Smith v The Queen [2006] NTSC 60

PARTIES:	SMITH, Kenneth Noel Applicant v THE QUEEN Respondent
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SCC 20510113
DELIVERED:	3 August 2006
HEARING DATES:	19 July 2006
JUDGMENT OF:	Olsson AJ

CATCHWORDS:

CRIMINAL LAW – EVIDENCE AND PROCEDURE

Application for stay of proceedings – non availability of samples preventing further testing – whether irretrievable prejudice to accused – delay on the part of an accused raising the issue a relevant consideration –

Application refused

Williams v Spautz (1992) 174 CLR 509, followed
Jago v District Court of New South Wales (1989)168 CLR 23, followed
Johanssen and Chambers (1996) 87 A Crim R 126, distinguished

R v Glynn (2002) 82 SASR 426, followed
Holmden v Bitar (1987) 47 SASR 509, distinguished
R v Devenish [1969] VR 737, distinguished
R v Reeves (1994) 122 ACTR 1, distinguished
R v Roberts (1999) 106 A Crim R 6, followed
Carosella v The Queen (1997) 142 DLR (4th) 595, distinguished

REPRESENTATION:

Counsel:

Appellant:	J Lewis
Respondent:	N Rogers

Solicitors:

Appellant:	Salmon and Sinoch
Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Smith v The Queen [2006] NTSC 60
No SCC 20510113

BETWEEN:

SMITH, Kenneth Noel
Appellant

AND:

THE QUEEN
Respondent

CORAM: Olsson AJ

REASONS FOR JUDGMENT

Introduction

1. On 19 July 2006 the accused filed an application pursuant to s339 (1) (a) of the Criminal Code that the indictment presented in these proceedings by the Director of Public Prosecutions be quashed on the ground "that it is calculated to prejudice or embarrass the accused in his defence to the charge". It was, however, argued on the basis that, in reality, the accused was seeking an order that the proceedings on the indictment be permanently stayed on the ground that, in the circumstances to which I shall refer, there is no possibility of a fair hearing (cf *Johanssen and Chambers (1996) 87 A Crim R 126 at 131-132).*

2. At the conclusion of the submissions of counsel I indicated that I was not prepared to grant the accused's application and would publish my reasons at a later date. I now do so.

Background

3. The indictment in this matter avers that, between 26 April 2005 and 27 April 2005 at Daly Waters the accused stole a quantity of diesel fuel, the property of Power and Water Corporation.

4. The accused was arrested on 29 April and charged with that offence. The Crown brief was served on the defence on 29 July 2005. An oral committal took place on 9 and 10 November 2005 and the indictment was filed on 13 December 2005. A pre-trial conference was held on 11 January 2006 and the matter was listed for trial commencing on 9 May 2006.

5. However, that date was vacated and the trial re-listed for the June sittings because of the inability of the accused to raise necessary funds for his defence. He was said to be asset rich but cash poor and, *inter alia*, desired to seek advice from a potential expert witness. He needed time to raise the necessary money to retain that expert.

6. I here pause to record that the accused has been represented by a legal practitioner experienced in criminal matters from a time not long after his arrest. His solicitor cross-examined the key Crown witnesses (including an expert witness named Craig Hicks) at the committal.

7. In the course of the preparation of the Crown case, samples of fuel were taken from a Toyota flat-top utility of which the accused was registered as an owner and from tanks from which the relevant fuel was said to have been stolen. They were sent to Hicks for expert analysis. He reported the result of his analysis to the Director of Public Prosecutions on 3 August 2005 and, on 6 September 2005, a copy of his report was duly served on the defence.

8. The trial was re-scheduled for 19 June 2006. On 15 June 2006 the accused's solicitor wrote to the Director indicating that a petroleum expert retained by the defence requested access to certain fuel samples that had been procured by the police at about the time of the accused's arrest and analysed by Hicks.

9. The trial date in June 2006 also had to be vacated, because of the overrun of a preceding trial. It was re-listed to commence before me on 24 July 2006.

10. On 10 July 2006 the Director responded to the solicitor for the accused to the effect that the police had sent the entire samples that they had originally taken to Hicks and no residual material had been retained by him after analysis.

11. It appears that, at some time immediately prior to 13 July 2006, the defence had first sought advice from a petroleum expert, Michael Richards, concerning the evidence given by Hicks at the committal hearing. Richards

advanced some criticism of the analytical technique adopted by Hicks and, in effect, recommended that further, more comprehensive, testing be carried out in an endeavour to place the provenance of the critical fuel samples beyond doubt. As I understand his report, he did not criticise the Hicks results *per se*, but, rather, suggested that, taken alone, they did not produce a fully validated, conclusive result.

12. The defence argues that the present non-availability of the fuel samples effectively prevents its expert from carrying out further testing that could be important to the development of its case and that it has therefore suffered substantial irretrievable prejudice.

The nature of the Crown case

13. The defence complaint falls to be considered in light of the manner in which the Crown proposes to develop its case.

14. Dr Rogers, of counsel for the Director, submitted that the proposed evidence of Hicks was but one segment of a much broader and what she characterised as a very strong circumstantial evidence case proposed to be mounted against the accused. She said that key aspects of that case were:

- On the night of 26 April 2005 the proposed witness Carmichael and his partner drove past the power station at Daly Waters.
- They there observed a white flat top Toyota utility and trailer adjacent to the power station fuel tanks. These had a series of drums on them.
- The fence adjacent to the tanks had been breached and it was apparent that fuel was being taken from them.
- Carmichael pulled up and investigated. He called out the registration number of the Toyota vehicle and this was written down by his partner.
- A man with physical characteristics said to be similar to those of the accused appeared and said "*Don't put me in or report me, I'm desperate*", to which Carmichael responded "*Pack up and get out*".
- Subsequent inquiries revealed that the Toyota was registered to the accused who was an owner of Broadmere Station, about two hours' driving distance from Daly Waters.
- Pursuant to search warrants, the police entered Broadmere Station on 28 April 2005 and searches were thereafter carried out on it.
- Because of prior recent larcenies of fuel from the power station, a blue dye of a specific type had been added to the above ground fuel tanks sometime prior to 26 April 2005.
- When police searched at Broadmere Station they were particularly looking for fuel containing a blue dye. A sample taken from the Toyota sub tank contained such a dye. The fuel in the main tank of the vehicle did not contain that dye.

- Police noted that there were large, still damp, diesel stains on the tray of and on the ground behind the Toyota and that there were lines on the ground where drums had been rolled.
- The sample taken from the sub tank of the Toyota was supplied to Hicks, together with a sample that had been taken from one of the fuel tanks at the power station after the fuel had been dyed and before 26 April 2005, together with a sample of the blue dye that had been used.
- The two fuel samples were scanned by Hicks using gas chromatography, and this indicated that the hydrocarbon profiles of the fuel samples were near identical.

15. Mr Carmichael was unable to correctly identify the photograph of the accused on a photo board following the arrest of the accused, but he did indicate the photograph of a person said to have features not dissimilar to those of the accused.

Relevant legal principles

16. As was reiterated by Gray J in *R v Glynn (2002) 82 SASR 426 at 437*, the power to stay a criminal prosecution will only be used in most exceptional circumstances. It is an order of last resort that may only properly be made to prevent what would otherwise be an unfair trial, in circumstances tantamount to an abuse of process (*Williams v Spautz (1992) 174 CLR 509 at 519*). There is a strong public interest in the prosecution of serious offences and the conviction of offenders. In *Jago v District Court of New South Wales (1989) 168 CLR 23 at 33,* Mason CJ said:

> "The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation, without regard to the community's right to expect that persons charged with criminal offences are brought to trial".

17. Fitzgerald P pointed out in *Johanssen and Chambers* (at 133) that it is not every disadvantage to which an accused person might be exposed in the conduct of his or her defence that makes a prosecution an abuse of process. There are many circumstances that can occur in the course of criminal proceedings which are potentially detrimental to an accused. A favourable witness may die or be unavailable, a witness may be non-compellable, or refuse to cooperate and so on. As Dr Rogers pointed out, it is not infrequently the case that, in the normal course of testing, test material such as that found on swabs is routinely entirely used during the test process.

18. Delay on the part of an accused in raising an issue may be a relevant consideration with regard to any issue of asserted unfairness. This is well illustrated by the case of *Roberts (1999) 106 A Crim R 67.*

19. That case concerned the situation in which a Kenworth truck and a Commodore vehicle were found in the possession of the accused, who had previously reported them stolen. The Crown relied on expert evidence that some vehicle part numbers had been obliterated and changed. After expert examination, both vehicles had been disposed of by the Crown and could not be traced.

20. The matter took several years to come on for trial. Very shortly prior to the date fixed for trial the solicitors for the accused sought to have the vehicles examined, only to find them no longer available.

21. The Court of Criminal Appeal upheld a refusal to grant a stay. The point was made that, although the Crown expert's report had been served on the appellant in a timely manner, he waited a very long time before requesting an examination of the vehicles. It was said that an accused person was not entitled to proceed on the basis that the assets of another person that were of considerable value would be frozen until a trial was held. Test or inspections should have been carried out by the appellant with reasonable promptitude.

22. In *Roberts* the trial judge had stressed that, on the face of the situation, the Crown case was a strong one and the loss of an opportunity to examine the truck would not result in such unfairness as to warrant a permanent stay. Suitable directions could be given to the jury concerning the relevant lack of opportunity. (cf also *Johanssen and Chambers at 135*). It had been open to the appellant to have the vehicles examined well before the time of committal and he had not sought to do so. It was not known what a further examination might have revealed.

The issues in the present case

23. Mr Lewis of counsel for the accused acknowledged that the request made by the defence had been left until very shortly prior to trial, although he emphasised that the defence had at least flagged a desire to retain an independent expert as early as April 2006. There had been some delay, he said, in achieving this because of a lack of liquid resources available to the accused at that time. Mr Lewis had no explanation to offer as to why there had been no request to preserve samples at an earlier time, despite the fact that the accused had been represented by an experienced practitioner.

24. Is fair to say that Mr Lewis relied heavily on the cases of *R v Devenish [1969] VR 737, Johanssen and Chambers (supra), Holmden v Bitar (1987) 47 SASR 509, R v Reeves (1994) 122 ACTR 1* and the majority decision of the Supreme Court of Canada in *Carosella v The Queen (1997) 142 DLR (4th) 595* as illustrating and supporting his contention that the destruction of the relevant fuel and dye samples had the practical effect of causing such

irretrievable prejudice to the accused as to deny him the possibility of a fair trial.

25. I do not think that such examples are determinative of the matter now under consideration. They very much turned on the facts and circumstances of the individual case and were by no means on all fours with the facts now under consideration.

26. Generally speaking, as Dr Rogers pointed out, the authorities relied upon reflected circumstances in which there had been some loss or destruction of evidentiary material which went to what was at the very core of the Crown case and that had given rise to situations of quite acute prejudice to the relevant accused. By way of example:

    - In *Devenish* the appellant was accused of larceny as a servant, fraudulent conversion and false pretences. Critical to the Crown case was expert evidence proposed to be led as to the examination of what was said to be a false receipt signed in the handwriting of the accused in the name of a fictitious person. At some stage prior to trial the alleged false receipt and another important document were lost by the prosecution, thereby depriving the accused of any opportunity to procure contrary expert evidence. The Full Court made the point that the lost documentation constituted the very foundation of the case for the prosecution and that it would be unfair to permit the Crown, who had been responsible for its loss, merely to rely on secondary evidence of its expert as to the form and content of the material. As Dr Rogers pointed out, this is a far cry from the present case, in which the fuel sample analysis was but one of a significant number of strong circumstantial features relied on by the Crown.
    - In *Johanssen and Chambers* the accused were charged with murder some 20 years after the alleged offence and one of them actually died pending trial. The police brief was incomplete, witness statements had been lost, as had been two records of interview, the police running sheets, the police notebooks and numerous related records. Additionally, two persons who had given witness declarations had also died. The Court held that a critical factor was that, due to the delay in prosecuting the accused, with the concomitant loss of a great deal of the original evidentiary material and its obvious serious prejudice to the accused, it would be unduly oppressive to proceed against him and impossible to accord him a fair trial. In the circumstances, the prosecution after so long an unexplained delay and its practical consequences constituted an abuse of process. Once again, the destruction of the primary evidence went to a situation at the very core of the matters in issue and the actions of the

prosecution necessarily denied the accused the possibility of a fair trial. There is no parallel with the instant case.

- The case of *Reeves* concerned multiple counts of complicity, as a director of a company, in making false accounting documents and other offences under the Companies Act 1981 (Cth). At some time after the institution of the prosecution, the relevant company wound down certain of its operations and destroyed a massive quantity of its records. These included an external consultant's working papers, computer printouts and disks; the accused's personal files, expense sheets, travel documents, correspondence and lease documents; files kept by the bookkeeper of a relevant partnership and other documents. The external consultant in question had died by his own hand. The effect of the destruction of the records was that, because the external consultant was dead and relevant source documents had been destroyed, it had become difficult to prove what the relevant system of bookkeeping had been, let alone whether it was a proper system from which it could be demonstrated what was the true financial position and thus whether false and misleading statements had been produced. It followed that the destruction created a fundamental defect that went to the root of the trial and that a fair trial was not possible. It is immediately apparent that this also was an extreme case, far removed from the present circumstances.
- Finally, the case of *Carosella* concerned an accused who had been charged with having committed acts of gross indecency with the complainant many years previously. The complainant sought advice from a sexual assault crisis centre and was interviewed for almost two hours by social worker, who took written notes of the whole of the complainant's narrative. At the accused's trial the file of the crisis centre was subpoenaed by the defence. This was produced but it was found not to contain the written notes. It appeared that these had been deliberately shredded with a view to combating applications for production of records. The social worker had no recollection of the detailed content of the notes. By majority of five to four, the Supreme Court of Canada upheld the order for a stay that had been made by the trial judge on the basis that the deliberate destruction of the notes had seriously prejudiced the defence in being able to cross-examine the complainant as to the previous statements made by her. It must be said that a perusal of the extensive reasons for judgment in *Carosella* immediately reveals that, like many other decisions of the Supreme Court of Canada, it is very much a product of the statutory environment created by the Canadian Charter of Rights and Freedoms. The destruction was held to have constituted a breach of the accused's constitutional rights which was incapable of redress or mitigation. Credibility was a major issue in the case and the majority held that the destruction of the notes was a very significant, in that the accused was effectively denied an important

> means of testing the consistency of the complainant's story and being able to frame and appropriate strategy in cross-examination. It is to be borne in mind that the members of the Court were by no means unanimous in their views. Four of the nine judges were of the opinion that, notwithstanding the breach of Charter rights, the asserted prejudice resulting from the destruction of the notes was entirely speculative. It simply could not be demonstrated that the absence of the notes would necessarily result in an unfair trial. "*It was not enough to speculate that there was the potential for harm, as the notes might somehow have proved useful*".

27. I have dwelt upon the cases relied upon by Mr Lewis at some length because they serve to constitute a very substantial contrast between the extreme situations that have been held to warrant a stay and the factual circumstances related to the instant case.

28. It must firmly be borne in mind that the report of the accused's expert to which reference has been made does not seek to join issue with the propriety of the tests that were carried out by Hicks. Indeed, he describes the work done by Hicks as "*a good start to further investigations*". His contention will apparently be that the test results to date do not sufficiently support the contention that the samples tested were identical diesel fuels. Additional test methods would, in his opinion, have to be employed to arrive at such a conclusion. He also seeks, at least to some extent, to question certain of Mr Hicks' qualifications.

29. It at once becomes obvious that the non-availability of sample material to the accused's expert by no means forecloses either criticism advanced by that expert. It will still be open to the accused to call him to advance what are essentially technical, conceptual opinions designed to impugn the opinions expressed by Hicks. Had further tests been possible, these may or may not have produced some additional ammunition for use by the defence. However, to employ the language of the minority in *Carosella*, any asserted prejudice to the accused is entirely speculative.

30. At the end of the day it must be concluded that any problem perceived by the defence is substantially of the accused's own making. He has, at all material times, had the benefit of competent legal advice and, had the desire to conduct separate testing been communicated in a timely fashion, the present problem may well not have arisen. Perhaps this is not a situation entirely akin to the testing of swab material as adverted to by Dr Rogers, but what cannot be ignored is that the work and opinions of the Crown expert were available to the defence at an early stage and that expert was cross examined at the committal. No suggestion was made, even then, that sample material ought to be preserved.

31. True it is that the accused is said to have been impeded in preparing his defence until he had disposed of some of his apparently considerable assets, it being said that it was not until relatively recent times that he has had the liquid funds with which to retain expert advice. However, it seems to me that it has always been apparent that the stage would be reached when funds would become available and, if it was seen as a critical matter, a timely request could have been made to preserve some residual test material, if, indeed, any did remain at the conclusion of the Crown's testing process. It was not.

32. Be that as it may, what sounds the final death knell to the accused's application is the fact that the test result evidence does not constitute the main and central core of the Crown case. It is but one of what are said to be a substantial number of strong circumstantial facts relied on by the Crown and, as I have said, the accused remains in a position to seek to impugn the validity and significance of the testing process at trial in any event.

Conclusion

33. In the foregoing circumstances, the accused has fallen far short of establishing that this is one of those exceptional cases that compels the grant of a stay on the basis that he will not be able to secure a fair trial. On the contrary, I see no impediment to a fair trial in what has transpired.

34. It was for those reasons that I declined to accede to the accused's application.

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