Calma v Nunn [2005] NTSC 54

PARTIES:	CALMA, Leslie Bartholemew John v NUNN, Peter
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 27 of 2005 (20423536)
DELIVERED:	16 September 2005
HEARING DATES:	14 September 2005
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

APPEAL
Justices – Liquor Act s 75, s 86 – appellant convicted of offence of bringing liquor into a restricted area – no substantial dispute as to facts – appellant purchased liquor on behalf of his uncle and brought it to Yulara, intending to deliver it to him at an outstation outside restricted area of Mutitjulu – uncle not present at outstation on appellant's arrival, but at Mutitjulu – telephone discussion between parties – intention to secrete liquor outside restricted area near old Amata Road – most direct route to that location via Mutitjulu – uncle intended to be picked up in Mutitjulu en route – appellant entered restricted area with liquor for dual purposes of picking up uncle and conveying liquor to intended ultimate location – consideration of proper interpretation of s 86(1) of Liquor Act – whether statutory offence enlivened on facts – appeal allowed.

REPRESENTATION:

Counsel:

Appellant:	W Smith
Respondent:	R Noble

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Calma v Nunn [2005] NTSC 54
No. JA 27 of 2005 (20423536)

BETWEEN:

LESLIE BARTHOLEMEW JOHN CALMA
Appellant

AND:

PETER NUNN
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 16 September 2005)

Introduction

[1] In this matter the appellant appeals against his conviction of an offence of bringing liquor into a restricted area contrary to the provisions of s 75(1)(a) of the Liquor Act and the sentence imposed in respect of it.

[2] The appellant was charged on complaint with two alternative offences, one under s 75(1)(a) of the Liquor Act and the other under s 75(1)(b) of that statute.

[3] Count one asserted that, on 16 October 2004 at Yulara, he brought liquor, namely beer, into a restricted area, namely Mutitjulu Community.

[4] Count two asserted that, on the same occasion, he did control liquor, namely beer, within a restricted area, namely Mutitjulu Community.

[5] The appellant pleaded not guilty to the charges and the case proceeded to trial before a stipendiary magistrate, sitting as the Court of Summary Jurisdiction at Mutitjulu on 17 March 2005.

[6] On 21 July 2005 the learned magistrate recorded a conviction against the appellant in respect of the first count and expressed oral reasons for so doing. She dismissed the alternative second count.

[7] Consequent upon the conviction recorded against him, the appellant was sentenced to imprisonment for 14 days, suspended forthwith, with a 12-month period of operation.

[8] The notice of appeal in this matter avers that the learned magistrate erred in her interpretation of s 86(1) of the Liquor Act. It also complains that the sentence imposed was, in all the circumstances, manifestly excessive.

The relevant facts

[9] The learned magistrate found that, on 16 October 2004, two police officers were on patrol in the Yulara area. They observed a Nissan Patrol Wagon, of which the appellant was the driver, turn off the Lasseter Highway on to the metal road before the entry station. They caused the Nissan to stop.

[10] The police officers indicated that they wished to search the appellant's vehicle, to which he responded: "Yep, no worries, search it". They found a

carton of VB beer cans on the front passenger side of the vehicle. The appellant stated that he was taking the beer to Johnny Jingo's place, at an outstation going towards the Olgas. That outstation was not within a restricted area. Mutitjulu Community, itself, is a restricted area.

[11] One of the police officers reminded the appellant that it was an offence to take alcohol into the Mutitjulu Community and that, if he was found doing so, he would be prosecuted.

[12] At that point, the police officers drove back on to the highway and resumed patrol duties. An hour or so later, having completed their patrol, the officers drove past the courthouse and stopped at the T-intersection in the main entrance road of the Mutitjulu Community itself. As their vehicle was stationary at the intersection, they observed the appellant in his vehicle turn left into the community proper. He stopped when he met the police.

[13] One of the police officers said to him: "I hope you haven't got that grog in the car", to which the appellant replied: "Johnny wasn't there". One of the police officers said to him: "Well, that means you're bringing alcohol into a restricted area then". The appellant was arrested.

[14] He protested, but the police said to him that the start of a restricted area was at the entry to the Community on the Yulara Ring Road between 10 and 25 metres in from the main road; and that there was a big sign right in the driveway.

[15] The police were aware that the appellant lived in Mutitjulu.

[16] The appellant gave evidence to the effect that he had found that Johnny Jingo was not at the outstation. He therefore returned back towards Mutitjulu. He did not lock the beer up in the shed at the outstation because he saw "sniffers" in the area. He rang Johnny from Sunset View on a mobile telephone and was able to contact him at that time. As I understand the situation, Johnny Jingo was then in Mutitjulu.

[17] The appellant said that he then arranged to pick up Johnny, en route to taking the beer out to a location on the old Amata Road some 70 km distance from Mutitjulu, where the latter was going to hide it. In essence, his evidence was to the effect that he was therefore driving through the restricted area to pick up Johnny and then proceed on to where he wished to hide the beer, so that it would be safe from the sniffers.

[18] It only remains to record that the appellant personally was a non-drinker and that there was no evidence to suggest that he took the liquor in question into the restricted area with a view to its supply or consumption within that area.

The findings of the learned Magistrate

[19] Not unsurprisingly, the learned magistrate found that the appellant had brought the carton of beer well within the restricted area – within the actual community itself.

[20] She noted that the core of the defence case was that the appellant had only brought the liquor within the restricted area for the purpose of transporting it to a destination outside that area.

[21] On the evidence before her, the learned magistrate expressed her finding as to this aspect in these terms:

> "In this case the defendant's purpose is to find his uncle, Johnny Jingo, and then transport the beer outside of the restricted area. It cannot be said that the only purpose he'd come into Mutitjulu was to go to the other side of the restricted area. What he was planning to do was to collect Johnny Jingo and then take the beer to the other side of the restricted area."

[22] As I understand the findings of the learned magistrate, she concluded, on the evidence, that it would have been theoretically possible for the appellant to meet Johnny Jingo outside the restricted area and proceed to the proposed hiding place by means of a circuitous route along various bush tracks that did not involve traversing the restricted area at any point. His purpose in going into the restricted area, on his own evidence, was to pick up Johnny Jingo and then take him and the liquor to the proposed hiding place elsewhere.

[23] Having referred to some of the detailed evidence given by the appellant the learned magistrate commented:

> "The evidence of the defendant is clear that he had other options, well, there was no reason other than to pick up his uncle to go into the restricted area. In my view he was driving into the Mutitjulu Community does not fit within s 86(1) of the Liquor Act in that the defendant has b[r]ought liquor into a restricted area for a purpose

> other than to transport the liquor to a destination outside the restricted area. He agreed in his questions and answers that he could have made the journey on bush tracks without the need to come into the Mutitjulu Community."

[24] I here pause to record that I have some difficulty with the finding of the learned magistrate concerning alternative routes via bush tracks to the proposed hiding location for the beer. That proposition was certainly put to the appellant in cross-examination, but he initially rejected it. His response was: "No, 'cause no long way around. This is the only road there's through". The essence of that assertion was never refuted by other evidence.

[25] It is true that when further pressed in cross-examination, he conceded that it may have been *physically* possible to wend his way around the restricted area over some bush tracks. However, the obvious inference was that this would not have been a direct route to the ultimate destination and, presumably, would have been a very rough and, to some extent, inconvenient trip. At any event, this evidence did not adversely impact against the primary finding of the learned magistrate as to what had been the appellant's intention.

The relevant statutory provisions

[26] Section 75 of the Liquor Act provides that it is an offence for a person to bring liquor into, or have liquor in his possession or under his control, within a restricted area.

[27] However, s 86 of the statute provides as follows:

> "86. Not an offence to transport liquor through restricted area
>
> (1) It shall not be an offence under section 75 where a person brings liquor into, or has liquor in his possession or under his control within a restricted area, for the purpose only of transporting that liquor to a destination outside the restricted area.
>
> (2) In any proceedings for an offence under section 75, the onus of establishing a purpose of nature referred to in subsection (1) shall be on the accused."

[28] It is common ground that the defence provided by the section requires an accused person to accept the onus of establishing facts enlivening subsection (1) on the balance of probabilities.

The appellant's contention

[29] Counsel for the appellant submitted that the approach of the learned magistrate to the interpretation of the language of s 86(1) of the Liquor Act was erroneous.

[30] It was argued that, when the section speaks of bringing liquor into a restricted area "for the purpose only of transporting that liquor to a destination outside" of a restricted area, it is directing attention to the purpose of the alleged offender in relation to the disposition of the liquor.

[31] On the ordinary interpretation of the language of the section, the use of the word "only" is directed solely to the purpose of bringing in the liquor. It does not give rise to the concept that the sole subjective intention of the

alleged offender in coming into the restricted area with the liquor must be its onward transit out of that area and nothing else. In other words, it is permissible for an alleged offender to have multiple subjective purposes in entering the relevant restricted area, so long as the sole object of bringing the liquor into the area is related to its proposed onward transmission to a destination outside of a restricted area.

[32] Counsel contended that, to say that the person having more than one purpose in entering a restricted area – but still having brought liquor into it for the sole purpose of its onward transportation to a destination outside a restricted area – was in contravention of the legislation, would result in an unfair, oppressive and potentially absurd outcome, not in the contemplation of the legislature.

[33] It was put that the learned magistrate obviously accepted that the appellant took the liquor into a restricted area both in the process of collecting his uncle and then moving on, by the most convenient direct route, to transport it to a location outside that area. The fact that he may have had more than one subjective purpose driving into the restricted area with the liquor in his possession, en route to a destination outside of it, is irrelevant and does not negate the operation of s 86(1). The critical question is: What was the singular purpose of what the appellant intended to do with the liquor when bringing it into the restricted area?

[34] It was argued that such an approach sits comfortably with the obvious intention and purpose of the relevant legislation.

[35] In addressing the issue of penalty, counsel for the appellant emphasised these aspects:

35.1 The appellant was a non-drinker;

35.2 There was no suggestion that he intended to bring the liquor into the restricted area for an illicit purpose. He was doing his uncle a favour;

35.3 The evidence did not indicate that there was, in fact, other than a circuitous and presumably inconvenient series of rough bush routes around Mutitjulu to the intended final destination;

35.4 Entry into the restricted area was, in part, to pick up the owner of the liquor en route, so that he could oversee its transport to the desired location, although the evidence indicates that the most convenient direct route to that location was via the restricted area;

35.5 Although the appellant had an antecedent record, most of the offences were stale, all but one minor offence ante-dated early 1987;

35.6 He had a good record of service with the night patrol, at the clinic and in the community generally; and

35.7 He had no relevant convictions under the Liquor Act.

[36] Reliance was placed on comparative sentencing data that indicated that, in over 75% of cases, the penalty imposed for an offence of the type here in question was a fine. It was contended that, in the case of a first offender with the type of background possessed by the appellant, it was inappropriate to opt for a first instance custodial sentence, even if it was fully suspended.

[37] This was particularly so when it is clear that the motives of the appellant were not sinister and that he did not lose control of the liquor whilst in the restricted area.

The respondent's contention

[38] Mr Noble, of counsel for the respondent, submitted that the provisions of s 86 were plain and unequivocal. They should, he said, be interpreted according to the normal English usage of the words employed.

[39] He contended that, as the title of the section clearly indicated, the exculpatory provision was restricted in its operation to factual circumstances in which an alleged offender had no purpose other than simply transiting the restricted area with the liquor in question for the purpose of transporting it to some location outside that area. The phrase "for the purpose only" means that there must be a single specific purpose on the part of an alleged offender in entering a restricted area with liquor in his possession, namely to pass through it to get to an ultimate location outside of it.

[40] He pointed to the express finding of the learned magistrate that it had not been absolutely essential for the appellant to transit the restricted area for

the purpose of going to what was the ultimate intended location of a hide for the liquor. He could have resorted to circuitous bush tracks around it. On the appellant's own evidence, he drove into the restricted area for an ancillary, secondary purpose of picking up Johnny Jingo, so that the two of them could then take the liquor to its intended location.

[41] It followed, he argued, that the conviction of the appellant was, on his own evidence, inevitable.

[42] As to the issue of sentence he pointed out that the maximum penalty provided under the Liquor Act was either a fine of $1000 or six months imprisonment. The problems associated with bringing liquor into Aboriginal communities were notorious. The need for a deterrent sentence in relation to s 75 offences was a paramount consideration.

[43] Whilst he conceded that the appellant was to be treated as a first offender, nevertheless, he was not a young person and had deliberately brought liquor into a restricted area. It was a significant quantity of full-strength beer and he was well aware of the fact that the area was restricted, because he was a resident of it. Moreover, it was argued, he conceded in evidence that he had been aware of other options in relation to the proposed ultimate disposition of the beer that would not have involved bringing it into or through the restricted area.

[44] Mr Noble submitted that in those circumstances and bearing in mind the fact that the appellant was not entitled to any discount for a timely plea of guilty,

the suspended sentence of 14 days imprisonment was well within the proper exercise of a sentencing discretion.

Conclusion

[45] It is clear that each case in which a s 86 defence is raised must necessarily be disposed of in light of the particular facts and that it is unhelpful to embark upon undue generalisations as to the practical application of the statute.

[46] Be that as it may, the critical initial consideration is the proper interpretation of the provisions of s 86(1) of the Liquor Act.

[47] It is trite to say that, in embarking on such an interpretation:

47.1 A construction to be favoured that promotes the apparent objects of the Statute (Interpretation Act, s 62A);

47.2 The court ought to avoid a possible interpretation that would lead to absurd, incongruous or highly inconvenient results (*Director of Public Prosecutions v Serratore* (1995) 81 A Crim R 363 at 373);

47.3 Legislation that impinges on the freedom of the individual should be strictly construed (*Serratore* at 369); and

47.4 The duty of the court is to find the meaning of the relevant legislative provision that best achieves the purpose of the statute. In doing so, however, the words used will be given their plain and

ordinary meaning unless some contrary meaning is clearly indicated (*Cody v J.H. Nelson Proprietary Limited* (1947) 74 CLR 629).

[48] In the course of argument Mr Noble was driven to a position in which he conceded that no offence would have been committed had the appellant determined to stop at Mutitjulu to refuel his vehicle, purchase something to eat, or talk with some friend, or (perhaps) engage in a variety of other activities unrelated to the liquor, but that, simply because he opted to pick up the person who was intended, ultimately, to take delivery of the liquor, then it could no longer be said that the appellant had brought liquor into the restricted area for the purpose only of transporting it to a destination outside a restricted area.

[49] It seems to me, with respect, that such an approach leads to an anomalous and almost absurd result. Moreover, it ignores what appears to me to be the plain intendment of the legislation.

[50] In my opinion, the specific focus of s 86(1) is upon the purpose for which the relevant liquor has been brought into the restricted area; and not on the subjective reasons why the alleged offender may have entered the restricted areas, as and when he did. Of course, those reasons may throw clear light on the purpose for which the liquor was, in fact, brought in. However, that is not an issue in the instant case.

[51] I consider that it matters not that the appellant may have had multiple reasons for entering the restricted area, as and when he did. Provided that it

can fairly be said that, in the instant case, the sole purpose of bringing the liquor into the restricted area was no more than as part and parcel of the transportation of it to a destination outside a restricted area, then the provisions of s 86(1) are enlivened.

[52] Such an approach embraces the obvious concern of the legislature in ensuring that liquor is not made available within dry areas and does not promote the clear potential anomalies that would be attendant on the type of construction urged upon me by Mr Noble.

[53] In the present case the undisputed evidence was that the appellant was en route to an ultimate destination outside a restricted area where the liquor was to be positioned, the most direct and convenient route was via the restricted area and he merely proposed to pick up Johnny Jingo (the ultimate intended consignee of the liquor) on the way through.

[54] On those facts, I consider that he duly made good the statutory defence available to him. The original singular intention with regard to the liquor remained unchanged.

[55] I therefore allow the appeal, set aside the conviction recorded against and sentence imposed on him and substitute an order of dismissal of the complaint.

[56] It accordingly becomes unnecessary to dilate on the issue concerning the severity of the sentence imposed. I content myself by saying that there is

much force in the points relied upon by Mr Smith, of counsel for the appellant.

[57] Whilst, no doubt, the factor of general deterrence is important, it is difficult to perceive why, on the facts of this case, the appellant should have been classified as one of the small percentage of persons who ought to be subjected to a first instance custodial sentence, even given that it was suspended. On any view, the circumstances of any offending placed the situation towards the lower end of the scale of seriousness, there being no suggestion of sinister intention on the part of the appellant or any evidence of likelihood of the liquor being made available to anyone for consumption within the restricted area.

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