Director of Public Prosecutions Reference No 1 of 1999 [1999] NTSC 23

PARTIES:	DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO 1 OF 1999
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION ON A QUESTION RESERVED BY THE DIRECTOR OF PUBLIC PROSECUTIONS
FILE NO:	9709243
DELIVERED:	12 March 1999
HEARING DATES:	14, 15 December 1998
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

CRIMINAL LAW & PROCEDURE – CASE STATED – ABORIGINAL CUSTOMARY LAW – CLAIM OF RIGHT

Whether questions of law stated for consideration under s162A Justices Act are fit for consideration – jurisdiction restricted to questions of law – claim of right not required to be one recognised by law – Claimant must have honest belief that the right is recognised by the general law of the Territory – Traditional Aboriginal law cannot found a claim of right within the meaning of s30(2) of the Criminal Code

Justices Act 1928 (NT)
Criminal Code 1983 (NT)
Aboriginal Land Rights Act (Northern Territory) 1976 (Commonwealth)
Native Title Act 1993 (Commonwealth)

Mellifont v Attorney General (Qld) (1991) 173 CLR 289, referred to.
Attorney-General's Reference (No 3 of 1994) [1998] AC 245, referred to
Director of Public Prosecutions (Cth) Reference No 1 of 1996 [1998] 3 VR 217, referred to.
Bruce v Commonwealth Trade Marks Label Association (1907) 4 CLR 1569, at 1571, referred to.
In re Judiciary and Navigation Acts (1921) 29 CLR 257 at pp 265 - 267, referred to.
Director of Public Prosecutions Reference No 1 of 1992 [1992] 2 VR 405, referred to.

Director of Public Prosecutions v B (1998) 72 ALJR 1175, referred to.
R v Barlow (1997) 188 CLR 1, considered.
R v Pollard (1962) QWN 13, referred to.
R v Skivington (1968) 1 QB 166, considered.
R v Day (1844) 8 JPR 186, considered.
Walden v Hensler (1987) 163 CLR 561, considered.
R v Sanders (1991) 57 SASR 102, considered.
R v Freeman (1985) 3 NSWLR 303, considered.
Mabo v Queensland [No 2] (1992) 175 CLR, considered.
Coe v The Commonwealth (1979) 53 ALJR 403, considered.
Walker v NSW (1994) 182 CLR 45, considered.
Mungatopi v R (1992) 2 NTLR 1, referred to.
R v Minor (1992) 2 NTLR 183, referred to.
Munungurr v R (1994) 4 NTLR 63, referred to.
R v Miyatatawuy (1996) 6 NTLR 44, referred to.
Ashley v Materna, Bailey J., unreported 21 August 1997, referred to.
Yarmyrr v Northern Territory (1998) 156 ALR 370,considered .
Ward v Western Australia (1998) 159 ALR 483, considered.

REPRESENTATION:

Counsel:

Appellant:	D Jackson QC with him A Fraser
Respondent:	D Ross QC with him B Howie

Solicitors:

DPP:	DPP
Y:	D Dalrymple

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mar99006
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Director of Public Prosecutions Reference No 1 of 1999 [1999] NTSC 23
No. 9709243

DIRECTOR OF PUBLIC
PROSECUTIONS REFERENCE
NO. 1 OF 1999

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 12 March 1999)

[1] This matter comes before the court pursuant to s162A of the *Justices Act* 1928 (NT). A complaint having been dismissed, the Magistrate who made the order was requested by counsel for the Crown to reserve for decision of this Court what he regarded as being questions of law arising at or in connection with the hearing. As required, the Director of Public Prosecutions consented.

[2] *Procedure*

There is no form prescribed under the regulations to the *Justices Act* to initiate the procedure. That employed was adapted for the purpose from the prescribed form for a reservation on a question of law by the Court under s162. Given the requirements of s162A(6), that no report of proceedings

under that section shall be published which discloses the name or identifies the person charged, and that the request was made by counsel for the Crown, with the consent of the Director, the naming of the complainant as "applicant" and the person charged as "respondent" in the instituting document was inappropriate.

[3] I note that in other jurisdictions the cases are titled: "Director of Public Prosecutions Reference No. of 199 " or the like. I commend that procedure to those responsible and suggest that the appropriate form be prescribed without delay. As things stand there is a real risk that the statutory injunction will be infringed.

[4] The material provided by the learned Magistrate as the "statement of the circumstances out of which the question arose" is extensive, including a full copy of his reasons. I do not think that is what the legislation envisages, but for these purposes the following is a summary taken from that material.

[5] *Circumstances*

The person charged, who I will call "Y" is an Aboriginal and a leader or senior elder of the Gumatj clan. He has many responsibilities, one of them being to enforce Aboriginal law in land which, in Aboriginal terms, the Gumatj clan owns ("the land"). The Aboriginal law is referred to as Yolngu law. His responsibility to enforce that law is a responsibility to the land of the clan which it occupies and with which it identifies.

[6] The land in question is "Aboriginal land" under the provisions of the *Aboriginal Land Rights (Northern Territory) Act* 1976 being part of the land granted pursuant to the operation of s10 of that Act and described in Schedule 1 to it. His Worship found as a fact that it is wrong for a stranger to come into or onto the land without the permission of the senior elder, and, more importantly for these purposes, it is wrong for a person to take a photograph of the land for commercial purposes without permission. His Worship accepted evidence that if a stranger trespasses or takes photographs for a commercial purpose without permission, then he is expected to "expiate his wrong doing" and pay a penalty or make other amends. The process involves the giving of compensation, and if not given, then more dire sanctions may follow. The expiation process probably involves an apology. (It apparently matters not that the stranger is not an Aboriginal nor that the transgressor is unaware of his transgression).

[7] The incident which gave rise to the complaint took place adjacent to the Gove Yacht Club premises on 4 April 1997. Part of a grassed area running to the nearby beach, and the beach itself, is Aboriginal land. A professional photographer was at the club at the same time as Y. Other Aboriginals related to Y were there. The photographer was looking for a suitable backdrop against which wedding photographs could be taken. He went onto the beach and took photographs. He did not have permission to do so, either pursuant to s70 of the *Aboriginal Land Rights (Northern Territory) Act* or otherwise. Initially Y decided not to confront the photographer, but the

photographer came onto the grassed area on the Aboriginal land and was invited by a male relative of Y to take photographs of the relative's children. The relative should have directed the photographer to Y. Y became aware that photographs were being taken of the children. Y had a special role to protect the children, including preservation of their spiritual wellbeing.

[8] Y said to the photographer: "Have you taken photographs of the children?", and the photographer replied words to the effect "Yes, I did". Y then said: "Yes? Give them $50". The photographer said: "No". Y again said: "Give them $50" and the photographer again said: "No". Y then approached the photographer and demanded the film. The photographer said: "What for?" Y said words to the effect: "You have taken/captured spirit images of the children". Y again demanded that he be given the film, and the photographer backed away. Y reached for, and grabbed the strap of the photographer's camera, and pulled it towards himself. There was a tug of war with the strap, and in pulling the camera strap, Y exerted pressure on the photographer's body. Y was successful in obtaining the camera, opened it, removed the spool of film, tried to tear it, and placed it in a rubbish bin. He returned the camera to the photographer.

[9] His Worship found that it was an offence against Gumatj land, also an offence against Yolngu law, for the taking of photographs for commercial purposes, whilst on Gumatj land, without the permission of the senior elder or senior member present. Under Yolngu law, the image of the land is

valued highly; it is believed that reproduction of an image of the land interferes with Yolngu law because it diminishes the integrity or strength of the wholeness of the land. In Yolngu law, land includes not only the physical features of the landscape, but as well, the people who identify with the land, in this case the Gumatj people. A photograph taken on Gumatj land of a Gumatj person or of a part of the landscape is an image of the land. A photograph of a Gumatj person on Gumatj land captures the spirit of that person on the land. That spirit is important to the land for it is part of the land.

[10] At the conclusion of the prosecution case, Y stood charged for unlawfully assaulting the photographer contrary to s188(1) of the *Criminal Code* 1983 (NT), unlawfully damaging the photographer's Kodak slide film to the value of $18, and unlawfully damaging the camera. As to the damage to the camera, his Worship expressed himself not to be satisfied beyond reasonable doubt that the damage was attributable to any act of Y. He was satisfied beyond reasonable doubt that he had applied force to the photographer without the photographer's permission, and intended to apply that force to him. As to the damage to the film, his Worship expressed himself so satisfied that Y had damaged the film by removing it from the camera and exposing it to light and that he intended to damage it.

[11] However, his Worship was not satisfied that the prosecution had succeeded in proving beyond reasonable doubt that Y had not acted in the exercise of a

right granted or recognised by law, and that he had not exercised an honest claim of right without intention to defraud.

[12] His Worship found that Y:

> "… held an honest belief that he was entitled to act as previously stated. He held that belief by virtue of his position and upbringing in Yolgnu society. He is an enforcer at Yolgnu law on Gumatj land having been trained to enforce Yolgnu law on Gumatj land. He was, to use a possible crude example, performing the combined roles of policeman, tribunal of fact (or summary judge), sentencing judge and bailiff.
>
> The respondent held an honest belief that he had a right to seize the camera and destroy the slide film as an incident of his obligation as to law enforcer on Gumatj land to enforce Yolgnu law. Under the Aboriginal customary law called Yolgnu law the respondent had an interest to ensure that Mr McRostie did not profit from his behaviour which was wrong under Yolgnu law. The respondent held an honest belief that Mr McRostie's behaviour was wrong by virtue of his (the respondents) upbringing and training. He honestly believed that Mr McRostie, who was a stranger to Gumatj land, by taking photographs of the children without his permission had captured the spirit image of the children.
>
> The prosecution failed to negative the excuse honest claim of right without intention to defraud for the simple reason that I accepted that the respondent acted honestly and reasonably as an enforcer of Yolgnu law on Gumatj land when he seized the camera and destroyed the Kodak slide film."

[13] The questions of law said to arise at or in connection with the hearing are these:

> "(a) For the purposes of s.30(2) *Criminal Code* (NT) in order to claim an honest claim of right is it sufficient that the accused's actions are predicated on the belief that he is to be entitled to do what he is doing?

(b) Can traditional Aboriginal law found an honest claim of right within the meaning of s.30(2) *Criminal Code* (NT)?

(c) Does that honest claim of right have to relate to a possessory or proprietary right as referred to in *Walden v Hensler* (1987) 163 CLR 561?

(d) Can the right I have found as having been exercised by the respondent correctly be categorised as a right giving rise to an honest claim of right within the meaning of s.30(2)?

(e) Can an honest claim of right ever excuse a non-property offence such as assault even if that non-property offence is said to be committed in the furtherance of the honest claim of right?

(f) Does the fact that the alleged offences were committed on land to which the *Aboriginal Land Rights Act (Northern Territory)* 1976 (Commonwealth) applies affect the existence of the honest claim of right?

(g) Does the belief held by the respondent amount to a mistake of law in that he thought he was justified in doing what he did or does it amount to a mistake of fact in that he thought that the images on the film were property in which he held a possessory or proprietary right?

(h) If the finding to (g) was that it was a mistake of fact, what was the nature of that possessory or proprietary right?

(i) On the facts in this case is s.26(1)(a) of the *Criminal Code* (NT) capable of authorising the impugned behaviour of the respondent?

(j) Can the reference to … right granted or recognized by law … in s.26(1)(a) *Criminal Code* (NT) be interpreted to include Aboriginal customary law or is it limited to a law created by the Northern Territory or Commonwealth legislatures."

[14] *Question of law arising at or in connection with the hearing*

The Northern Territory provision appears to be somewhat wider than that in other jurisdictions in that it introduces the concept of questions arising "in

connection with" the hearing. There are a number of recent cases on the provisions elsewhere which are applicable notwithstanding the apparently broader scope in s162A.

In *Mellifont v Attorney-General* (Qld) (1991) 173 CLR 289 the High Court considered a similar procedure under Queensland law. Mason CJ, Deane, Dawson, Gaudron and McHugh JJ said at 305:

> "The statutory procedure, which has its counterparts in other Australian jurisdictions, is a standard procedure for correcting error of law in criminal proceedings without exposing the accused to double jeopardy. It is a procedure which was designed to enable the Crown to secure a reversal of a ruling by a trial judge without infringing the common law rule that the Crown cannot appeal against a verdict of acquittal, a rule which precluded a review of the trial judge's ruling at the instance of the Crown in the case of an acquittal. The fundamental point, as it seems to us, is that s669A(2) enables the Court of Criminal Appeal to correct an error of law at the trial."

It does not enable a judicial roving commission. In *Attorney-General's Reference (No. 3 of 1994)* [1998] AC 245 the House of Lords dealt with the Criminal Justice Act 1972 s36(1) which provides "…the Attorney-General may, if he desires the opinion of the Court of Appeal on a point of law, refer that point to the Court…" At p265 Lord Mustill said that those words imposed an essential restriction. His Lordship continued:

> "The courts have always firmly resisted attempts to obtain the answers to academic questions, however useful this might appear to be. Normally, where an appeal is brought in the context of an issue between parties, the identification of questions which the court should answer can be performed by considering whether a particular answer to the question of law might affect the outcome of the dispute. The peculiarity of a reference under the Act of 1972 is that

> it is not a step in a dispute, so that in one sense the questions referred are invariably academic. This peculiarity might, unless limits are observed, enable the Attorney-General, for the best of motives, to use an acquittal in a point of law to set in train a judicial roving commission on a particular branch of the law, with the aim of providing clear, practical and systematic solutions for problems of current interest. This is not the function of the court, and the words emphasised in section 36(1) were in my view designed to keep Attorney-General's references within proper bounds."

Approved: *Director of Public Prosecutions (Cth) Reference No. 1 of 1996* [1998] 3 VLR 217 (CA) at 226 per Winneke P; *Director of Public Prosecutions Reference No. 1 of 1996* [1998] 3 VR 352 (CA) at 356 per Callaway JA.

Nor are hypothetical questions permitted. Australian courts have refused to entertain hypothetical or academic questions: *Bruce v Commonwealth Trade Marks Label Association* (1907) 4 CLR 1569 at 1571; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267.

Even in references by the DPP or Attorney-General, questions which did not arise at trial, or were the exercise of discretion are not appropriate to answer.

In *Director of Public Prosecutions Reference No. 1 of 1992* [1992] 2 VR 405 (CCA) the questions referred were not answered. Marks J giving the leading judgment said at 410:

> "It is the court's duty to give its opinion on the points as formulated only if it can properly do so. In the first place, to employ the jurisdiction sought to be invoked by the Director he must establish that the point is a "point of law". For instance an exercise of

> discretion in a certain way is not to be treated as a point of law… In the second place, it must be shown that the point of law "has arisen" in the case."

Crockett and Smith JJ examined the referred question A and said at 407:

> "Thus it may be said that, if the question is read down to relate to the trial, what is sought to be challenged is the exercise of his Honour's discretion. Alternatively, when question A is read literally it may be said to raise a hypothetical question. In either case, the question does not raise "a point of law that arose in the case" and cannot be referred under s450A of the Act… It follows that question A does not in the circumstances require an answer."

In *Director of Public Prosecutions v B* (1998) 72 ALJR 1175 the High Court was asked to decide whether in South Australia the trial judge had power to refuse to accept a *nolle prosequi* entered by the DPP so as to prevent a trial from starting. Mohr J had refused to accept the nolle prosequi, and the DPP stated a case. Gaudron, Gummow and Hayne JJ held that the trial had not been begun. They said:

> "[24] In our view, the questions reserved did not arise at the trial of the respondent. It follows that there was no power to reserve them for the consideration of a Full Court.
>
> [25] It also follows that this court should not, and indeed cannot, accept the invitation proffered by the appellant to express its opinion upon the issues which it was sought to agitate by the case stated. To do so would be to deliver an advisory opinion and that, of course, is beyond the power of this court whether in its appellate or its original jurisdiction."

[15] In order to give this Court jurisdiction, the questions to be determined must be questions of law. It was submitted on behalf of Y that none of the questions were such. It was put that they are all questions of fact. I do not

accept that. The questions do not call for a review of the facts found. Such of the questions as fall within s162A, are questions of law arising from those facts. Are the facts found capable of making out, as a matter of law, the excuse referred to in s30(2), or the authorisation under s26(1)(a)? In my opinion on a reference such as this, the Court should not go beyond questions of law which are founded upon those facts. To do otherwise would be to heighten the risk of venturing upon the academic or hypothetical, or wandering about with indefinite destination. It may be, however, that in the course of reasoning towards the answers of some questions, some of the others may be answered coincidentally.

[16] The questions to which answers will be given are those at par(d) and (i).

[17] "(d) *Can the right I have found as having been exercised by the respondent correctly be categorised as a right giving rise to an honest claim of right within the meaning of s.30(2)*?"

So far as is material s30 of the *Criminal Code* provides:

> "(1) Subject to subsections (2) and (3) ignorance of the law does not afford an excuse unless knowledge of the law by the offender is expressly declared to be an element of the offence.
>
> (2) A person is excused from criminal responsibility for an act or omission done or made with respect to, or for an event caused to, property in the exercise of an honest claim of right and without intention to defraud."

[18] In *R v Barlow* (1997) 188 CLR 1, commencing at p31, Kirby J set out some of the rules which have been established for the construction of the provisions of a Code. For present purposes I bear in mind that as with any

legislation the language of the Code must be given its natural meaning, but the Court may look to other sources where the words used previously acquired a technical or special meaning, such as where it employs words and phrases conventionally used to express a general common law principle. Consistency as between the various jurisdictions is desirable in cases of ambiguity or where alternative constructions appear arguable.

[19] It will be noted that:

1. Y was convicted both of assault and damage to the property. Both in the Court below and on this reference it was argued on his behalf that a claim of right could be applied to both offences.

2. His Worship found that the elements comprising the acts of each offence were made out. He also found that Y intended to do what he did in each case, but, given his ultimate decision, not that he had a criminal intent.

3. The offence in respect of the film was of unlawfully damaging it.

4. The facts which his Worship found as giving rise to the honest belief of a claim of right are set out above.

[20] Speaking of s22 of the *Criminal Code*, Queensland, the equivalent to the Territory provision, in *R v Pollard* (1962) QWN 13 Gibbs J, speaking for the Court of Criminal Appeal said at p29:

"It is well settled that a claim of right sufficient to relieve a person of criminal responsibility need only be honest and need not be reasonable *(Clarkson v Aspinall: Ex parte Aspinall* ([1950] St R Qd 79, at 89)); "the fact that it is wrongheaded does not matter": *R v Gilson and Cohen* ([1944] 29 Cr App R 174 at 180). In *Rex v Bernhard* ([1938] 2 KB 264 at 270) the Court of Criminal Appeal said that a person has such a claim of right "if he is honestly asserting what he believes to be a *lawful* claim even though it may be unfounded in law or in fact" (emphasis mine).

[21] A claim of right is a defence to robbery, being an aggravated form of larceny, *R v Skivington* (1968) 1 QB 166; that does not arise here. The assault was not an element of the offence of damaging the film. There is no case cited which supports the submission that a claim of right could be considered in relation to an assault such as occurred in this case. The question reserved at (e) is too wide and I declined to determine it. In the view I take it is unnecessary to go any further with this issue.

[22] It has been held that a claim of right can be a defence to unlawful damage of property. *R v Day* (1844) 8 JPR 186, where the accused had been charged with maiming sheep belonging to another which had wandered onto his property, and it was left to the jury to say whether the accused had acted maliciously or whether he had maimed the sheep under a mistaken claim of right to do the act complained of. He was acquitted. Brennan J in *Walden v Hensler* (1987) 163 CLR 561 at 577 in referring to *R v Day* said: "The defence is available when the offence relates to the damaging or destroying of property and contains a mental element which would be negated by the existence of an honest claim of right".

[23] As to taking of property on behalf of another whom the accused believes to have a bone fide claim, King CJ with whom Bollen J concurred said in *R v Sanders* (1991) 57 SASR 102 at 105:

> "There is a clear authority that a crime of larceny, or any crime of which larceny is an element, is not committed by a person who takes the property on behalf of another, or in collaboration with another, whom he believes to have a bona fide claim of right to it. He is not guilty because he lacks the necessary mens rea: see *R v Knight and Roffey* (1781) 2 East PC 510: *R v James* (1837) 8 C & P 131; 173 ER 429; *R v Knight* (1908) 1 Cr App R 186; *R v Williams (No 3)* [1962] Crim LR 111. Such a person would not have the intent to defraud which is an element of the crime of obtaining by false pretences."

I consider that these considerations could be applied to a case of damaging property on behalf of another. It would seem that the actions taken by Y were on behalf of himself and other Aboriginals, and it will noted that $50 was demanded on behalf of the children.

[24] It must be readily accepted that the basis for the assertion of the claim of right in this case is novel. The question of Y's honesty does not arise. That was a question of fact for his Worship.

[25] It is the Director's submission that unless the particular aspect of Aboriginal law relied on is recognised by the general law in force in the jurisdiction, an honest claim of right based on that law cannot give rise to an excuse under s30(2) of the Code. The submission proceeds that Y, along with all other persons present in the Territory, are presumed by s30(1) to know the law, including that it is a criminal offence to damage the property of another or to assault another. Thus an assertion by Y that, notwithstanding those

criminal offences, he is entitled by Aboriginal law alone to act in a manner that would otherwise constitute a criminal offence, cannot of itself found an honest claim of right. It is provided in s74 of the *Aboriginal Land Rights (Northern Territory) Act*, that that Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with that Act.

[26] A submission on behalf of Y was that the photographer was a trespasser who had committed an offence under s70 of the *Aboriginal Land Rights (Northern Territory) Act*. But there was nothing in the circumstances of the case known to this Court which would indicate that the actions taken by Y was that of an owner or occupier of land against a trespasser.

[27] It is also put on his behalf that mens rea is an element of assault and there is no argument about that (see s31 *Criminal Code*); there was no mens rea because the reference to "property" in s30(2) includes both realty and personalty (s1), thus Y was acting in respect of both the land and the film in the camera, and having a positive belief that he was acting lawfully, he was not acting unlawfully (or, the prosecutor could not prove beyond reasonable doubt that he did not have such a belief).

[28] The Director relies upon *Walden v Hensler* (1987) 163 CLR 561.
Mr Walden was an Aboriginal found in possession of a partly plucked adult turkey and a live turkey chick. He had shot the turkey in the bush for food, and the chick was being kept as a pet until it had grown sufficiently to be

released in the bush. The birds were fauna for the purposes of the *Fauna Conservation Act* of Queensland and the appellant had no licence to take them. At the relevant time he believed, in accordance with Aboriginal custom and his own practice of a lifetime, that he was entitled to take the turkeys as "bush tucker" and that he was committing no offence in doing so. His assertion as a claim of right was rejected.

[29] References were made by both the Director and those representing Y to passages from the judgments in this case. Taking into account the facts and the law under consideration there, I have extracted those passages from the various judgments which seem to me to be apposite to this matter.

[30] Brennan J held that the claim of right did not avail Mr Walden. The "critical question" posed at p569 was whether s22 applied to the offence charged. His Honour held at p575 that the turkeys were not "property" for that purpose. At p565 his Honour indicated the taking of turkeys was a common law right, but the legislation in question changed the law, and eliminated that right. At p568 at the foot of the page his Honour says that it was not necessary that the right claimed be one recognised by law, and at p569: "… the right claimed does not have to be a right recognised by the law of Queensland". With all of that, with respect, I agree. However, it seems to me that that does not deny that the belief must be that the claim is founded in law, that the belief is that the claim is "lawful", even though that belief is unfounded in law.

[31] At p571 of *Waldren v Hensler* Brennan J draws attention to *Taylor v Newman* (1863) 8 L.T. 424:

> "…a neighbour's pigeons had flown onto the prisoner's land and picked out sown seed: The prisoner complained, threatening to destroy the pigeons if they did the same thing again. The pigeons returned. The prisoner fired one shot and they rose, a second shot and he killed a pigeon. After conviction for an offence of "unlawfully and wilfully" killing a pigeon, the conviction was quashed, seemingly on the ground that a claim of right negated what Mellor J called "a wilful and wanton intention". Blackburn J construed the section creating the offence "in connection with the rest of the statute which applies to larceny" and it seems that his Lordship regarded the offence as containing a mental element similar to the mental element in larceny, for he said (1863) 8 I.T. at p425 "the farmer who was protecting his crops, *and who really thought he was doing a lawful act*, cannot be said to have unlawfully killed the bird" (emphasis mine).

[32] In his judgment Deane J at p580 said:

> "The phrase "honest claim of right" has no defined meaning for the purposes of the Code. Its connotation in s22 must be determined in the context of the opening provision of that section that ignorance of the law does not of itself afford any excuse for an action or omission which would otherwise constitute an offence and against the background of general common law principle to that effect. Plainly, the fact that a person can honestly say that he thought he was entitled to do the relevant act because he was unaware that it was proscribed by the criminal law does not suffice to provide him with a defence of honest claim of right under s22. Nor does an honest belief of some special entitlement to do the particular act with respect to property necessarily constitute such a defence. An honest belief of a special entitlement to do the act with respect to the property, such as belief of ownership, will only constitute a defence under s22 of the Code if that entitlement would, if well founded, preclude what was done from constituting breach of the relevant criminal law which an accused is assumed to know: see, generally, Adams, *Criminal Law and Practice in New Zealand*, 2nd Ed (1971) pp24-26. In other words, it is not to the point to establish an honest belief of a special relationship with property which, even if it existed, would not constitute an answer to the offence charged."

[33] Commencing at the foot of p581 his Honour said that the point could be illustrated by reference to possible offences involving the taking of property from the natural environment.

> "An example of such a possible offence is that of mining in a natural forest. If the offence charged be the extraction of minerals owned by the Crown or another person in breach of the provisions of royalty legislation, the existence of an honest belief of ownership of the relevant minerals would found a defence of claim of right under s22 of the Code in that, if the belief were well founded, the offence would not have been committed. On the other hand, if the mining is in breach not of royalty provisions but of a general conservation law intended to protect the forest from all mining activities, including any mining activities of the owner of the minerals, an honest belief of ownership of, or of some more limited claim to, the minerals could not constitute a defence of claim of right under s22 for the reason that, even if it had existed, ownership of, or the more limited claim to, the minerals would be simply irrelevant. In such a case, ignorance of criminality flows not from the honest belief of ownership or of some more limited entitlement but from ignorance of the relevant criminal law. So it is in the present case."

[34] At p591 Dawson J, dealing with s22, indicated that it embraced a mistake of law as well as a mistake of fact and went on:

> "It is, of course, always necessary for the prosecution to prove the intent which forms an ingredient of a particular crime and any honestly held belief, whether reasonable or not, which is inconsistent with the existence of that intent will afford a defence. But in addition, there is the wider principle that the existence of any state of mind, however limited, which is an element of a crime, may be negated by an honest and reasonable belief in the existence of circumstances which, if true, would make the impugned act innocent".

[35] His Honour went on at p592:

> "It is not ignorance of the criminal law which founds a claim of right, but ignorance of the civil law, because a claim of right is not a claim to freedom to act in a particular manner – to the absence of

> prohibition. It is a claim to an entitlement in or with respect of property which goes to establish the absence of mens rea. A claim of that sort is necessarily a claim to a private right arising under civil law: see *Cooper v Phibbs* (1867) L.R. 2HL.- 149 at p170, per Lord Westbury. As Hanger J pointed out in *Olsen* [1962] Qd R, at p589: "Section 22, after stating that ignorance of the law is no excuse, does not proceed to say that ignorance of the law is an excuse in the case of an offence relating to property for an act done with respect to property. It refers to an act done in the exercise of an honest claim of right and without intention to defraud."
>
> In *Reg v Pollard* [1962] QWN 13, a claim of right was raised in answer to a charge of unlawful use of a motor vehicle. Gibbs J observed that it was not to the point that the accused had no right to take the vehicle – a claim of right need only be honest and need not be reasonable – and observed that if he "honestly believed that he was entitled to take it, or if the jury had a reasonable doubt whether he had such a belief, he should have been acquitted, however wrong his belief may have been, and however tenuous and unconvincing the grounds for it may seem to a Judge" [1962 QWN at p29. His Honour was not, however, referring to a belief on the part of the accused in an entitlement to behave as he did, that is to say, in the mere absence of a prohibition, but to a belief on his part that he was exercising a claim of right, that is to say, a *legal* entitlement to the vehicle arising under civil law which would negate the criminal intent involved in the offence with which he was charged, namely, unlawfully using a motor vehicle without the consent of the owner and without the consent of any person in unlawful possession thereof: see *Olsen* [1962] Qd R at pp584-585, 590; *Reg v Walsh* [1984] 2 Qd R 407, at pp408-409" (emphasis mine).

[36] Although recognising the novelty of the claim made by Mr Walden, Toohey J at p603 expressed himself satisfied that it fell within s22:

> "There was an honest claim that he was entitled to do what he did; it was a claim with respect to property: and it was a claim made in answer to a charge relating to property. It was not a claim to be able to act without the restraint of the *Fauna Conservation Act*. When analyzed, it was an honest claim that by the customs of his people, *recognized by law*, he was entitled to eat the adult bird and keep the chick as a pet. Whether the claim be well founded is not the point" (emphasis mine).

[37] It will be noted that his Honour laid particular emphasis on the customs of Aboriginals "recognised by law", referring back, I think, to what was said at p600 in regard to foraging rights of Aboriginals having been recognised in a variety of statutes.

[38] Similarly, commencing at p608 Gaudron J:

> "In the present case, the foundation of Mr Walden's claim of right is based on his membership of an Aboriginal community and the customs of that community. That seems to me to lay a sufficient foundation for a claim of right, provided that the claim is made by reference to some supposed operation of the law, for within a legal context, rights do not exist in the abstract. *A right must mean a right in law, and not merely one which owes its existence to a moral order, religious code or other non-legal regimen*. A claim of right predicated on the customs of the Aboriginal community does not, without more, constitute a claim of right within the contemplation of s22 of the Code. However, should such a claim be asserted on the basis that the customs of the Aboriginal community in question are recognized by law, the claim will be brought within the purview of the section. It is not to the point to inquire whether or not the right claimed subsists at law: the nexus that is required to bring the right claimed within the scope of the section is its *supposed recognition by the law*" (emphasis mine).

[39] As I understand it, the supposition to which her Honour refers is that made by the accused, that is, to bring the claim of right within the scope of the statute the Crown must negative a supposition on the part of the accused that what was done was recognised by law as being lawful. In her Honour's view the claim of right put forward by Mr Walden was based upon his having obtained permission to hunt from the manager of the station property where the birds were taken, and it may be that he thought that his claim "derived immediately from the permission granted" or he may have thought

that such permission was a condition precedent to the exercise of a right recognised by law.

[40] It was submitted on behalf of Y that a person may not be convicted of an offence is he holds a positive belief that his action is lawful, and emphasis placed on a passage in the judgment of Gaudron J at p606:

> "Section 22 of the (Qld) Criminal Code is in two parts: the first part gives expression to the principle encompassed in the maxim *ignorantia juris non excusal*; the second part provides, not by way of exception, but by way of qualification to this principle, the defence of claim of right. Such a defence is not constituted by mere ignorance of the criminal law, and therefore must have some foundation or basis independent of a mere belief in the liberty to engage in that which is not unlawful. Equally, however, ignorance of the criminal law does not preclude the assertion of a supposed right, notwithstanding that such assertion involves a belief, founded in ignorance, that conduct proscribed by the criminal law is *lawful*" (emphasis mine).

In the view that I take this passage does not assist Y. The question of what is "lawful" remains.

[41] Reference is also made to *R v Freeman* (1985) 3 NSWLR 303. It does not assist in consideration of the issues here. As held at p310 there is an onus on the Crown in a charge of conspiracy to pervert the course of justice to establish the guilty intention on the part of the person charged. That involved the Crown proving the intention to agree and the accompaniment of that intention by a guilty mind, that is to say, an intention to pervert or wrongfully interfere in the course of justice. It arose in a case where the trial judge adopting the law as enunciated in English authority had

withdrawn from the jury any consideration of the accused's subjective state of mind in relation to the element of criminality or wrongfulness. The accused's state of mind was an essential element in the offence. Here, consideration is not given to that, since his Worship held that the accused intended to commit both offences for which he was charged.

[42] Although it is not necessary that the right be a right recognised by law, I accept the submissions made on behalf of the Director that Y could only succeed under s30(2) of the *Criminal Code* if he honestly believed that the rights he asserted were recognised by the general law in force in the Territory sufficient to displace the operation of the criminal responsibility arising from the commission of the offences, even if that was not the correct legal position.

[43] His Worship's findings as to the belief of Y is set out above. They do not mention the belief of Y as to the recognition by the general law in force in the Northern Territory of the lawfulness of his claim of right. He asserted his right to act as he did based upon Aboriginal law.

[44] As to whether those rights are recognised by law in force in the Northern Territory, it is opportune to turn to the second basis upon which his Worship held that Y was not criminally responsible for his actions.

[45] *On the facts in this case is s26(1)(a) of the Criminal Code (NT) capable of authorising the impugned behaviour of Y*?

It is there relevantly provided that an act is authorised if it is done in the exercise of a right granted or recognized by law.

[46] It is clear from the tenor of the questions referred, and the circumstances described by his Worship, that the law which Y says grants or recognizes the right he was exercising was to be found in the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). Counsel for Y upon the hearing before me, however, asserted that the submissions put to his Worship on this point included as well reference to the common law and the *Native Title Act* (Cth).

[47] I have not been directed to any particular law referring to any such particular act making up the offences here under consideration. That is not surprising. The submissions made on behalf of Y proceed upon the basis that there has been a general grant or recognition of the right he was exercising as one of the many rights which attached to common law native title to land which have not been extinguished. What is put is that there is a law operating within the Northern Territory which grants or recognizes the right of Y to assault a person and to damage property because he is given responsibility to do those things arising from the application of Aboriginal law in the circumstances.

[48] The common law and statutes recognize a form of native title which reflects the entitlement of Aboriginals, in accordance with their laws and customs, to their traditional lands (*Mabo v Queensland [No 2]* (1992) 175 CLR 1 per Mason CJ and McHugh J at p15; Brennan J at p58; Deane and Gaudron JJ at

pp109-110 and Toohey J at p188). Reference might also be made to the definitions in the *Aboriginal Land Rights (Northern Territory) Act* and the definition at s223(1) of the *Native Title Act* 1993 (Cth). The title of which the law speaks is one related to proprietary, possessory, occupational and usufructuary rights and interests in the land held or enjoyed under indigenous law or custom. Such a title may be extinguished by the valid exercise of sovereign power inconsistent with the continued right to enjoy the title. Neither under the common law nor the statutes are the rights asserted by Y granted or recognized.

[49] Counsel for Y draws attention to what was said by Deane and Gaudron JJ in *Mabo* at p94:

> "The practical inability of the native inhabitants of a British Colony to vindicate any common law title by legal action in the event of threatened or actual wrongful conduct on the part of the Crown or its agents did not, however, mean that the common law's recognition of that title was unimportant from the practical point of view. The personal rights under the title were not illusory: they could, for example, be asserted by way of defence in both criminal and civil proceedings (eg. alleged larceny or produce or trespass after a purported termination of title by the Crown by mere notice as distinct from inconsistent grant or other dealing)."

[50] Those examples, however, relate to the possessory and usufructuary rights in land and, with respect, their Honours' general statement as to the rights under native title being capable of being asserted by way of defence to criminal proceedings does not necessarily include a defence to the offences with which Y was charged.

[51] The action taken by Y was in response to a perceived wrong done to the land. Aboriginal people are subject to the laws of the Territory (*Coe v The Commonwealth* (1979) 53 ALJR 403 at 408; *Walker v NSW* (1994) 182 CLR 45). It is not in question that Y had a relationship to the land arising from his position as a traditional Aboriginal owner and elder, and his Worship made findings as to his beliefs and responsibilities which are not questioned in these proceedings. However, it strikes me that the right he claimed "owes its existence to a moral order, religious code or other non-legal regimen".

[52] Some aspects of Aboriginal law and Aboriginality have been recognised in the Northern Territory in the administration of criminal justice. For example, in respect of provocation see *Mungatopi v R* (1992) 2 NTLR 1 and as to sentencing, see *R v Minor* (1992) 2 NTLR 183; *Munungurr v R* (1994) 4 NTLR 63; *R v Miyatatawuy* (1996) 6 NTLR 44 and *Ashley v Materna*, Bailey J, unreported 21 August 1997.

[53] In the course of that latter judgment, Bailey J drew attention to what was said by Mason CJ in *Walker v NSW* (1994) 182 CLR 45 at 49:

> "It is a basic principle that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle (*Racial Discrimination Act* 1975 (Cth), p10). The general rule is that an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons and matters (*Bennion, Statutory Interpretation*, 2nd ed (1992), p255). The rule extends not only to all persons ordinarily resident within the country, but also to foreigners temporarily visiting. And just as all persons in the country enjoy the benefits of domestic laws from which they are not expressly excluded, so also must they accept the burdens those laws impose. The presumption applies with added force in the case

of the criminal law, which is inherently universal in its operation, and whose aims would otherwise be frustrated. So, in *Quan Yick v Hinds*, Griffith CJ when dealing with the more general question whether the entirety of Imperial law was in force in Australia stated ((1905) 2 CLR 345 at p359):

> 'It has never been doubted that the general provisions of the criminal law were introduced by the [*Australian Courts Act* 1828 (Cth)].' (0 Geo.IV c.83)

Even if it be assumed that the customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application. In *Mabo [No 2}*, the Court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in *Mabo [No 2]* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people."

See also *Warren & Ors v R* (1996) 88 A Crim R 78.

[54] Recent cases arising under the *Native Title Act* refer to rights and interests in Aboriginals to protect places of cultural and spiritual importance and safeguard cultural and spiritual knowledge (*Yarmyrr v Northern Territory* (1998) 156 ALR 370 at 439 and *Ward v Western Australia* (1998) 159 ALR 483 at 639. But neither those rights nor any that may be expressly or impliedly granted or recognised under the *Aboriginal Land Rights (Northern Territory) Act* sanction the commission of criminal offences in pursuance of the rights.

[55] In the view that I take, it is unnecessary to consider whether or not, as the Director contends, native title was extinguished by the fee simple grant of Aboriginal land under the Commonwealth Act.

[56] I determine the questions fit for consideration under s162A of the *Justices Act* as follows:

(d) *Can traditional Aboriginal law found an honest claim of right within the meaning of s.30(2) Criminal Code (NT)?* No.

(i) *On the facts in this case is s.26(1)(a) of the Criminal Code (NT) capable of authorising the impugned behaviour of the respondent?* No.
