CITATION:	*Theisinger v Rigby* [2018] NTCA 8
PARTIES:	THEISINGER, Nigel v RIGBY, Kerry Leanne
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from the SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	AP 3 of 2018 (21722152)
DELIVERED:	29 June 2018
HEARING DATES:	30 May 2018
JUDGMENT OF:	Grant CJ, Blokland and Barr JJ

CATCHWORDS:

CRIMINAL LAW – CRIMINAL LIABILITY AND CAPACITY – OFFENCES AGAINST THE PERSON – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – LIMITATION OF TIME FOR PROSECUTION

Appeal against two convictions for unlawful stalking – whether complaint filed within six month limitation period – whether denial of natural justice by refusal to grant adjournment – whether verdict unsafe and unsatisfactory – appeal dismissed.

Criminal Code (NT) s 189
Local Court (Criminal Procedure) Act (NT) s 52

Adams v Watson (1938) 60 CLR 548, *Byrne v Menzies* [1931] SASR 264, *GAX v The Queen* (2017) 344 ALR 489, *M v Hill* (1993) 114 FLR 59, *M v The Queen* (1994) 181 CLR 487, *Parisienne Basket Shoes Pty Ltd v White* (1937-1938) 59 CLR 369, *SKA v The Queen* (2011) 243 CLR 400, referred to.

REPRESENTATION:

Counsel:

Appellant:	In person
Respondent:	S Geary

Solicitors:

Appellant:	Not applicable
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	18

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

Theisinger v Rigby [2018] NTCA 8
No. AP 3 of 2018 (21722152)

BETWEEN:

NIGEL THEISINGER
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: GRANT CJ, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 29 June 2018)

THE COURT:

[1] This is an appeal from the decision of the Supreme Court dismissing the appellant's appeal against two convictions for the offence of unlawful stalking entered by the Local Court.

The decision of the Local Court

[2] By complaint taken on 11 May 2017, the appellant was charged with seven offences alleged to have taken place variously between November 2016 and May 2017. They were:

(a) stalking Cheyenne Gage on 24 November 2016 (for reasons discussed further below, the complaint was amended during the

course of the trial to allege that the offence took place between 16 September 2016 and 27 November 2016);

(b) behaving in a disorderly manner in Mitchell Street between 1 and 16 January 2017 by throwing eggs at the Hotel Darwin premises;

(c) behaving offensively in the Hotel Darwin on 23 January 2017 by urinating on the front steps of the Hotel Darwin;

(d) stalking Penelope Phillips between 12 February and 14 March 2017;

(e) trespassing on the premises of the Hotel Darwin after warning on 13 February 2017;

(f) trespassing on the premises of the Hotel Darwin after warning on 21 February 2017; and

(g) possessing less than a trafficable quantity of cannabis in a public place on 10 May 2017.

[3] In the disposition of those charges:

(a) the appellant was found guilty of stalking Ms Gage;

(b) the appellant was found not guilty of behaving in a disorderly manner in Mitchell Street;

(c) the appellant pleaded guilty to behaving in an offensive manner in the Hotel Darwin;

(d) the appellant was found guilty of stalking Ms Phillips;

(e) the charge that the appellant had trespassed on the premises of the Hotel Darwin on 13 February 2017 was withdrawn at hearing;

(f) the appellant was found guilty of trespassing on the premises of the Hotel Darwin on 21 February 2017 by attending at the premises in an attempt to pass letters to Ms Gage; and

(g) the appellant pleaded guilty to the possession of cannabis in a public place.

[4] On 22 September 2017, the Local Court sentenced the appellant as follows:

(a) imprisonment for four months on the charge of stalking Ms Gage;

(b) imprisonment for 14 days for behaving in an offensive manner by urinating on the steps of the Hotel Darwin;

(c) imprisonment for two months on the charge of stalking Ms Phillips;

(d) imprisonment for one month for the trespass offence; and

(e) imprisonment for 28 days for the cannabis offence.

[5] The sentences imposed in respect of the first four offences were ordered to be served in full concurrency, and the sentence imposed in respect of the cannabis offence was ordered to be served cumulatively on the other sentences by operation of s 37(4) of the *Misuse of Drugs*

Act, yielding a total effective period of imprisonment of four months and 28 days. The sentence was not backdated.

The appeal to the Supreme Court

[6] The appellant brought an appeal to the Supreme Court, but only in respect of the two convictions for unlawful stalking.

[7] The appeal was heard on 18 April 2018. The grounds of appeal were that the Local Court failed to give the appellant a reasonable opportunity to present his case by refusing the appellant's application for an adjournment, and that the verdicts were unsafe and unsatisfactory.

[8] After hearing submissions, the Supreme Court delivered *ex tempore* reasons and dismissed the appeal.

[9] In dismissing the appeal, the Supreme Court found that the first ground of appeal could not be made out because the appellant had not in fact applied for an adjournment of the proceedings. So far as the second ground of appeal was concerned, the Supreme Court found that the trial judge was entitled to make the findings of credit which she did, to make findings of fact based on those credit findings, and thereupon to be satisfied beyond reasonable doubt that the appellant was guilty of the two stalking charges. There was no basis on which to find that the trial judge must have entertained a reasonable doubt concerning the appellant's guilt.

[10] On 1 May 2018, the appellant filed an appeal from the whole of the judgment of the Supreme Court given on 18 April 2018. The grounds are expressed to be the same as those pressed before the Supreme Court.

Limitation on time for making complaint

[11] At the commencement of the hearing of this appeal, counsel for the respondent properly raised a preliminary issue concerning the limitation on the time for filing a complaint in relation to the charge of stalking Ms Gage. As already described, the complaint as initially filed pleaded that the offence took place on 24 November 2016, but was amended during the course of the hearing to allege that the offence took place between 16 September 2016 and 27 November 2016. This was to accommodate the fact that the incidents which were said to constitute the unlawful stalking commenced on or about 16 September 2016.

[12] Counsel for the respondent drew attention to s 52 of the *Local Court (Criminal Procedure) Act* (NT), which requires that "[w]here no time is specifically limited for making the complaint by any statute or law relating to the particular case, the complaint shall be made within 6 months from the time when the matter of complaint arose". The complaint was made on 11 May 2017 and, following the amendment at trial, the period during which the offence was alleged to have been committed fell in part outside of that six month period. The issue had

not been raised either at trial or in the course of the appeal before the Supreme Court. No such difficulty arises in relation to the charge of stalking Ms Phillips between 12 February and 14 March 2017.

[13] Counsel for the respondent directed the Court's attention to the decision in *Parisienne Basket Shoes Pty Ltd v White* (1937-1938) 59 CLR 369, as authority for the proposition that the laying of a complaint or information outside the statutory period does not deprive the trial court of jurisdiction. That case is authority for the proposition that the determination by a trial court as to whether or not a proceeding is out of time cannot constitute jurisdictional error, and so is not amenable to judicial review. It does not answer the question whether such a determination involves an error or mistake on a question of fact or law, or mixed fact and law, in the context of an appeal of this nature.

[14] There can be no doubt that the entry of a conviction for an offence brought by complaint which is filed outside of the statutory limitation period would constitute an error of law which is susceptible of correction on appeal. That is because the time bar would provide a good defence: see *Adams v Watson* (1938) 60 CLR 548 at 553 per Latham CJ and 559 per Starke J; *M v Hill* (1993) 114 FLR 59 at 60. The question which arises here is whether the complaint was in fact filed out of time. That requires some examination of the provision creating the offence and the conduct said to constitute the breach of

that proscription. Section 189 of the *Criminal Code* (NT) provides relevantly:

> (1) A person (***the offender***) stalks another person ("the victim") if the offender engages in conduct that includes repeated instances of or a combination of any of the following:
>
> (a) following the victim or any other person;
>
> (b) telephoning, sending electronic messages to, or otherwise contacting, the victim or another person;
>
> (c) entering or loitering outside or near the victim's or another person's place of residence or of business or any other place frequented by the victim or the other person;
>
> (d) interfering with property in the victim's or another person's possession (whether or not the offender has an interest in the property);
>
> (e) giving offensive material to the victim or another person or leaving it where it will be found by, given to or brought to the attention of, the victim or the other person;
>
> (f) keeping the victim or another person under surveillance;
>
> (g) acting in any other way that could reasonably be expected to arouse apprehension or fear in the victim for his or her own safety or that of another person,
>
> with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of another person and the course of conduct engaged in actually did have that result.

[15] As is apparent from that provision, the offence is constituted by repeated instances of one or more of the species of conduct described. There must be a minimum of two incidents before they may be characterised as “repeated instances”. The commission of the offence will be perfected upon the commission of the last of the acts alleged to comprise the “repeated instances”. The evidence given by Ms Gage

and the other witnesses during the course of the trial identified many instances of conduct by the appellant which could be characterised variously as following the victim, loitering outside the victim's place of business, keeping the victim under surveillance, and acting in a manner which could reasonably be expected to arouse apprehension or fear in the victim. The evidence disclosed the following matters in that respect.

[16] The victim commenced working at the Hotel Darwin in June 2016. She left that employment in mid-December 2016. She met the appellant a number of weeks after she commenced that employment. Over the course of their early acquaintance, the appellant indicated a romantic interest in the victim. She indicated to the appellant that she was not interested in that type of relationship with him. Some months after she commenced her employment at the Hotel Darwin, the victim was at work at closing time. The appellant had by that time been banned from the Hotel Darwin for fighting with other patrons. She saw the appellant hiding across the road. She says that he started throwing rocks onto the roof in an attempt to get her attention. The appellant then approached the victim as she was leaving and said words to the effect that she knew he had feelings for her; that they could have been together; that she had ruined that prospect; and that she was a "treacherous dog". She saw the appellant loitering outside the hotel on a number of occasions in the following weeks.

[17] In about mid-September 2016, the victim attended Monsoons with her cousin. They left Monsoons and started walking towards the Hotel Darwin. In the course of that journey they walked past the appellant, who began berating the victim using abusive terms. The victim's cousin told the appellant to desist, whereupon the appellant challenged him to a fight. The victim then saw the appellant on approximately seven further occasions after that time leading up to the final incident on 27 November 2016. On those occasions, he would stand outside her place of business at the Hotel Darwin alternately yelling abuse at her and demanding to know why she did not love him.

[18] The appellant's habit of loitering outside the victim's place of business was confirmed by the appellant in the course of a meeting he had with licensing officers on 24 November 2016. The meeting was conducted on the appellant's initiative. He had advised the licensing authority that he wished to lodge a complaint against the Hotel Darwin concerning alleged licensing violations. During the course of that meeting, the appellant explained to the licensing officers that he went to the vicinity of the Hotel Darwin "every day" in an attempt to talk with the victim, and often waited for her shift to finish. He also stated that he would follow the victim to other licensed premises when she finished her shifts. During the evidence he gave at trial, the appellant conceded in cross-examination that he waited across the road from the Darwin Hotel on a regular basis over the period of the victim's

employment there. Putting the matter neutrally, his purpose in doing this was to observe and make contact with the victim.

[19] Approximately three days after the meeting with the licensing officers, in the early hours of 27 November 2016, the victim was walking through the Woolworths car park on her way home. The appellant alighted from a motor vehicle in the car park and started yelling at the victim about her refusal to enter into a relationship with him. This incident was the last of the acts alleged to constitute the offence of unlawful stalking. It is for that reason the complaint as amended pleaded that the commission of the offence took place in the period up to 27 November 2016.

[20] The purpose of the time limitation in s 52 of the *Local Court (Criminal Procedure) Act* is to ensure that a complaint is filed within six months of the act done by the accused that is the matter of complaint. The act done by the appellant in this case which gave rise to the matter of complaint was the last of the acts alleged to comprise the "repeated instances". It is at that point that the offence is complete, even where the offence is constituted by that act combined with other facts or matters earlier occurring, and the limitation period runs from that time: see, by way of analogy, *Byrne v Menzies* [1931] SASR 264 at 270-271. Even if we are wrong in that, the evidence heard at trial, including the appellant's evidence, was sufficient to sustain a finding that the appellant engaged in conduct within the limitation period which,

together with the act on 27 November 2016, constituted repeated instances of one or more of the species of conduct prescribed by s 189 of the *Criminal Code*.

[21] Accordingly, the complaint in this matter was filed within time. We turn then to deal with the grounds of appeal.

Denial of natural justice

[22] The first ground of appeal is that the appellant was deprived of a reasonable opportunity to present his case in the Local Court, and was denied an adjournment for that purpose. It is necessary to put that complaint in context.

[23] The charges were laid 11 May 2017. It appears that the appellant had been arrested for one or more of the offences charged on 10 May 2017. He made an application for bail on 11 May 2017, which was refused. Bail was subsequently granted on 12 May 2017. At the mention conducted on 27 June 2017 it was recorded that the appellant had obtained a grant of legal aid. Despite that, the appellant continued to appear on his own behalf. At the mention conducted on 4 August 2017 the appellant advised that all charges would be contested. At that time, the matter was set for hearing to commence at 9:30 am on 21 September 2017. That listing was confirmed at the mentions conducted on 15 August 2017 and 11 September 2017, at which the appellant appeared in person. The appellant was subsequently arrested

on 18 September 2017 for breach of the conditions of his bail, his bail was revoked on that day, and he was remanded in custody from that time until the conduct of the hearing on 21 September 2017.

[24] The appellant had been at liberty between 12 May and 18 September 2017, he had received assistance from the Northern Territory Legal Aid Commission in relation to the charges he was facing, and he had chosen to represent himself at the hearing. There is no suggestion that at any time between the laying of the charges and his apprehension on 18 September 2017 the appellant took any proper steps to summons witnesses, or sought to have the prosecution call further witnesses, or made any complaint to the Local Court in those respects. The matter came before the Local Court for mention on 10 occasions following the appellant's grant of bail in May 2017 and prior to the revocation of his bail three days prior to the hearing.

[25] It is also the case that the appellant did not in fact make an application for the adjournment of the hearing. He made complaint in general terms on four occasions during the course of the hearing. That complaint was in essence that he was not being afforded a fair trial because he had not had opportunity to summons witnesses while in custody. The first occasion of complaint in that respect occurred well into the hearing, and after the second prosecution witness had given his evidence-in-chief. The appellant's contention did not recognise that in the intervening four months he had taken no steps for the purpose of

summoning witnesses, and had not previously identified any additional material witnesses. The appellant's assertions concerning unfairness were considered by the trial judge in that light, and her Honour proceeded with the trial. The appellant had opportunity to cross-examine each of the witnesses called in the prosecution case, and gave evidence in his defence. The appellant brings no evidence that the witnesses he now identifies as necessary for his defence of the stalking charges would have given evidence favourable to his cause or otherwise relevant to the resolution of those charges.

[26] The appeal on this ground should be dismissed.

Unsafe and unsatisfactory

[27] The second ground of appeal is, in essence, that the findings of guilt made by the trial judge were unsafe and unsatisfactory. The function to be performed by an appellate court in determining an appeal on that ground was described in *M v The Queen* (1994) 181 CLR 487 at 493 in the following terms:

> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

[28] That question also governs the determination of an appeal on this ground from a summary trial by judge alone. The determination turns on the appeal court's own assessment of whether it was open to the

tribunal below to be satisfied of the appellant's guilt to the criminal standard: see, for example, *GAX v The Queen* (2017) 344 ALR 489 at [25]; *M v The Queen* (1994) 181 CLR 487 at 492-493 per Mason CJ, Deane, Dawson and Toohey JJ; *SKA v The Queen* (2011) 243 CLR 400 at [11]-[14] (405-6) per French CJ, Gummow and Kiefel JJ. This is not to say that the appellate court must disregard the advantages in fact-finding which the trial judge enjoys by reason of hearing the evidence in its entirety and in its context, and having opportunity to assess the demeanour of the various witnesses while they are giving evidence. However, the approach properly taken in the event that the appeal court has some doubt on its own assessment of the evidence was described in *M v The Queen* (at 493) in the following terms:

> It is only where a jury's [or trial judge's] advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.

[29] The matters which an appeal court may take into account in determining whether it was open on the evidence to be satisfied of guilt beyond reasonable doubt cannot be exhaustively catalogued. Sometimes the question may resolve to whether the particular dealing described in the evidence was capable in law of constituting the offence charged. In other cases, the question will be whether a lengthy delay in making complaint requires particular caution; whether there are material inconsistencies between the initial complaint(s) and the

evidence given at trial; whether the surrounding circumstances suggest some ulterior purpose for a victim's account; whether a victim might be considered unreliable due to some impairment of memory or suggestibility; whether there is a real possibility that the victim's account was a reconstruction; whether collusion between a victim and some other interested party cannot be excluded beyond reasonable doubt; or whether there are internal inconsistencies in the victim's evidence which necessarily give rise to a reasonable doubt.

[30] So far as the charge involving the stalking of Ms Gage was concerned, the appellant's conduct in that respect was the subject of evidence not only from Ms Gage herself, but also from the licensing officers, the Manager of the Hotel Darwin during the relevant period, and Ms Phillips, who was the Functions and Administration Manager at the hotel over the relevant period and the subject of the second stalking charge. The evidence also disclosed that both Ms Gage and Ms Phillips had previously applied for and been granted restraining orders against the appellant. There is nothing arising from a reading of the transcript of that evidence which would suggest that it was not open to the tribunal of fact to be satisfied beyond reasonable doubt that the appellant was guilty of the charge.

[31] The appellant himself conceded in evidence that he went to the hotel daily in an attempt to talk to Ms Gage after she had indicated to him that she was not interested in a relationship with him; that he became

agitated and upset because he could not see her; that he had yelled out to her on one occasion; that he had become angry and sworn at her after she took out the restraining order against him; and that he was affected by drugs over the relevant period. In essence, the appellant's contention in this respect is that his evidence should have been accepted over that of Ms Gage concerning the interactions during which she said she felt intimidated by his behaviours, and that Ms Gage should be disbelieved because he had on one occasion provided her with a recreational drug and she had on one occasion had a drink with him at a nightclub.

[32] So far as the first matter is concerned, it was clearly open to the trial judge to accept the evidence of Ms Gage, particularly as it was corroborated by the evidence of other witnesses. It was also open to the trial judge to reject the appellant's evidence concerning the tenor of his interactions with Ms Gage. In doing so, the trial judge found expressly that the appellant was not a reliable witness. So far as the second matter is concerned, Ms Gage freely conceded during the course of her evidence that she had on one occasion accepted a recreational drug from the appellant when she had first made his acquaintance (although he later requested its return, which she did), and that she had a drink with him one night at a nightclub. Those concessions did not properly ground any adverse finding concerning her credit; and findings of fact in those terms would not bear on the ultimate finding

that the appellant intended to cause fear and apprehension in the victim, or that a reasonable person in the appellant's circumstances would have foreseen that as a likely consequence of his actions.

[33] The appellant makes three further specific complaints under the umbrella of the second ground of appeal.

[34] The first complaint is that the trial judge led Ms Gage into saying that she was scared of the appellant, and did not permit her to express that her true feelings were of annoyance rather than fear. During the course of her evidence Ms Gage gave a number of answers indicating she was fearful of the appellant before the trial judge asked any questions in relation to that matter. When the trial judge queried the cause of her fear, Ms Gage indicated that she was embarrassed, scared, worried, concerned and annoyed. That exchange was not as the appellant now seeks to assert. After that exchange Ms Gage went on to give evidence in relation to specific incidents involving the appellant which caused her fear.

[35] The appellant's second complaint is that one of the licensing officers who gave evidence confirmed during the course of cross-examination that the appellant had never admitted to following Ms Gage. An examination of the transcript discloses that the first licensing officer had given evidence-in-chief that the appellant had admitted to waiting for Ms Gage when she finished work and then following her. The

appellant did not in fact cross-examine the licensing officer in relation to that evidence, and simply made assertions to the trial judge that he was corrupt. The appellant did cross-examine the second licensing officer. During the course of that cross-examination the appellant asked whether he had ever admitted to seeing Ms Gage leave a nightclub and follow her. The second licensing officer's answer to that question had no bearing on the admission spoken of by the first licensing officer.

[36] The appellant's third complaint is that the trial judge accepted evidence from Ms Phillips that on one occasion the appellant had chased her into the hotel. The appellant denied that event ever took place. However, the evidence given by Ms Phillips in that respect was not challenged during the course of cross-examination. In fact, the appellant did not seek to cross-examine Ms Phillips and indicated to the trial judge that Ms Phillips was "basically … telling the truth". No other error is asserted by the appellant concerning the conviction for the unlawful stalking of Ms Phillips.

[37] There is also no substance to this ground of appeal.

Disposition

[38] For these reasons, the appeal is dismissed.

———————————————