Graham v Atkins [2006] NTSC 51

PARTIES:	GRAHAM, Benjamin v ATKINS, Sandy Lee
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 22 of 2005 (20414874)
DELIVERED:	7 JUNE 2006
HEARING DATES:	7 JUNE 2006
JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	COURT OF SUMMARY JURISDICTION 20414874, 5 MAY 2005

CATCHWORDS:

CRIMINAL LAW
Appeal –Justices Appeal – appeal against conviction – plea not taken at outset of trial - s 67 Justices Act not complied with - remarks by Magistrate about counsel - requirements of restraint by judicial officers in use of language - appeal allowed.

Justices Act (NT), s 67

Tutty v Reinke (NTSC, unreported decision delivered 28 March 2006), followed.

REPRESENTATION:

Counsel:

Appellant:	A McLaren
Respondent:	D Lewis

Solicitors:

Appellant:	McLaren's
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Mar0609
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Graham v Atkins [2006] NTSC 51
No. JA22 of 2005 (20414874)

BETWEEN:

BENJAMIN GRAHAM
Appellant

AND:

SANDY LEE ATKINS
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 7 June 2006)

[1] The appellant appeals against his conviction for the offence of Dangerous Act. The Crown concedes that the appeal must be allowed.

[2] The hearing of the complaint commenced on 5 April 2005 before his Honour, Mr Loadman SM. At the outset counsel for the appellant raised a number of preliminary issues. Following resolution of those issues a trial proceeded with the calling of witnesses.

[3] Unfortunately the Magistrate and counsel overlooked the requirement found in s 67 of the Justices Act that the substance of a complaint be stated to the appellant and that he be asked if he has any cause to show why he should not be found guilty.

[4] In effect, the requirement that the appellant be asked to plead to the charge was overlooked.

[5] The failure to ask the appellant to plead was first brought to the attention of the Magistrate on 3 May 2005 after the conclusion of the evidence and submissions and as his Honour was commencing his oral reasons for judgment. His Honour ceased giving his reasons and the charges were read to the appellant. He pleaded not guilty.

[6] On 5 May 2005 submissions were made to the Magistrate as to whether the trial had miscarried. Notwithstanding a judgment of the Supreme Court that compliance with s 67 is mandatory, His Honour rejected the submission that the trial had miscarried. His Honour was in error. The correct position was summarised by Mildren J in *Tutty v Reinke* (unreported decision delivered 28 March 2006) in the following terms:

> "I think the authorities are very clear that a provision such as s 67 of the Justices Act is mandatory as it founds, in effect, the jurisdiction of the magistrate to hear the case. Non-compliance with this provision therefore renders the proceedings a nullity"

[7] In *Tutty*, after two witnesses had been called the Magistrate realised that the defendant had not been properly charged. The charge was read and a plea was taken. In that context Mildren J observed that had the Magistrate then arranged for the witnesses whose evidence he had already heard to be recalled, or had the defendant waived that requirement and advised the Magistrate that the defendant was prepared to treat that evidence as if it had

been heard after the charges had been read, then the problem may have been cured. No such attempt was made in the matter under consideration. The appeal must be allowed.

[8] In considering the course of the trial I had occasion to read the transcript. It reveals that on a number of occasions the Magistrate was frustrated by points taken by counsel for the appellant. While there may well have been good reason at times to feel frustrated, it is unfortunate that his Honour, without good cause, chose on more than one occasion to verbally attack counsel for the appellant and to level accusations against her.

[9] The proper administration of justice requires that even in the face of extreme frustration, judicial officers exercise restraint in their language and show courtesy toward counsel, parties and witnesses. While at times firmness and perhaps plainer than usual language by a judicial officer is both justified and required, the wider interest of the administration of justice require that such firmness and language be delivered courteously and without verbal abuse or intimidation.

[10] As to bringing the failure to require the appellant to plead to the attention of the Magistrate, counsel for the appellant advised his Honour that it was not until she had perused the transcript that she realised the error had occurred. The same counsel advised me that it was in the course of preparing submissions that she came to the realisation that the error had occurred and it had been her intention to bring the error to the attention of the Magistrate

during her submissions. However, she overlooked doing so. At the time His Honour commenced his oral reasons counsel remembered that she had omitted to make the point about the error.

[11] It is well recognised that the primary duty of counsel is to the court. This includes a duty to assist the court in avoiding an appealable error. In the matter under consideration counsel was not aware of the error until well after the evidence given on the first day of the hearing had been completed.

[12] In compliance with the duty to the court, as soon as counsel became aware of the error counsel should have drawn the error to the attention of the Magistrate. In submissions before the Magistrate counsel suggested that she did not owe the prosecution a duty to advise them of the error. That submission was misconceived.

[13] The error under consideration was not in the nature of an error by the prosecution in the conduct of its case which, for example, might have left an inadequacy in the prosecution evidence adduced in proof of a charge. In such circumstances there is no duty on counsel for a defendant to inform the prosecution of the deficiency. By way of contract, the error under consideration involved a fundamental procedure going to the validity of the proceedings in their entirety. In those circumstances it was the duty of counsel to bring the matter to the attention of the Magistrate as soon as counsel became aware of the error.

[14] Having made those observations, I accept that counsel mistakenly believed she was not obliged to bring the matter to the attention of the court or prosecution during the course of the evidence given on the second day of the hearing. I also accept that she overlooked bringing the matter to the attention of the Magistrate during her closing submissions. In the particular circumstances it made no practical difference that the disclosure of the error was delayed during the second day.

[15] I have already addressed remarks to the language used by the Magistrate during the course of the trial. I find it necessary to add that in the course of his Honour's reasons for rejecting the application for a mistrial, his Honour made particularly unfortunate remarks about the conduct of counsel in the context of that application. While his Honour properly rejected the submission of counsel that she was not obliged to bring the error to the attention of the prosecution, and while his Honour understandably felt particularly frustrated that the issue had arisen at such a late stage, nevertheless some of his Honour's remarks which amounted to an attack upon the integrity of counsel for the appellant were utterly unjustified and should not have been made.

[16] The appeal is allowed and the matter is remitted to the Magistrates Court for re-hearing. I direct that the re-hearing be conducted before a different Magistrate.
