Langtree v Trenerry & ors [1999] NTSC 97

PARTIES:	WAYNE CHARLES LANGTREE v ROBIN LAURENCE TRENERRY AND PETER HALES AND THE DIRECTOR OF PUBLIC PROSECUTIONS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	108 of 1999 (9916787)
DELIVERED:	9 September 1999
HEARING DATES:	3 September 1999
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Plaintiff:	S. Southwood
Defendants:	T. Pauling QC / J Blokland

Solicitors:

Plaintiff:	North Australian Aboriginal Legal Aid Service
Defendants:	Director of Public Prosecutions

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

Langtree v Trenerry & ors [1999] NTSC 97
No. 108 of 1999 (9916787)

BETWEEN:

WAYNE CHARLES LANGTREE
Plaintiff

AND:

ROBIN LAURENCE TRENERRY
First Defendant

AND:

PETER HALES
Second Defendant

AND:

DIRECTOR OF PUBLIC PROSECUTIONS
Third Defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 9 September 1999)

[1] The plaintiff in these proceedings seeks to challenge decisions to prosecute him and to continue the prosecutions in relation to charges of unlawfully damaging a Holden Commodore sedan and unlawfully damaging a Mazda Hatchback motor vehicle. Alternatively he seeks a stay of proceedings on the basis that the proceedings amount to an abuse of process.

[2] In the event that the plaintiff is found guilty of one or other of the charges of unlawful damage he will become what has been described as "a third striker" for the purposes of the *Sentencing Act* (NT). By virtue of s 78A of that Act, when dealing with such a person, "the court must record a conviction and order the offender to serve one term of imprisonment of not less than 12 months" in respect of that offence or those offences.

[3] For present purposes the circumstances of the offending are described by the plaintiff as follows:

> "At approximately 4.00 am on the morning of Saturday 20 February 1999 the plaintiff was … with three friends when they stopped at the Nightcliff jetty car park, Casuarina Drive, Nightcliff NT.
>
> The [plaintiff] walked over to Florde Coombs who was talking with a small group of friends nearby. The [plaintiff] said to the group words to the effect of 'you mob staring at me or what, you want to fuck with us?'.
>
> After an altercation and assault on another the plaintiff approached Coombs and kicked him on the knees with his right leg and punched him with a closed fist to the right side of Coombs' head, striking above the ear. Coombs got into the driver's seat of his vehicle, a white Holden Commodore sedan NT526066. The plaintiff smashed the driver's side front window of the vehicle. The glass from the window cut Coombs right elbow causing it to bleed. The plaintiff then punched Coombs in the face several times with his fists closed.
>
> The plaintiff then chased the victim Ricky Juzuf who was about to enter his vehicle, a green Mazda 323 Hatchback NT reg 513197. As the plaintiff ran past the open door of the victim's vehicle he kicked the driver's side door window and shattered the glass. Ricky Juzuf apprehended that he would be struck by the plaintiff. He was able to successfully avoid the plaintiff."

[4] As a consequence of those incidents the plaintiff faces the charges of unlawful damage to each of the vehicles along with one count of unlawful assault involving circumstances of aggravation in relation to the victim Florde Coombs. Notwithstanding the submissions of the plaintiff to the contrary it is clear that both the assault and unlawful damage charges are available on the facts as presented.

[5] Following the laying of those charges the solicitor for the plaintiff wrote to the Officer in Charge, Summary Prosecutions, requesting that the charges of unlawful damage to property against the plaintiff be withdrawn. That request was refused and the Director of Public Prosecutions directed that the prosecutions for unlawful damage to property proceed.

[6] The plaintiff complains that the Director has given no reasons for the decision that the plaintiff should be prosecuted for the charges of unlawful damage which, upon a finding of guilt, will lead to him being imprisoned for a period of 12 months in addition to any period of imprisonment imposed for the assault alleged against him.

[7] The plaintiff says that the Director of Public Prosecutions did not have regard to or did not comply with the guidelines issued by the Director under s 25 of the *Director of Public Prosecutions Act* and, in particular, the following factors were not considered:

> "(c) the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender,

(d) the alleged offender's antecedents and background,

…

whether the prosecution would be perceived as counter productive, for example, by bringing the law in to disrepute,

…

(k) whether the consequence of any resulting conviction would be unduly harsh and oppressive,

…

(q) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court,

…

(s) the necessity to maintain public confidence in such basic institutions as the parliament and the courts.".

[8] I note in passing that s 25(3) of the *Director of Public Prosecutions Act* provides, in relation to such guidelines, that "an act or omission of the Director… shall not be called in question or held to be invalid on the grounds of a failure to comply with a statement issued under this section."

[9] It was submitted that if the plaintiff were to plead guilty to the charges of unlawfully damaging property, or if the plaintiff was found guilty of one of those charges, then the court would have no option other than to impose a period of imprisonment which the plaintiff said would be "manifestly disproportionate" to the alleged unlawful conduct of the plaintiff. It was

therefore submitted that the plaintiff was "effectively deprived of a proper opportunity to plead guilty because of the disproportionate penalty he would be subject to".

[10] In the circumstances the plaintiff submitted that the commencement and continuation of the proceedings was an abuse of process and sought orders that the proceedings in respect of those matters be permanently stayed or, alternatively, that the decision of the authorities to lay a complaint charging the plaintiff with those offences and seeking to proceed to trial in relation to them be quashed.

Review of decision to prosecute

[11] It was the submission of the plaintiff that in the circumstances of this matter, which the plaintiff said were "special", the decision to prosecute for unlawful damage to property and the decision to continue the proceedings were reviewable and capable of being quashed. In this regard the plaintiff pointed to a number of English authorities where the exercise of the discretion to prosecute had been reviewed.

[12] Reference was made to *R v Constable of the Kent County Constabulary and Anor, ex parte L* (1993) 1 All ER 756. In that case it was held that the discretion of the Crown Prosecution Service to continue or to discontinue criminal proceedings against a juvenile was subject to judicial review by the High Court. However it was said that this is so only where it could be

demonstrated that the decision had been made regardless of, or clearly contrary to, a settled policy of the Director of Public Prosecutions which had been formulated in the public interest, such as a policy of cautioning juveniles. It is interesting to note that in that case Watkins LJ said (at 770):

> "I have confined my views as to the availability of judicial review of a CPS decision not to discontinue a prosecution to the position of juveniles because, of course, the present cases involve only juveniles. My view as to the position of adults, on the other hand, in this respect is that judicial review of a decision not to discontinue a prosecution is unlikely to be available. The danger of opening too wide the door of review of the discretion to continue a prosecution is manifest and such review, if it exists, must, therefore be confined to very narrow limits. Juveniles and the policy with regard to them are, in my view, in a special position."

[13] In *R v Inland Revenue Commissioners, ex parte Mead* (1993) 1 All ER 772 Stuart-Smith LJ concluded that a decision to prosecute by a prosecuting authority is "in theory susceptible to judicial review, albeit the circumstances in which such jurisdiction could be successfully invoked will be rare in the extreme". The only other member of the Court, Popplewell J, reached a contrary view and held that there was no such jurisdiction.

[14] I was also referred to *R v Director of Public Prosecutions, ex parte C* (1995) 1 Cr.App.R. 136. In that case there applied a Code for Crown Prosecutors established under the provisions of the *Prosecution of Offences Act* which was said to have been breached. The resolution of the matter turned upon the applicable statutory provision and the Code issued thereunder..

[15] In Australia the position would seem to be different from that which is referred to in the cases discussed above.

[16] In *Barton v R* (1980) 147 CLR 75, Gibbs ACJ and Mason J said (at 94-95):

> "It has generally been considered to be undesirable that the court, whose ultimate function it is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced."

See also the observations at 96 per Gibbs ACJ and Mason J, at 104 per Stephen J, at 107 per Murphy J, at 109 per Aicken J and at 110 per Wilson J.

[17] In *Jago v District Court (NSW)* (1989) 168 CLR 23, Gaudron J said (at 77):

> "The features which attend the criminal process enable the general considerations to be refined somewhat in their application to the grant of a permanent stay of criminal proceedings. One particular feature relevant to criminal proceedings is that the question whether an indictment should be presented is and always has been seen as involving the exercise of an independent discretion inhering in prosecution authorities, which discretion is not reviewable by the court. Originally, the unreviewable nature of that decision was seen as an aspect of the prerogative power vested in the office of Attorney-General … . More recently, the unreviewable nature of that discretion has been seen as deriving from the nature of the subject matter to be decided and, perhaps, the incompatibility of judicial review with the ultimate function of a court in a criminal trial."

[18] In that case Brennan J said (at 39):

> " … for the moment, it should be noted that *Barton* reaffirms the clear division between the executive power to present an indictment and the judicial power to hear and determine proceedings founded on the indictment. That division is of great constitutional importance. It ensures that the function of bringing alleged offenders to justice is reposed entirely in the hands of the executive branch of government who must answer politically for the decisions which they make – not only decisions to prosecute in particular cases but decisions relating

> to the commitment of resources to the detection, investigation and prosecution of crime generally. These are decisions which courts are ill equipped to make and, so far as they relate to the commitment of resources, powerless to enforce. The division of powers in the administration of the criminal law between the executive and judicial branches of government also ensures that the courts do not become concerned by matters extraneous to the fair determination of the issues arising on the indictment and are thus left free to hear and determine charges of criminal offences impartially."

[19] In her paper "Judicial Review of Prerogative Power in Australia: Issues and Prospects" (1992) 14 Sydney Law Review 432, Fiona Wheeler said (at 457):

> "To the undesirability of blurring the functions of prosecutor and of judge and the need to preserve the integrity of the criminal process may be added the consideration that some prosecutorial decisions are not wholly referable to personal circumstances but are informed in part by matters of policy relating to the cost to the public of criminal investigations and prosecutions …. it is no accident that our drug laws are pursued more faithfully than those relating to prostitution or homosexuality …. When such budgetary and planning matters bear upon the institution of criminal proceedings, they would seem even less amenable to judicial scrutiny. Although the some time presence of this 'policy element' could not, of itself, justify judicial refusal to review in all cases, it nonetheless weighs against judicial intervention in conjunction with the other factors here mentioned.
>
> In essence then, the refusal of the courts to review the manner of exercise of the Attorney-General's prerogative decision to prosecute is soundly based. Nevertheless, it may still be possible to contemplate departures from this rule in exceptional circumstances bordering, perhaps, on bad faith or fraud."

[20] There was no suggestion of bad faith or fraud in the present matter.

[21] The plaintiff pointed to, and relied upon, the views expressed in the judgment of Kirby J in *Director of Public Prosecutions (SA) v B* (1998) 72 ALJR 1175 where his Honour said (at 1197):

> "Having regard to the parties named and to the procedures adopted, the suggestion that the primary judge was actually engaged in a judicial review of the appellant's decision to enter a nolle prosequi can not be accepted. The only relevance of the suggested susceptibility of that decision to conventional judicial review is that it calls attention to the differentiation between decisions of the Attorney-General exercising a vestige of the royal prerogative and decisions of the appellant which must in every case conform to the DPP Act. As Debelle J correctly discerned, this differentiation affords a court different, and larger, powers of scrutiny in relation to the appellant than were conventionally exercised by courts in relation to decisions of the Attorney-General. Whether the latter might also now be subject to examination by a court is a question which does not have to be considered in these proceedings."

[22] In his judgment Kirby J was dealing with the position regarding the entry of a nolle prosequi. He noted that the power relied upon in the proceedings in that case was a statutory power contained in the DPP Act. He observed that he would not accept that the decision to enter a nolle prosequi under the DPP Act was beyond judicial scrutiny "as to its lawfulness or beyond a judicial response necessary to defend the court from abuse of process or to ensure a fair trial".

[23] In *Director of Public Prosecutions (SA) v B* the majority declined to answer the questions reserved because they did not arise at the trial of the respondent. However in the course of their reasons reference was made by Gaudron, Gummow and Hayne JJ to *Maxwell v R* (1996) 184 CLR 501 and in particular the judgment of Gaudron and Gummow JJ in that case.

[24] In *Maxwell v R* Gaudron and Gummow JJ said (at 534):

> "The power of the Attorney-General and of the Director of Public Prosecutions to enter a nolle prosequi and that of a prosecutor to

> decline to offer evidence are aspects of what is commonly referred to as ‘the prosecutorial discretion’. In earlier times the discretion was seen as part of the prerogative of the Crown and, thus, as unreviewable by the courts. That approach may not pay sufficient regard to the statutory office of the Director of Public Prosecutions which now exists in all States and Territories and in the Commonwealth. Similarly, it may have insufficient regard to the fact that some discretions are conferred by statute, such as that conferred on a prosecutor by s 39A of the Act.
>
> It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process – particularly its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.”

[25] In *Director of Public Prosecutions (SA) v B* (supra at 1180) Gaudron, Gummow and Hayne JJ quoted the second paragraph set out above and preceded the quote by observing:

> “The line between, on the one hand, the decisions whether to institute or continue criminal proceedings (which are decisions the province of the Executive) and on the other, decisions directed to ensuring a fair trial of an accused and the prevention of abuse of the court’s processes (which are the province of the courts) is of fundamental importance.”

[26] See also *Pearce v R* (1998) 72 ALJR 1416 at 1422 (par 30).

[27] The fact that the decision to prosecute and the decision to continue with a prosecution are made by the Director of Prosecutions rather than the Attorney-General does not alter the position. This follows from the

observations of Gaudron and Gummow JJ in *Maxwell v R* (supra). See also *Von Einem v Griffin* (1998) 72 SASR 110 at 133.

[28] It follows from the above that decisions of the kind sought to be challenged in these proceedings are insusceptible of judicial review.

Abuse of Process

[29] The plaintiff further says that pursuit of the proceedings is an abuse of the process of the court. The centrepiece of his argument was that, because of the operation of the mandatory sentencing regime in the Northern Territory in the particular circumstances of this matter, the sentence that must be imposed upon him is "a disproportionate sentence" which "infringes the principle of totality". It was submitted that this results in a sentence which is "manifestly excessive".

[30] In *Walton v Gardiner* (1992-93) 177 CLR 378, Mason CJ and Deane and Dawson JJ said (395-396)

> "As was pointed out in *Jago*, the question whether criminal proceedings should be permanently stayed on abuse of process grounds falls to be determined by a weighing process involving a subjective balancing of a variety of factors and considerations. Among those factors and considerations are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice."

[31] In *R v Swingler* (1996) 1 VR 257 at 265 the Court of Appeal noted that the circumstances that will lead a court to exercise the jurisdiction to stay

proceedings have been variously described as "exceptional", "rare" and as a power which should be used "sparingly and with the utmost caution". It is a jurisdiction which will only be exercised where it is readily apparent that it should be exercised to prevent "prosecutorial oppression".

[32] A distillation of the arguments presented by the plaintiff reveals, as the defendants submitted, that the plaintiff's contention is that charges clearly available on the uncontested facts ought not be prosecuted because they attract the consequences of the mandatory sentencing provisions of the *Sentencing Act*. The concern of the plaintiff is not that he will be tried unfairly or that the court's processes are being abused but rather with the consequences that the Legislature has provided will flow from a finding of guilt in such cases. The court's processes cannot be said to be abused simply because the court may be called upon to impose a penalty specified by relevant legislation.

[33] As with the plaintiff in the matter of *Spencer v Loadman* (1999) NTSC 48 the plaintiff in these proceedings seeks orders which will enable him to avoid the effects of the mandatory sentencing provisions in the *Sentencing Act*. In that case the application was dismissed and likewise in this case it must be dismissed.