Rockman v Smallridge [2012] NTSC 56

PARTIES:	ROCKMAN, Bradley
	v
	SMALLRIDGE, Gary
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 8 of 2012 (21118079)
DELIVERED:	8 August 2012
HEARING DATES:	17 July 2012
JUDGMENT OF:	MILDREN J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION (MR R WALLACE SM)

CATCHWORDS:

CONSTITUTIONAL LAW – *Liquor Act* (NT) – *Northern Territory National Emergency Response Act 2007* (Cth) – whether s 75 of *Liquor Act* inconsistent with Commonwealth legislation – general principles discussed.

STATUTORY INTERPRETATION – *Liquor Act* (NT) s 75 – whether offences of bringing liquor or controlling liquor in restricted area still exist – whether repugnant to *Northern Territory National Emergency Response Act 2007* (Cth) s 12.

EVIDENCE – whether certificate under s 75(2) of *Liquor Act* (NT) admissible to prove that location of offence occurred in a "prescribed area" for the purposes of the *Liquor Act* as modified by the *Northern Territory National Emergency Response Act 2007* (Cth).

Liquor Act (NT)
Northern Territory National Emergency Response Act 2007 (Cth)

Attorney-General (NT) v Minister for Aboriginal Affairs & Ors (1989) 90 ALR 59; *Federal Capital Commission v Laristan Building & Investment Company Pty Ltd* (1929) 42 CLR 582; *Northern Territory of Australia v GPAO & Ors* (1999) 196 CLR 553; *The Queen v Kearney; Ex parte Japanangka* (1983-1984) 158 CLR 395; *University of Wollongong v Metwally* (1984) 158 CLR 447; *Webster & Anor v McIntosh* (1980) 32 ALR 603, applied.

REPRESENTATION:

Counsel:

Appellant:	L Bennett
Respondent:	L Wilson

Solicitors:

Appellant:	L Bennett
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID number:	Mil12520
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Rockman v Smallridge [2012] NTSC 56
No. JA 8 of 2012 (21118079)

BETWEEN:

BRADLEY ROCKMAN
Appellant

AND:

GARY SMALLRIDGE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 08 August 2012)

[1] The appellant was charged on complaint in that, on 6 June 2011, at Lajamanu, in the Northern Territory of Australia, did control liquor, namely, two 1.125-litre bottles of Bundaberg Rum and nine 375-millilitre cans of VB Beer within a restricted area, namely, Lajamanu community, contrary to section 75(1)(b) of the *Liquor Act*. He was further charged with a count that, on 6 June 2011, at Lajamanu, in the Northern Territory of Australia, he brought liquor, namely, two 1.125-litre bottles of Bundaberg Rum and nine 375-millilitre cans of VB Beer into a restricted area, namely, Lajamanu community, contrary to section 75(1)(a) of the *Liquor Act*. The appellant pleaded not guilty. After a summary hearing, he was found guilty on both

counts. The learned Magistrate imposed an aggregate fine of $250.00, with two $40.00 victim levies.

[2] The appeal to this Court is on the following grounds:

1. The appellant was incorrectly charged and that the offences of which he was found guilty did not exist in the Northern Territory.

2. There was insufficient evidence as to a prescribed area to found a finding of guilt in relation to each of the charges.

Background matters

[3] Section 75(1) and (1AA) of the *Liquor Act* provides:

> (1) A person commits an offence if the person:
> (a) brings liquor into a general restricted area; or
> (b) has liquor in his or her possession, or under his or her control, in a general restricted area.
> Maximum penalty: 100 penalty units or imprisonment for 6 months.
> (1AA) An offence against subsection (1) is a regulatory offence.

[4] Section 75(2) provides:

> (2) In any proceeding for an offence against this section, a certificate, purporting to be signed by a person who claims in the certificate to be the Director or a Deputy Director, stating that a place was or was not, at a specified time, within a restricted area is evidence of the facts stated.

[5] Under section 74 of the *Liquor Act*, the Northern Territory Licensing Commission may declare a specified area of land to be a general restricted area, or declare a specified area of land other than the private premises to be a public restricted area. Section 75(1B) provides that a person commits an

offence if a person consumes liquor within a public restricted area. That is also an offence of strict liability (see section 75(1BA)).

[6] The facts as found by the learned Magistrate were that, at about 3:00 am, the police attended a disturbance in Lajamanu community, as a result of which they found the liquor piled up on the front passenger's seat of a vehicle which was parked adjacent to a house in the community and within the restricted area according to a certificate that had been admitted into evidence. Shortly before this, the police had heard the sound of a car horn. They saw the appellant in the driver's seat of the motor vehicle. They saw the appellant getting out of the motor vehicle and then noticed the alcohol in the passenger's seat. The learned Magistrate was satisfied that the appellant, as the driver of the motor vehicle, had brought the liquor, as well as a number of other people, into the restricted area and, that at the time, that the police found the appellant in the vehicle, he was in the driver's seat and there was no one else in the vehicle. The vehicle belonged to the appellant and, in those circumstances, the learned Magistrate found that the liquor was under his control.

Submissions of the Appellant

[7] The appellant's submission in relation to ground 1 of the appeal is based upon section 12 of *Northern Territory National Emergency Response Act 2007* (Cth) (the Response Act).

[8] The Response Act provides in the object clause (s 5) that the object of the Act is to improve the well-being of certain communities in the Northern Territory.

[9] Part 2 of the Act deals with alcohol. Section 6A provides that the object of this part is to enable special measures to be taken to reduce alcohol-related harm in Indigenous communities in the Northern Territory.

[10] Section 7 provides:

> Expressions used in this Part that are defined in the *Liquor Act* have the same meanings as in that Act.

[11] Section 9 provides:

> The *Liquor Act*, the *Liquor Regulations* and the *Police Administration Act* have effect subject to the modifications in this Part in relation to a prescribed area.

[12] Section 10 provides:

> The *Liquor Act*, the *Liquor Regulations* and the *Police Administration Act*, as modified by this Part, have effect as laws of the Northern Territory.

[13] The words "prescribed areas" are defined in section 4 of the Act. Section 4(2) provides that:

> (2) The areas are:
>
> (a) an area covered by paragraph (a) of the definition of *Aboriginal land* in subsection 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* ; and
>
> (b) any roads, rivers, streams, estuaries or other areas that:
>
> (i) are expressly excluded under Schedule 1 to that Act; or
>
> (ii) are excluded from grants under that Act because of subsection 12(3) or (3A) of that Act; and
>
> (c) land granted to an association under subsection 46(1A) of the *Lands Acquisition Act* of the Northern Territory (including that land as held by a successor to an association); and

(d) each area in the Northern Territory identified in a declaration under subsection (3).

[14] Subsections (3) and (4) of section 4 enable the Commonwealth Minister to declare other areas as prescribed areas.

[15] Section 12 of the Response Act provides:

> (1) The *Liquor Act* has effect as if:
> (a) each prescribed area were a general restricted area under that Act; and
> (b) the offences against subsection 75(1) of that Act, so far as they relate to a prescribed area, were replaced by the following provisions of this section.

[16] Subsection 2 provides:

> (2) A person commits an offence if:
> (a) the person:
> (i) brings liquor into an area; or
> (ii) has liquor in his or her possession or control within an area; or
> (iii) consumes liquor within an area; and
> (b) the area is a prescribed area.
> Maximum penalty:
> (c) 10 penalty units for a first offence; or
> (d) 20 penalty units for a second or subsequent offence.

[17] It is well established that to the extent of any inconsistency between a law of the Northern Territory and a law of the Commonwealth, the latter must prevail.

[18] The precise reason why this is so and the principles to be applied have been discussed in a number of authorities. In the *Federal Capital Commission v Laristan Building & Investment Company Pty Ltd*,[1] Dixon J treated the issue of one of repugnancy to a Commonwealth statute. It was similarly dealt

[1] (1929) 42 CLR 582 at 588.

with by the Full Court of the Federal Court of Australia in *Webster & Anor v McIntosh*[2] where Brennan J said:

> "Where one of the laws is an Act of the Parliament and the other is an Ordinance of the Australian Capital Territory made under section 12 of the *Seat of Government (Administration) Act 1910*, the relevant question is not whether the Act can be so construed as to leave room for the operation of the Ordinance, but whether the Ordinance is repugnant to the Act."

[19] In *Attorney-General (NT) v Minister for Aboriginal Affairs & Ors*,[3] Lockhart J said:

> "It is beyond the power of the Northern Territory of Australia to make laws repugnant to or inconsistent with laws of the Commonwealth or to exercise powers conferred by Northern Territory laws in a manner inconsistent with, or repugnant to laws of the Commonwealth. It is not a question of inconsistency between the two sets of laws which may otherwise be valid, rather it is a question going to the competency of the subordinate legislature to enact laws or to cause laws to operate in a manner inconsistent with or repugnant to laws of the paramount legislature. Nor can a provision of a law of the Northern Territory operate so as to prevent or curtail the enforcement or enjoyment of a right conferred by a law of the Commonwealth."

[20] Von Doussa J said:[4]

> "I also agree with Lockhart J that the *Northern Territory (Self-Government) Act*, and the grant of self-government which it bestows, must be regarded as a particular exercise of Commonwealth power pursuant to section 122 of the Constitution. The exercise by the Northern Territory of the powers of self-government, and the laws of the Northern Territory must not conflict with the laws of the Commonwealth. In the case of conflict the Commonwealth laws have primacy."

[21] In *The Queen v Kearney; Ex parte Japanangka*,[5] Brennan J said:

> "It is beyond the capacity of a law of the Northern Territory or of the exercise of any power which such a law confers to affect the operation of a law of the Commonwealth or to destroy or to detract from a right

[2] (1980) 32 ALR 603 at 605.
[3] (1989) 90 ALR 59 at 75.
[4] Ibid at page 110.
[5] (1983-1984) 158 CLR 395 at 418.

thereby conferred unless a law of the Commonwealth so provides, expressly or by implication."

[22] In *University of Wollongong v Metwally*,[6] Mason J said:

> "It is significant that a conflict between a Commonwealth law and a territory law, which is unaffected by the provisions of section 109 [of the Constitution], is resolved in favour of the primacy of the Commonwealth law by reference to the same doctrine of inconsistency."

[23] In *Northern Territory of Australia v GPAO & Ors*,[7] Gleeson CJ and Gummow J said:

> "It is consistent with the imposition of this limitation upon the power of the Legislative Assembly with respect to pre-existing laws of the Commonwealth that no provision is made in the Self-Government Act with respect to the alteration or repeal by the Legislative Assembly of laws subsequently enacted by the Parliament of the Commonwealth. The phrase "to make laws for the peace, order and good government of the Territory" in section 6 of the Self-Government Act should not be construed as conferring such an extensive form of authority."

[24] In the same case, Kirby J said:[8]

> "Addressing the "threshold" question, it is essential to clarify the criteria by which inconsistency or repugnancy between the relevant federal and territory law are to be judged. Because section 109 of the Constitution does not attach according to its terms, the judicial elaboration of "inconsistency" for that purpose does not, as such, apply. However, it is an established principle of the Constitution that, in the case of a conflict between a federal and a territory law, similar principles apply by analogy. If the federal law is valid under the Constitution and applicable in accordance with its terms, it prevails. It permits no law, State or territory, to operate where, were the latter to do so, it would result in the imposition of inconsistent rights or obligations."

[25] The question then is what is the proper construction to be given to the provisions of the Response Act? The argument of counsel for the appellant was the term "restricted area" has no relevance in relation to the charge

[6] (1984) 158 CLR 447 at 464.
[7] (1999) 196 CLR 553 at 579.
[8] Ibid at page 636, para 209.

brought pursuant to section 75 of the *Liquor Act* and that what the Crown needs to prove beyond reasonable doubt was that the relevant liquor the subject of the charges was within a prescribed area at the relevant time.

[26] I do not think this is the correct construction to be given to the Response Act. In my opinion, the argument would have had some force if section 12(1)(a) had provided that the *Liquor Act* has effect as if a general restricted area under that Act was a prescribed area, but that is not what section 12 says. Furthermore, section 12(1)(b) uses the expression that the offences against section 75(1) of that Act "so far as they relate to a prescribed area" are replaced by the following provisions of the section.

[27] In other words, it seems to me that the modifications provided by the *Liquor Act* only have effect in prescribed areas, and that in dealing with an offence against section 75(1) of the Act, each prescribed area is treated as a general restricted area under the *Liquor Act*.

[28] It is notable that the Response Act does not purport to repeal any of the provisions of the *Liquor Act* which are relevant to this case. I do not think it was the intention of the Commonwealth to, in effect, repeal section 75(1) of the *Liquor Act*. This is supported not only by the wording of section 12 itself, but also by the fact that section 9 and section 10 of the Response Act talk about "modifying" the *Liquor Act* rather than repealing it. It is further to be noted that section 12(1)(a) modifies the *Liquor Act* as if each prescribed area were a general restricted area under the *Liquor Act*. The

conclusion to be drawn from this is that section 75 of the *Liquor Act* is not amended at all.

[29] It is, therefore, incorrect to say that the offence of bringing liquor into a restricted area or having liquor within a restricted area under a person's control cannot be charged as if it were an offence against section 75, using the terminology "restricted area" or "general restricted area".

[30] So far as section 12(2) is concerned, para (a) does not materially alter the wording of section 75 of the *Liquor Act.*

[31] However, if the area is a prescribed area, I consider that section 12(2) does create an offence in itself. To the extent that the relevant area is both a general restricted area as well as a prescribed area, the provisions of section 12(2) of the Response Act must take priority over section 75 of the *Liquor Act* in accordance with the general principles to which I have referred in the authorities cited above. This is because of the paramouncy of Commonwealth legislation. It is plain that the Commonwealth intended to create new offences which apply only to prescribed areas. If, therefore, the appellant committed the offence in a prescribed area, he could not be charged under section 75 of the *Liquor Act* in its original form because section 12(1)(b) provides that the offences against subsection 75(1) of the Act, *so far as they relate to a prescribed area*, are replaced by the following provisions of the section. I note there the word "replaced".

[32] The difficulty for the appellant is that there was no admissible evidence that the area in question was a prescribed area. As the appellant has correctly submitted, the only evidence that the prosecution tendered relating to this question was a certificate signed by the Acting Director of Licensing that the area of the land in question was "an area within a restricted area". Section 75(2) of the *Liquor* Act provides that such a certificate is prima facie evidence that the place referred to in the certificate was at a specified time, evidence of the facts stated. Both counsel agreed that s 12(1) of the Response Act does not apply in such a way as to enable a certificate issued under s 75(2) of the *Liquor Act* to deal with prescribed areas. This is clearly correct. The certificate went on to provide: "That restricted area of land, being Lajamanu, described in certificate of title NT Portion 01643, Lajamanu from Plan CP 004191 and as prescribed in Schedule 1, Part I, Clause 20 of the *Northern Territory National Emergency Response Act 2007*."

[33] Schedule 1, Part I, Clause 20 does not have any relevance to the definition of prescribed areas for the purposes of section 4 of the Response Act. Schedule 1 land in the Response Act has a relevance to Part IV of the Response Act, which deals with the acquisition of rights titles and interests in land. This is a different thing from section 4(2)(a), which deals inter alia with "an area covered by para (a) of the definition of Aboriginal land in subsection 3(1) of the *Aboriginal Land Rights (NT) Act 1976*." The relevant provisions of subsection 3(1)(a) of the *Aboriginal Land Rights (NT) Act*

1976 defines Aboriginal land to mean "land held by a Land Trust for an estate in fee simple".

[34] There was no evidence tendered at the hearing to this effect and there was no authority under either the *Liquor Act* or under the Response Act for a certificate to be issued which provided prima facie evidence to that effect either.

[35] There was, therefore, no evidence that the provisions of section 12(2) of the Response Act applied to the circumstances of this case.

[36] I note that there was no point taken in the Court below that the alleged offences took place on Aboriginal land. Had that occurred, and had it been proved that the offences occurred in a prescribed area, no doubt simple amendments could have been made to the complaint.

[37] As to ground 2 of the Notice of Appeal, I accept that that ground is made out, but it is a ground which has no relevance to the outcome of the appeal. It was never put in issue in the Court below that the land was Aboriginal land and, therefore, a prescribed area. In those circumstances, the prosecutor was not obliged to prove the contrary.

Conclusion

[38] The appeal must be dismissed.