task of courts is to interpret the words used by Parliament. It is not to divine the intent of parliament: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591; *Re Fish*; *Ingham v Raynor* [1894] 2 Ch 83. As Chief Justice Spigelman has stated, "In an era where a purpose approach to interpretation is emphasised, and required by statute, the distinction between interpretation and divination is not always observed."<sup>6</sup> It is erroneous to look at the extrinsic materials before

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<sup>5</sup> (2009) 239 CLR 27 at par [47].

<sup>6</sup> Spigelman CJ, "*The poet's rich resource: issues in statutory interpretation*", (2001) 21 Aust Bar Rev 224.

exhausting the application of the ordinary rules of statutory interpretation.<sup>7</sup>

“The words of a Minister must not be substituted for the text of the law.

Particularly is this so when the intention stated by the Minister but

unexpressed in the law is restrictive of the liberty of the individual.”<sup>8</sup>

[19] To the extent that the language of a penal provision remains ambiguous or doubtful the ambiguity or doubt may be resolved in favor of the subject by refusing to extend the category or scope of criminal offences: *Beckwith v The Queen*.<sup>9</sup> Provisions such as s 174FA must be strictly construed: *Smith v Corrective Services Commission of New South Wales*;<sup>10</sup> *McLaughlin v Fosbery & Ors*;<sup>11</sup> *Donaldson v Broomby*.<sup>12</sup> To do so is perfectly consistent with the primary policy of the section which, as we have said, is to ensure assistance to victims of serious vehicle incidents.

[20] The above approach was explained in *R v Adams* in the following way:

No doubt, in determining whether an offence has been created or enlarged, the Court must be guided, as in other questions of interpretation, by the fair meaning of the language of the enactment, but when the language is capable of more than one meaning, or is vague or cloudy so that its denotation is uncertain and no sure conclusion can be reached by a consideration of the provisions and subject matter of the legislation, then it ought not be construed as extending any penal category.<sup>13</sup>

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<sup>7</sup> *Saed v Minister for Immigration and Citizenship* (2010) 84 ALJR 507 at 515.

<sup>8</sup> *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ.  
<sup>9</sup> (1976) 13 ALR 333 at 339.

<sup>10</sup> (1980) 33 ALR 25 at 29.

<sup>11</sup> (1904) 1 CLR 546 at 559.

<sup>12</sup> (1982) 40 ALR 525 at 526.

<sup>13</sup> (1935) 53 CLR 563 at 567-8 referred to in Pearce and Geddes, *Statutory Interpretation in Australia* 7<sup>th</sup> Ed. (2011 LexisNexis Butterworths).

[21] “A Court should be especially careful, in view of the consequences on both sides, to ascertain and enforce the actual commands of the legislature, not weakening them in favour of private persons to the detriment of the public welfare, nor enlarging them against the individuals towards whom they are directed.”<sup>14</sup>

[22] What we have stated above is not intended to exclude the possibility that, in a particular case, a driver’s duty to give assistance to a person, who is not dead, may require the driver to contact the police and the ambulance service. Taking such steps may constitute reasonable assistance in the circumstances of a particular case. Our remarks are confined to cases where the person is killed immediately on impact.

### **Section 1B of the Criminal Code (NT)**

[23] Section 1B of the *Criminal Code* (NT) states that a person against whom an offence may be committed under the Code is a person who has been born and who has not already died. The section defines ‘a person against whom an offence may be committed’ and is of primary relevance in construing those provisions of the *Criminal Code* (NT) dealing with offences against the person. Section 1B was enacted with Part IIAA of the *Criminal Code* (NT) which introduced the Model Criminal Code provisions. Its purpose is to clearly provide when life begins and ends for the purpose of criminal responsibility for offences resulting in death. It is of no application in construing the provisions of s 174FA of the *Criminal Code* (NT) as that

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<sup>14</sup> *Scott v Cawsey* (1907) 5 CLR 132 at 154-5.

section does not create an offence against the person but involves a related matter. It prescribes rules of conduct in a particular set of circumstances which are the result of prior conduct.

[24] The non-applicability of s 1B of the *Criminal Code* (NT) to s 174FA is further supported by the fact that the fault element of s 174FA is knowledge of, or reckless disregard of, the result of prior conduct, not an intention to harm or act against the person.

### **The Answers**

[25] It follows that the answers to the questions are:

1. No.
2. Yes. However, whether it is possible or impossible to give assistance to the person, is of no relevance if the driver has breached s 174FA by failing to stop at the scene of the incident. Whether it is possible or impossible to give assistance is only relevant to the question of whether a driver has breached the section by failing to give assistance to the person.
2. No.

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