

O'Neill v Lockyer [2012] NTSC 10

PARTIES: O'NEILL, Wayne
v
LOCKYER, Marissa

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: 104 of 2011 (21128817)

DELIVERED: 1 March 2012

HEARING DATES: 18 November 2011

JUDGMENT OF: BARR J

CATCHWORDS:

SPECIAL CASE STATED – MENTAL ILLNESS OR MENTAL
DISTURBANCE – SUMMARY JURISDICTION – DISMISSAL OF
CHARGE – ONUS OF PROOF

Mental Health and Related Services Act (NT) s 77 – provision of certificate
under s 77(2) – receipt of evidence additional to the certificate – court's
power to dismiss charges under s 77(4) – whether the court can rely on a
certificate to satisfy itself of mental illness or mental disturbance under
s 77(4)(a) – onus is on defendant to prove a defence under s 77(4)

Criminal Code s 43C, s 43D, s 43E, s 43F, s 43X, s 43ZA, s 189A
Justices Act s 162

Mental Health and Related Services Act s 77

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; *Dunstan v Comcare* [2011] FCAFC 108, applied.

Mununggurr v Gordon & Anor, Mununggurr v Balchin & Anor, Mununggurr v Gordon & Anor, Mununggurr v Gordon, Mununggurr v Gordon and Mununggurr v Balchin [2011] NTSC 82; *Sodeman v The King* (1936) 55 CLR 192, followed.

Taylor v Bamber & Anor [2011] NTSC 36, explained.

REPRESENTATION:

Counsel:

Informant and Complainant: P Usher
Defendant: J Hunyor and B Wild

Solicitors:

Informant and Complainant: Office of the Director of Public
Prosecutions
Defendant: North Australian Aboriginal Justice
Agency

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

O'Neill v Lockyer [2012] NTSC 10
No. 104 of 2011 (21128817)

BETWEEN:

WAYNE O'NEILL
Informant and Complainant

AND:

MARISSA LOCKYER
Defendant

CORAM: BARR J

REASONS FOR DECISION

(Delivered 1 March 2012)

Special case stated

- [1] On 1 September 2011 Suzanne Oliver SM, Stipendiary Magistrate for the Northern Territory of Australia, sitting as the Court of Summary Jurisdiction, stated a special case reserving questions of law for the consideration of the Supreme Court pursuant to s 162 *Justices Act*.¹
- [2] The defendant was charged on complaint before the Court of Summary Jurisdiction that, on 15 October 2010 at Darwin in the Northern Territory of Australia, being a person against whom a DVO was in force, she engaged in conduct that resulted in a contravention of a Domestic Violence Order,

¹ The special case was stated by the learned Magistrate before Reasons for Judgment were delivered by the Supreme Court in *Mununggurr v Gordon & Anor*, *Mununggurr v Balchin & Anor*, *Mununggurr v Gordon & Anor*, *Mununggurr v Gordon*, *Mununggurr v Gordon* and *Mununggurr v Balchin* [2011] NTSC 82, decision of Kelly J.

contrary to s 120(1) *Domestic and Family Violence Act*; and further on the same date, that she resisted a member of the police force in the execution of his duty, contrary to s 158 *Police Administration Act*. The defendant was also charged on information that on the same date she unlawfully assaulted a police officer, Constable Jennifer Young, in the execution of her duty, contrary to s 189A of the *Criminal Code*.

- [3] On 25 November 2010 the defendant appeared before the Court of Summary Jurisdiction on the above and other charges. The presiding magistrate, Dr Lowndes SM, requested a certificate in the approved form pursuant to s 77(2) *Mental Health and Related Services Act*.
- [4] Section 77 is the sole section within Division 2 in Part 10 of the *Mental Health and Related Services Act*. It reads as follows:-

“Division 2- Dismissal of charge following certificate from Chief Health Officer

77. Dismissal of charge

- (1) This section applies to a person if:
- (a) the person is charged with an offence in proceedings before a court (other than proceedings for a committal or preliminary hearing); and
 - (b) the court is exercising summary jurisdiction in the proceedings.
- (2) The court may request from the Chief Health Officer a certificate in the approved form stating:

- (a) whether at the time of carrying out the conduct constituting the alleged offence, the person was suffering from a mental illness or mental disturbance; and
- (b) if the person was suffering from a mental illness or mental disturbance – whether the mental illness or disturbance is likely to have materially contributed to the conduct.

(3) The Chief Health Officer must not give the court the certificate unless the Chief Health Officer has received and considered advice on the person from an authorised psychiatric practitioner or designated mental health practitioner.

(4) After receiving the certificate, the court must dismiss the charge if satisfied that at the time of carrying out the conduct constituting the alleged offence:

- (a) the person was suffering from a mental illness or mental disturbance; and
- (b) as a consequence of the mental illness or disturbance, the person:
 - (i) did not know the nature and quality of the conduct; or
 - (ii) did not know the conduct was wrong; or
 - (iii) was not able to control his or her actions.”

[5] A certificate dated 27 January 2011 was subsequently provided to the Court of Summary Jurisdiction in response to the request made by Dr Lowndes SM. It read as follows (as best as it can be reproduced):-

“37 Dismissal of Charge Certificate

To the Court

Form 37

Section 77

Client details

HRN [*not reproduced*]

Family name: LOCKYER

Given Name: Marissa

DOB [*not reproduced*]

I, Dr Christine Connors

Located at 87 Mitchell Street, Darwin

notify the Court that I have received and considered advice from an Authorised Psychiatric Practitioner or Designated Mental Health Practitioner regarding the accused person. On the basis of this advice:

I am satisfied

OR

I am not satisfied

that Marissa LOCKYER

currently residing at 14 Bagot Road, Darwin NT

was suffering from a Mental Illness/Mental Disturbance at the time of carrying out the conduct constituting the alleged offence and that the Mental Illness/Mental Disturbance is likely to have materially contributed to the conduct.

sgd. ‘Christine Connors’

(dated) 27.1.2011

Signature of Chief Health Officer or Delegate

Date

[end Certificate]

- [6] The questions reserved for the consideration of this Court and the Court’s answers are set out below.

Question 1

Does s 77 require the court to be separately advised of the two issues set out in subsection (2), that is (a) whether at the time of carrying out the conduct constituting the alleged offence, the person was suffering from a mental illness or mental disturbance; and then (b) if the person was suffering from a mental illness or mental disturbance – whether the mental illness or disturbance is likely to have materially contributed to the conduct?

Answer 1

Section 77 requires the court to be advised of the issue set out in subsection (2) paragraph (a), and, if the answer to paragraph (a) is in the affirmative, s 77 requires the court to be advised of the issue set out in subsection (2) paragraph (b).

Notwithstanding that the court requests the Chief Health Officer to give a certificate stating an answer to the questions in both paragraphs (a) and (b) of subsection (2), it is only necessary that the certificate state an answer to the question in paragraph (b) if the answer to paragraph (a) is in the affirmative.

If the person was not suffering from a mental illness or mental disturbance at the time of carrying out the conduct constituting the alleged offence, that is the end of the matter. There would not then be, relevantly, a “mental illness or disturbance ... likely to have materially contributed to the conduct”.

The certificate provided in the present case is deficient in that the Chief Health Officer (or delegate) provided a rolled-up answer to the questions in both paragraphs (a) and (b) of subsection (2), and did not first separately deal with the issue set out in subsection (2) paragraph (a), before (if it were relevant to do so) dealing with the issue in subsection (2) paragraph (b).

Question 2

If the answer to question 1 is ‘yes’ that a certificate should state separately whether a defendant was suffering from a mental illness or mental disturbance at the time of carrying out the relevant conduct,

can the court rely on that certificate for the purpose of satisfying itself under s 77(4)(a) that “at the time of carrying out the conduct constituting the alleged offence the person was suffering from a mental illness or mental disturbance.”

Answer 2

If the question is whether the court can rely on the certificate alone, without further evidence, the answer is ‘no’.

I assume for the purpose of answering this question that a certificate will contain a statement of the Chief Health Officer as to whether (or not) at the time of the alleged offence a defendant was suffering from a mental illness or mental disturbance; and that it may also contain a statement as to whether the mental illness or disturbance was likely to have materially contributed to the offending conduct. Such statements are necessarily based on opinion: the opinion of the Chief Health Officer, informed by the advice (factual details and opinion) of an “authorised psychiatric practitioner or designated mental health practitioner” under s 77(3). The opinion of the Chief Health Officer may be an expert opinion actually reached by the Chief Health Officer himself or herself, or may be a simple transmission of the opinion of another person, that is, of the psychiatric practitioner or mental health practitioner who provided advice under s 77(3). The opinion of the Chief Health Officer may be a combination of both.

The court should not rely exclusively on a s 77(2) certificate for the purpose of satisfying itself under s 77(4)(a) that “at the time of carrying out the conduct constituting the alleged offence the person was suffering from a mental illness or mental disturbance.”

In many cases, the court ought not rely *at all* on a s 77(2) certificate for the purpose of satisfying itself under s 77(4)(a). The certificate may not be admissible in evidence, and even if admissible the weight to be accorded it may be nil or slight.

The certificate is not binding on the court and the court must consider all the evidence. As Kelly J. said in relation to s 77(4)(a) in *Mununggurr*:-

“... the Court must undertake its own assessment of those matters, which it can only do by considering relevant evidence.

.... the subsection plainly requires the Court to be satisfied of the relevant matters; it does not require, or authorise, the Court to accept the certificate of the Chief Health Officer as determinative of those questions.”²

An examination by the court of the evidence will reveal the basis on which the Chief Health Officer made the statements in the certificate. If they represent an expert opinion actually reached by the Chief Health Officer himself or herself; and if, on the evidence, the facts on which the expert opinion is based are established,³ then the statements of opinion would probably be admissible and entitled to such weight as the court thinks fit. If the statements in the certificate are merely a transmission of the opinion of another person, then the certificate will be inadmissible for the purposes of the court’s consideration of the s 77(4) matters, and would in any event have little evidentiary value.

In this context, obiter remarks made by me in *Taylor v Bamber and Westphal*,⁴ where I said that the s 77(2) certificate and the statements of opinion it contains have significant evidentiary value, should be treated with caution and read subject to the matters explained in the preceding paragraphs. Such caution is particularly necessary where (as in the present case) the certificate is not informative as to the facts and matters taken into account and the reasoning applied to arrive at the expert opinion(s) on which the certificate is based.

Question 3

What is the test of “material contribution” that an authorised psychiatric practitioner or designated mental health practitioner is required to apply? Does s 77(2) require that the Chief Health Officer must simply be satisfied on advice that there is a causal link between the mental illness or mental disturbance and leave for the further determination of the court the matters that the court must be satisfied of in s 77(4)(b), that is, that as a consequence of the mental illness or disturbance, the person:

² *Mununggurr v Gordon & Anor, Mununggurr v Balchin & Anor, Mununggurr v Gordon & Anor, Mununggurr v Gordon, Mununggurr v Gordon and Mununggurr v Balchin* [2011] NTSC 82 at [19] and [20].

³ It is necessary that the facts underlying the expert opinion and the reasoning of the expert based on those facts is made clear for the expert opinion to be properly considered by the court – see, for example, *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [64] – [67] per Heydon JA. Moreover, the underlying facts must be established on the evidence for the expert opinion to be given weight.

⁴ *Taylor v Bamber & Anor* [2011] NTSC 36 at [11]; see also at [16].

- (i) did not know the nature and quality of the conduct; or
- (ii) did not know the conduct was wrong; or
- (iii) was not able to control his or her actions.

Answer 3

A useful test as to whether a mental illness or mental disturbance materially contributed to conduct constituting an alleged offence is whether the mental illness or mental disturbance was a factor that *operated actively* to bring about the conduct.⁵

The Chief Health Officer is required to provide a certificate only as to the s 77(2) matters. It is for the court and not for the Chief Health Officer to consider the matters in s 77(4)(b). I agree, with respect, with the observations of Kelly J in *Mununggurr* at [16] where her Honour discussed the differences between the considerations of the Chief Health Officer and those of the court:-

“ ... the certificate is directed to a different question from that to be decided by the Court under s 77(4). Both the Chief Medical Officer and the Court must determine whether at the time of carrying out the conduct constituting the alleged offence the person was suffering from a mental illness or mental disturbance. Thereafter the enquiries differ. The Chief Medical Officer must state whether the mental illness or disturbance is likely to have materially contributed to the conduct. That is a different matter from that which the Court must determine under s 77(4), namely whether, as a consequence of the mental illness or disturbance, the person:
(i) did not know the nature and quality of the conduct; or
(ii) did not know the conduct was wrong; or (iii) was not able to control his or her actions.”

Accordingly, the Chief Health officer must leave the s 77(4)(b) matters for the consideration and determination of the court.

⁵ I have adapted the test ultimately used by the Full Court of the Federal Court in *Dunstan v Comcare* [2011] FCAFC 108 at [40], noting the difference in statutory context and the history of amendment to relevant sections of the *Safety, Rehabilitation and Compensation Act 1988* (Cth).

Question 4

Can the court go behind the certificate and receive as evidence the report on which the Chief Health Officer has relied?

Answer 4

Yes. The court should always go ‘behind the certificate’. I refer to the answer to question 2. Whether the court should receive as evidence the report on which the Chief Health Officer has relied is a separate question, to be answered by the court by reference to relevance and admissibility, as well as the principles relating to the receipt of expert evidence.⁶

Question 5

At what stage of proceedings can a request for consideration⁷ of a s 77 certificate be made? Should such a request only be made by the court once the parties have agreed the conduct elements of the alleged offence or the court has determined those facts on evidence?

Answer 5

Subject to the conditions in s 77(1)(a) and (b) being satisfied, including the condition that the court must be exercising summary jurisdiction, the court may request a s 77(2) certificate at any stage of the proceedings up to the point of final disposition.

In a given case the parties may be able to agree the facts of the conduct constituting the alleged offence, and the court may then be able to adopt the agreed facts. In other cases the court may have to hear evidence before it can itself determine the conduct constituting the alleged offence.

It is important that the court’s request of the Chief Health Officer state clearly the conduct constituting the alleged offence, for each offence in respect of which the s 77(2) certificate is requested. The

⁶ see footnote 3

⁷ I assume that “consideration” should read “provision”.

conduct constituting the alleged offence should not be left to the Chief Health Officer to determine.

The reference to “conduct constituting the alleged offence” is to the physical conduct, and not to any fault element.

Question 6

Is the court’s power to dismiss charges pursuant to s 77(4) entirely dependent on an initial establishment of the causal link between the defendant’s mental state and the conduct in question through the s 77 Certificate?

Answer 6

No.

The court’s power to dismiss charges pursuant to s 77(4) can only be exercised after the court has received a certificate from the Chief Medical Officer requested by the court under s 77(2). That is made clear by the Division heading,⁸ which reads: “Division 2 – Dismissal of charge following certificate from Chief Health Officer” and by s 77(4), which commences with the words “After receiving the certificate...”. There is no power in the Court of Summary Jurisdiction, except under s 77(4), to dismiss a charge on grounds the same as or similar to those set out in s 77(4).⁹

However, notwithstanding the requirement that the Court first receive a certificate from the Chief Health Officer before proceeding under s 77(4), the court’s power to dismiss charges pursuant to s 77(4) is not dependent on the establishment of the causal link, via the s 77 certificate, between the defendant’s mental state and the conduct in question.

The court has an independent role to consider and assess the evidence in any criminal hearing where it is exercising summary jurisdiction. The court hears the evidence in chief and cross-

⁸ A heading to a Division of an Act is part of the Act – see s 55(1) *Interpretation Act*.

⁹ The matters set out in s 77(4) (a) and (b) are essentially the same matters which constitute the defence of “mental impairment” under s 43C(1) *Criminal Code* for matters in the Supreme Court. However, s 43C does not apply to matters heard and determined in the Court of Summary Jurisdiction.

examination of all prosecution and defence witnesses (including possibly the defendant). It therefore follows that the court's findings and conclusions may be very different from the matters stated by the Chief Health Officer in the s 77(2) certificate. So, for example, even if the certificate of the Chief Health Officer certifies in the negative to the issue in s 77(2)(a), or in the affirmative to the issue in s 77(2)(a) but in the negative to that in s 77(2)(b), the court might well arrive at an opposite conclusion after considering the identical issue to s 77(2)(a) as part of its s 77(4)(a) deliberations, and may make findings under s 77(4)(b) inconsistent with the certificate of the Chief Health Officer under s 77(2)(b).

Question 7

If the answer to question 6 is 'no', does the onus then fall to the defendant to satisfy the court as to each of the matters set out in s 77(4) or is the court to undertake its own enquiry?

Answer 7

Although the court must dismiss the charges if satisfied as to the matters set out in s 77(4) *Mental Health and Related Services Act*, the Act is silent as to whether either party, and if so which, bears the onus of satisfying the court as to those matters.

Before me, the parties have submitted that s 77(4) creates, in effect, an 'onus-neutral' situation, in which the court will undertake an enquiry, almost in the nature of an administrative enquiry.¹⁰ Thus, the informant submits: "It is not a matter for the defendant to satisfy the court but for the court to undertake its own enquiry and for the court to satisfy itself". The defendant submits: "Section 77(4) does not impose an onus on any party to prove the matters set out in that section. It is a matter for the court to be satisfied of those matters on the basis of the material put before it by the Chief Health Officer in the form of a certificate or the parties."

I do not accept the parties' submissions on this question. In my opinion, the defendant has the onus of establishing the defence of mental illness or mental disturbance under s 77(4), consistent with the common law in relation to the defence of insanity in a criminal

¹⁰ such as that referred to in the New Zealand High Court decision in *Fewtrell v Police* [1997] 1 NZLR 444.

trial.¹¹ However, I agree with the informant's submission that the standard of proof is on the balance of probabilities.¹²

It should be noted that s 77(4) provides a complete defence, in that the court must dismiss the charge if satisfied as to the relevant matters. In that respect, the position under s 77(4) may be contrasted with the regime in place under the *Criminal Code*, although there are some provisions common to the two Acts. The grounds on which the defence of 'mental impairment' can be established under the Code are essentially the same as those in s 77(4)(a) and (b).¹³ Consistent with the common law, the mental impairment provisions in the Code incorporate a presumption that a person was not suffering a mental impairment unless the contrary is proved.¹⁴ The standard of proof is on the balance of probabilities.¹⁵

The significant difference between s 77(4) and the Code is that, under the Code, if the defence of 'mental impairment' is established, the accused must be found "not guilty because of mental impairment".¹⁶ It is a special finding. After such a finding, the Supreme Court has the power to declare the accused person liable to supervision,¹⁷ with the consequent power to order custodial or non-custodial supervision.¹⁸ Thus, the finding of "not guilty because of mental impairment" can lead to very different consequences to those which follow the dismissal of a charge under s 77(4).

The *Criminal Code* specifies that the party raising the defence of mental impairment bears the onus of rebutting the presumption that a person was not suffering a mental impairment.¹⁹ The defence of mental impairment may be raised by the defence, or by the court on application by the prosecution, or by the court on its own initiative.²⁰ If the defence raises the defence of mental impairment, the defence bears the onus of rebutting the presumption. On the other hand, if

¹¹ *Sodeman v The King* (1936) 55 CLR 192.

¹² The High Court in *Sodeman* referred to the "preponderance of probability" at 200.10 per Latham CJ. Dixon J used the same expression to describe the onus on the accused at 216 and cited with approval a Canadian formulation of the onus in these terms: "The jury should be told that insanity must be clearly proved to their satisfaction but that they are at liberty to find the issue in the affirmative if satisfied that there is a substantial, that is to say a clear preponderance of evidence."

¹³ *Criminal Code*, s 43C(1).

¹⁴ *Criminal Code*, s 43D(1).

¹⁵ *Criminal Code*, s 43E.

¹⁶ *Criminal Code*, s 43C(2).

¹⁷ *Criminal Code*, s 43X(2)(a). The Supreme Court may also order the accused to be released unconditionally – see s 43X(2)(b).

¹⁸ *Criminal Code*, s 43ZA.

¹⁹ *Criminal Code*, s 43D(2).

²⁰ *Criminal Code*, s 43F(1).

the prosecution can be said to have ‘raised the defence’ by application to the court, the prosecution must rebut the presumption. The onus there placed on the prosecution “reflects the reality that the prosecution ... may wish to have the defence put before the jury even in the face of strenuous opposition from the defendant.”²¹

There may be good reason for the prosecution in the Supreme Court to raise the defence of mental impairment, to ensure protection of the public by the court-ordered supervision of an accused who is found “not guilty because of mental impairment”. That is not the case in the Court of Summary Jurisdiction because s 77(4) provides a complete defence leading to dismissal of the charge. As a result, reference to the regime under the *Criminal Code* is not determinative of the answer to question 7.

Question 8

Alternatively, if the purpose of the s 77 Certificate is only to establish a causal link between the defendant’s mental state and the conduct that constitutes the alleged offence and a court receives a certificate that does establish that link, does the onus still then fall to the defendant to satisfy the court as to the matters set out in s 77(4)(b) or is the court to undertake its own enquiry?

Answer 8

The purpose of the s 77(2) certificate is to give a preliminary indication to the court and to the parties as to whether the defence of mental illness/mental disturbance might be available. In practice, given that the court has to request the certificate, the court would probably have already detected in the facts or evidence some indication of mental illness/mental disturbance on the part of the defendant. The certificate takes the consideration to the next stage by providing an opinion or statement as to whether (or not) at the time of the alleged offence the defendant was suffering from a mental illness or mental disturbance; and to whether the mental illness or disturbance is likely to have materially contributed to the offending conduct.

However, given my answers to questions 2, 3, 4, 6 and 7, the s 77(2) certificate cannot be other than a preliminary indication, a ‘red flag’

²¹ see Gray, Stephen “Criminal Laws Northern Territory”, The Federation Press (2004) , page 90

as it was described in submissions before me. Whatever the certificate might say, the onus is on the defendant to satisfy the court as to the matters set out in s 77(4)(a) and (b), on the balance of probabilities.

[7] I give leave to the parties to argue the issue of costs in default of agreement.
