Knight v Littman & Luppino [2006] NTSC 33

PARTIES:	KNIGHT, Bradley John v LITTMAN, Andrew Kevyn and LUPPINO, Vincent Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 40 of 2006 (20610027)
DELIVERED:	24 April 2006
HEARING DATES:	13 April 2006
JUDGMENT OF:	RILEY J

CATCHWORDS:

CRIMINAL LAW

Juveniles – co-offenders - pleas – plea bargaining – prosecutor accepting plea to lesser charge – plea of guilty to lesser charge – accused “discharged” from serious charge – election of crown to proceed with more serious charge – whether autrefois convict – whether proceedings should be permanently stayed

Justice Act
Juvenile Justice Act

REPRESENTATION:

Counsel:

Plaintiff:	B Cassells
Defendants:	R Coates with G Bryant

Solicitors:

Plaintiff:	North Australian Aboriginal Justice Agency
Defendants:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	ril0607
Number of pages:	17

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

Knight v Littman & Luppino [2006] NTSC 33
No JA 40 of 2006 (20610027)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an application for a permanent stay of proceedings

BETWEEN:

KNIGHT, Bradley John
Plaintiff

AND:

LITTMAN, Andrew Kevyn
First defendant

and

LUPPINO, Vincent Michael
Second defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 24 April 2006)

[1] This matter has a convoluted history. On 2 May 2005 the plaintiff and another, Rudi Kurt Muller, were involved in an assault upon MJD, a person

previously unknown to them. The assault was random in nature and resulted in MJD suffering serious injury.

[2] The plaintiff and Mr Muller were jointly charged by way of an information for an indictable offence with having unlawfully caused grievous harm to MJD. Subsequently the plaintiff was also charged upon information with assaulting MJD causing him bodily harm. The offence of causing grievous harm carries a maximum penalty of imprisonment for 14 years. The offence of assault occasioning bodily harm carries a maximum penalty of imprisonment for five years. Each of the charges was laid under the provisions of the Juvenile Justice Act.

[3] Mr Muller pleaded guilty to the charge of causing grievous harm to MJD before Mr Lowndes SM in the Juvenile Court and was committed to this Court for sentence. He was granted bail but at a later time failed to appear. It is understood that he has left the jurisdiction and is presently overseas.

[4] The proceedings relating to the plaintiff were the subject of discussion and negotiation between a Crown prosecutor and counsel for the plaintiff. On 11 October 2005 the plaintiff pleaded guilty before Mr Trigg SM in the Juvenile Court to having unlawfully assaulted MJD causing him bodily harm. The parties placed before the court a statement of agreed facts and Mr Trigg SM then recorded that: "The defendant is found guilty of charge 2". He then granted "leave to withdraw charge 1 (the charge of causing grievous harm) and the defendant is discharged".

[5] Mr Trigg SM made observations regarding the serious nature of the conduct of the plaintiff and adjourned the matter so that a pre-sentence report could be obtained. Such a step is necessary under the Juvenile Justice Act if a period of detention is being contemplated by the court.

[6] Prior to the receipt of the pre-sentence report Mr Trigg SM became aware of the agreed facts that had been placed before Mr Lowndes SM in respect of the charge against Mr Muller. Those facts differed from the agreed facts placed before him in significant ways. Mr Trigg SM formed the view that he could not put those matters out of his mind and, on 21 October 2005, he disqualified himself from further dealing with the plaintiff. He adjourned the matter to be heard before Mr Lowndes SM so that both matters could be before the one magistrate.

[7] On 27 October 2005 the plaintiff's matter came before Mr Lowndes SM. Mr Lowndes initially expressed the view that as Mr Muller and the plaintiff were co-offenders he should deal with both, observing that: "You can't have two different magistrates dealing with diametrically opposed facts, it's just not in the interests of the administration of justice".

[8] There was discussion with counsel and the matter was adjourned to 4 November 2005 when further submissions were made and it was then further adjourned to 22 November 2005. On that day counsel for the Crown acknowledged that "the plea stands", meaning the guilty plea of the plaintiff to the charge of assault occasioning bodily harm. Counsel asked that the

matter be dealt with by way of a disputed facts hearing. His Honour observed that it "should proceed as a fully contested matter". He stated that it would be "a summary hearing" but that it may convert to a committal hearing. He noted that "if the juvenile is found guilty" then it may go to the Supreme Court for sentence in any event. He listed the matter for a summary hearing on 6 and 7 April 2006.

[9] The hearing on 6 April was before Mr Luppino SM. At that time the Crown was represented by different counsel who indicated to the court that it was proposed to proceed with a charge of causing grievous bodily harm with the charge of assault occasioning bodily harm as an alternative.

[10] The facts that had been placed before Mr Trigg SM at the time of the plea indicated that the plaintiff was present when the victim was assaulted. The victim was unknown to the plaintiff and his co-offender. The plaintiff was said to have approached the victim from behind and struck him to the back of the head with sufficient force to cause him to fall to the ground. It was not alleged that the plaintiff took any further part in the assault. The agreed facts then presented referred to the co-offender, Mr Muller, carrying out a vicious assault upon the victim whilst he was on the ground including kicking him to the face and upper body until he lost consciousness.

[11] When the matter came before Mr Luppino SM the procedural history of the matter was explained. It was intimated that the Crown wished to proceed with a charge of causing grievous harm. His Honour was asked by counsel

for the plaintiff to stay the proceedings. His Honour sensibly requested that he be provided with an opening by the Crown. In opening the case counsel for the Crown gave a summary of the allegations which was similar to that earlier provided to Mr Trigg SM but went on to allege that the involvement of the plaintiff in the assault upon the victim was greater than previously stated. The alleged involvement went beyond one blow to the back of the head. It included him kicking the victim to the upper body and the face. The Crown case had changed to allege more serious conduct on the part of the plaintiff.

[12] Mr Luppino SM refused the application to grant a stay. He went on to observe that the allegations were "very serious" and that the suitability of the penalties available to the court meant the matter should be referred to the Supreme Court. He indicated that he would deal with the charges "as a committal". He referred to the earlier plea and asked whether it had been vacated, observing: "It must have been". He then said that as the matter was to proceed as a committal "the plea doesn't matter, no plea is taken on a committal".

[13] An application for a stay was made to a judge of the Supreme Court and, by consent, an interim stay was granted. The issue now is whether the interim stay should be made permanent or whether the committal should be permitted to proceed.

[14] I will come to that issue in a moment but before doing so I note the concern expressed by two of the magistrates as to the position in which they were placed, as a result of the plea agreement, when it became apparent to them that different facts were being placed before different magistrates in relation to different accused involved in the commission of an assault upon the same victim. This matter has been addressed in a general sense by the High Court in *GAS v The Queen* (2004) 78 ALJR 786. The Court (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) dealt in detail with the responsibilities of the prosecutor, the accused and, importantly, the court where a plea agreement had been entered into between the prosecutor and the accused person. The prosecution in that case arose out of the killing of an elderly woman by GAS and SJK who were juveniles aged 16 years and 15 years. They had both been charged with murder and were committed for trial. However the Crown was unable to establish which of the appellants had actually killed the victim. Prior to the jury being empanelled an agreement was reached between the Crown and the appellants whereby each pleaded guilty to the charge of manslaughter on the basis of aiding and abetting the manslaughter. The subsequent appeal against sentence ended up before the High Court. The observations of the Court (at 793) are worth repeating:

> "27. It is in those circumstances that it is now argued that what was done by the prosecution, in the conduct of the appeal to the Court of Appeal, and by the Court of Appeal, was contrary to 'the plea agreement reached with the defendants at trial'. The only information about any suggested agreement is that which

is set out above. In order to understand what might be involved in the concept of agreement, in those circumstances, it is necessary to have regard to certain fundamental principles.

28 First, it is the prosecutor, alone, who has the responsibility of deciding the charges to be preferred against an accused person. The judge has no role to play in that decision. There is no suggestion, in the present case, that the judge was in any way a party to the 'plea agreement' referred to. The appellants, through their counsel, evidently indicated to the prosecutor that, if a charge of manslaughter were to be substituted for the charge of murder, they would plead guilty, and the prosecutor filed a new presentment on that understanding. However, the charging of the appellants was a matter for the prosecutor.

29. Secondly, it is the accused person, alone, who must decide whether to plead guilty to the charge preferred. That decision must be made freely and, in this case, it was made with the benefit of legal advice. Once again, the judge is not, and in this case was not, involved in the decision. Such a decision is not made with any foreknowledge of the sentence that will be imposed. No doubt it will often be made in the light of professional advice as to what might reasonably be expected to happen, but that advice is the responsibility of the accused's legal representatives.

30. Thirdly, it is for the sentencing judge, alone, to decide the sentence to be imposed. For that purpose, the judge must find the relevant facts. In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge's capacity to find potentially relevant facts in a given case. The present appeal provides an example. The limitation arose from the absence of evidence as to who killed the victim, and the absence of any admission from either appellant that his involvement was more than that of an aider and abettor.

31. Fourthly, as a corollary to the third principle, there may be an understanding, between the prosecution and the defence, as to evidence that will be led, or admissions that will be made, but

that does not bind the judge, except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions. In deciding the sentence, the judge must apply to the facts as found the relevant law and sentencing principles. It is for the judge, assisted by the submissions of counsel, to decide and apply the law. There may be an understanding between counsel as to the submissions of law that they will make, but that does not bind the judge in any sense. The judge's responsibility to find and apply the law is not circumscribed by the conduct of counsel.

32. Fifthly, an erroneous submission of law may lead a judge into error and, if that occurs, the usual means of correcting the error is through the appeal process. It is the responsibility of the appeal court to apply the law. If a sentencing judge has been led into error by an erroneous legal submission by counsel, that may be a matter to be taken into account in the application of the statutory provisions and principles which govern the exercise of the appeal court's jurisdiction."

[15] In *Chow v DPP* (1992) 28 NSWLR 593 the New South Wales Court of Appeal addressed a situation where the prosecution and the defence agreed to an accused pleading guilty to a lesser offence and the court was invited to sentence the accused upon the basis of an agreed short statement of facts together with some brief evidence. The sentencing judge was concerned as to the propriety of the lesser charge and required the tender of depositions. In addressing the principles applicable to such a circumstance Kirby P observed (604 FF):

"(1) It is the function of prosecutors, not of judges, to determine whether a person will be prosecuted for a criminal offence and, if so, upon what offence. The judge is, at least ordinarily, bound by the charge which the prosecutor elects to bring … . Under our criminal justice system, the judge has no right to require the prosecutor to proceed on a 'higher' rather than a 'lesser' charge. Necessarily, the prosecutor will often have a great deal of material (some of it inadmissible) which

will be weighed in electing whether or not to prosecute and if so for what offence. The judiciary is not well placed to supervise such decisions. They belong, in any case, by statute, tradition and the principled demarcation of the prosecutorial and judicial functions, not to the judiciary but to the prosecution;

(2) Where an accused person has pleaded guilty, he or she is thereby taken to have admitted to guilt of the offence as charged 'and nothing more'. … Any dispute as to matters beyond such 'essential ingredients' admitted by the plea, must be resolved by the application of ordinary legal principles appropriate to a criminal trial … ;

(3) The role of the judge in sentencing, as elsewhere in the criminal trial, is controlled by the accusatorial nature which is fundamental to that trial. It is for the prosecutor to decide whether a person will be called as a witness. Save in the most exceptional circumstances, the judge should not take the initiative to call a person to give evidence, whether in a contested trial or to prove a fact relevant to sentencing which is not agreed. … In criminal proceedings, judges should avoid adopting an excessively inquisitorial role. They should maintain an appropriately neutral position. They should not usurp the function of the prosecutor or, where applicable, the jury. … ;

(4) This tradition [of manifest neutrality, restraint and impartiality] is not damaged by the candid disclosure on the part of a judge of concerns which he or she feels about aspects of the case before the court. … ;

(5) [A sentencing judge is not obliged] passively, and unquestioningly, to accept facts as the basis for sentencing which are presented by the prosecution and/or the accused. The judge's sentencing discretion is to be exercised in the public interest. Even where the prosecution and the accused are agreed, they cannot fetter the judge's performance of the judicial function by their plea bargaining: see *Malvaso* (1989) 168 CLR 227 at 233; *R v Altham* (Court of Criminal Appeal, 18 June 1992, unreported per Hunt CJ at CL). A statement of agreed facts may appear to the sentencing judge to be inadequate for sentencing purposes. The judge may feel the need for further material, for example, by way of pre-

sentence report to assist in the performance of the sentencing function. The parties cannot forbid the judge to seek such assistance. They have their respective functions to perform. But they cannot invade the judicial function any more than the judge may invade their functions;

(6) Nevertheless, where that judicial function is to be performed against the background of an agreement and acceptance of a plea to a 'lesser' charge, the judge will ordinarily be well advised to hesitate before assuming that a mistake has occurred, that the prosecutor has been tricked, that the representatives of the parties (who are under their own duties to the court) are seeking to mislead the judge, or that the judge's 'experienced eye' has perceived something which has escaped the attention of everyone else. Jumping to such conclusions affords an easy path to error;

(7) Least of all, is the judge entitled to proceed to sentence a person who has pleaded guilty to a lesser charge upon acceptance of a version of the facts which would constitute the more serious offence not charged, or actually abandoned. … ;

(8) In the protection of the public interest and the performance of the judicial function in sentencing, the judge may go behind the agreement of the parties as to the approach which they urge should be taken to the facts relevant to sentencing. But in that event, the judge must be careful to avoid the kind of procedural unfairness which is inherent in accepting a plea of guilty but then proceeding to impose a sentence upon a different factual substratum than that required by the essential ingredients of the offence and agreed between the parties when the plea was taken: cf *Malvoso* (at 233);"

[16] If a sentencer is unwilling to act on the facts presented to the court by counsel for the prosecution and counsel for the accused then he or she may call for "more cogent evidence from one or other of the parties": Fox and Freiberg "Sentencing State and Federal Law in Victoria": 2nd ed par 2.309. In the event that cogent evidence is not forthcoming there is little the court

can do. It may call for a pre-sentence report or a victim impact statement if they would assist. It would only be in the most exceptional of cases that the court would itself call a witness to give evidence. The judge should avoid "an excessively inquisitorial role". Ultimately the judge must make findings of fact based upon the material before the court and proceed to sentence accordingly. Of course once the evidence is before the court it is for the judge alone to decide the facts upon which the sentence is to be based: *Altham* (1992) 62 A Crim R 126 at 127.

[17] It is generally desirable for co-offenders to be dealt with together: *Lowie v The Queen* (1984) 154 CLR 606 at 617, 622. This limits the opportunity for conflicting versions of events to be placed before the court. It assists consideration of parity issues. It facilitates the comparison of conduct and antecedents and reduces the risk of unwarranted disparity between the sentences imposed. It encourages consistency of approach. However it will not always be possible for this to occur. If different judges are to deal with co-offenders the sentencer should, wherever possible, obtain details of the manner in which the co-accused was dealt, including any remarks made on sentence. In circumstances where there are co-offenders and conflicting versions of events are presented to the same, or different, judges it must be remembered that "the over-riding principle is that an offender is to be sentenced for the relevant offence with which he is charged and to which he has pleaded guilty, on the basis of facts either admitted by the nature of his plea, or by express admissions, or otherwise proved by admissible evidence

properly tested in the usual way by cross-examination which also allows the right to call evidence in rebuttal": *Scanlan* (1986) 21 A Crim R 428 at 434 per Rowland J.

The Juvenile Justice Act

[18] The Juvenile Justice Act provides a specific regime for dealing with indictable offences alleged to have been committed by juvenile offenders. By operation of s 35 of the Juvenile Justice Act where a juvenile is charged before a court with an offence which, if committed by an adult, is punishable by imprisonment for 12 months or longer, other than an offence punishable by imprisonment for life, the court shall hear and determine the matter in a summary manner. Section 36 of the Act then provides:

> "Where a juvenile is charged before the Court with an offence and –
>
> (a) the Court is not empowered to hear and determine the matter in a summary manner; or
>
> (b) the Court is so empowered but decides not to hear and determine the matter in a summary manner,
>
> the Court shall, subject to this Act, deal with the charge in accordance with the provisions of the *Justices Act* relating to indictable offences."

[19] Where a juvenile is charged with an indictable offence the Juvenile Court may decline jurisdiction in accordance with s 38 of the Act which provides as follows:

"(1) Where a juvenile is charged before the Court with an indictable offence that the Court is empowered to deal with in a summary manner, the Court may, of its own motion or on application by or on behalf of the informant, if it is of the opinion that the evidence has established a prima facie case against the juvenile in respect of an indictable offence, decline to deal with the charge in a summary manner and, in that case, shall, subject to this Act, deal with the charge in accordance with the provisions of the *Justices Act* relating to indictable offences.

(2) Before declining under subsection (1) to deal with a charge, the Court shall have regard to such matters as seem to it to be relevant and, in particular –

(a) the nature of the facts;

(b) the seriousness of the offence;

(c) the circumstances in which the offence is alleged to have been committed;

(d) the age of the juvenile;

(e) the apparent maturity of the juvenile;

(f) the apparent mental capacity of the juvenile;

(g) the suitability of the penalties available to the Court; and

(h) the difficulty of any question of law that is likely to arise."

[20] In declining to deal with the plaintiff's matter in a summary manner Mr Luppino SM proceeded in accordance with the provisions of the Juvenile Justice Act. He concluded that the offence was too serious to be dealt with in the Juvenile Court and therefore determined that the matter should

proceed by way of committal proceeding in accordance with the provisions of the Justices Act relating to indictable offences.

[21] The matters that were before him at that time, according to the prosecutor, were a charge of causing grievous harm and a charge of assault occasioning bodily harm. The submission of the plaintiff was that the only matter that should have been before his Honour was the charge of causing bodily harm, to which the plaintiff had already pleaded guilty. The charge of causing grievous harm had been withdrawn and the plaintiff discharged in relation to that count.

[22] As can be seen, the history of the matter is far from clear. When it came before Mr Luppino SM the position was that the plaintiff had entered a plea of guilty to the offence of assault occasioning bodily harm and he had done so on the basis of agreed facts. The plaintiff had been found guilty but had not been convicted and had not been sentenced. The plea had not been withdrawn or vacated. Prior to the commencement of the hearing before Mr Luppino SM the Crown had revisited the matter and determined that the evidence showed the involvement of the plaintiff to be greater than originally understood. The Crown therefore wished to press ahead with the more serious charge of causing grievous harm with the charge of assault occasioning bodily harm as an alternative.

[23] Had the matter involved an adult accused entering a plea of guilty in the Supreme Court the Crown may have sought to obtain the leave of the court

to withdraw its acceptance of the plea of guilty: *Maxwell* (1996) 184 CLR 501; *R v RSP* [2004] NTSC 14. The circumstances of a juvenile accused are to be determined in light of the statutory regime referred to above.

[24] Section 106A(3) of the Justices Act has application. The plaintiff had pleaded guilty to an offence contrary to s 188(2)(a) of the Criminal Code and consideration of that charge fell within the ambit of the offences contemplated by s 106A of the Justices Act. Section 106A(3) of the Justices Act provides:

> "If after the defendant has so pleaded guilty to an offence, the Magistrate, on consideration of any facts stated by the prosecution or given in evidence, is of the opinion that the time for taking the plea should be postponed, the Magistrate may order that the plea of guilty be withdrawn and thereupon all further proceedings in respect of the offence are to be conducted in accordance with this Part; but if any such further proceedings are taken the defendant is not, by reason of his or her plea of guilty, entitled to plead autrefois convict."

[25] At the hearing before Mr Luppino SM the prosecutor stated the facts that were to be alleged and Mr Luppino SM formed the view that the plea of guilty should be withdrawn. The order for withdrawal was not actually made, however it is clear from his remarks that such was the intention of his Honour had the interim stay not been granted. Following the withdrawal of the plea the hearing of that charge would proceed in accordance with Part V of the Justices Act in the manner anticipated by his Honour.

[26] The plaintiff raised the application of the defence of autrefois convict, however that defence is specifically dealt with in s 106A of the Justices Act.

Further, any prejudice that may have been suffered by the plaintiff consequent upon the plea entered, is met by the undertaking given on behalf of the Crown not to use any admission implicit or explicit arising out of the plea, or any material surrounding the presentation of the Information previously pleaded to, the plea entered or any circumstances surrounding the presentation of that Information and the plea entered.

[27] By operation of s 112 of the Justices Act, when the examination is completed the learned magistrate shall consider whether the evidence is sufficient to put the plaintiff upon his trial for any indictable offence. Depending upon the view the learned magistrate takes of the evidence that may include a charge of causing grievous harm. The magistrate is not limited to the offence or offences disclosed in the information presented to him at the commencement of the committal proceedings.

Grievous harm

[28] On 11 October 2005 Mr Trigg SM gave leave to withdraw the charge against the plaintiff of causing grievous harm. In so doing he noted that the plaintiff was "discharged" in relation to that offence. An issue arises as to what that expression means in the context.

[29] The word "discharged" may have many different meanings. In the present context it means "released" or "freed". It applied to the plaintiff in circumstances where the charge of causing grievous harm against him had been withdrawn. In the circumstances the plaintiff was released or freed

from his obligations in respect of that charge. He no longer had an obligation to present himself to be tried in respect of the charge and was released from his obligation to observe any relevant bail conditions that may have applied to him. It does not mean that he was to be discharged from liability from further prosecution in respect of such a charge. It does not mean that he has been "acquitted". It does not preclude the Crown from bringing further proceedings against the plaintiff. If there is to be any interference by the court with the right of the Crown to proceed further it will lie in the realm of the inherent jurisdiction of the court to stay proceedings for abuse of process. Whether or not such a course is available in the circumstances of this matter has not been addressed by the parties. As to the meaning of "discharge" in other contexts see generally the discussion in *Hill* (1982) Tas R 1; *R v Derrick & Ors* (1984) 29 NTR 9 and *R v Jenkin* (1994) 1 Qd R 266.

[30] I see no basis to extend the stay of proceedings.

———————