Willoughy v Trenerry [2000] NTSC 57

PARTIES:	WILLOUGHY, Brett Graham v TRENERRY, Robin Laurence
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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CATCHWORDS:

Appeal – general principles – interference with discretion of Court Below – uncontroverted facts –

R v Storey (1998) 1 VR 359 at 371, applied
R v Olbrich (1999) 166 ALR 330, applied

Criminal law – property offences – whether offence occurred "where goods are sold" – whether offender "lawfully in the premises".

Sentencing Act 1995 (NT) Sch I, Div 6 of Pt 3, s 5(2), s 20, "property", s 3

Dureau & Anor v Trenerry, unreported, 23 October 1998, applied.
Barker v The Queen (1983) 153 CLR 338, applied.
Hillen and Pettigrew v ICI (Alkali) Limited [1936] AC 65 at 69, considered.

REPRESENTATION:

Counsel:

Appellant:	Mr Lewis
Respondent:	Ms Austin

Solicitors:

Appellant:	Withnall Maley
Respondent:	DPP

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

Willoughy v Trenerry [2000] NTSC 57
No. JA 20/99

BETWEEN:

BRETT GRAHAM WILLOUGHY
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 13 July 2000)

[1] Appeal against the mandatory sentence of 14 days imprisonment, for stealing property valued at $2.04, imposed upon the respondent by the Court of Summary Jurisdiction sitting in Darwin on 13 April 1999.

[2] The *Sentencing Act* 1995 (NT) provides for the minimum mandatory imprisonment for "property offences" (Div 6 of Pt 3). A property offence means an offence specified in Sch I to the Act that is committed after 8 March 1997 (s 3). The schedule prescribes an offence against s 210 of the *Criminal Code* 1983 (NT), stealing, but makes exceptions where:

(a) the offence occurred at premises, or a place, where goods are sold;

(b) the offence was not part of a single criminal enterprise during which the offender committed an offence against Pt VI of the *Criminal Code*;

(c) the offender was lawfully in the premises or at the place at the time of the offence; and

(d) the offender was not employed at the premises or place at the time of the offence.

[3] It is submitted by the appellant, and not contested by the respondent, that the prosecutor must prove beyond reasonable doubt that the appellant did not come within one of the conjoined exceptions if the limitation on the sentencing discretion of the court under Div 6 of Pt 3 is not to be removed. In *Dureau & Anor v Trenerry*, unreported, 23 October 1998, Mildren J noted that the Magistrate in that case held that the onus was on the Crown to prove beyond reasonable doubt that at least one of the elements in the schedule was negatived. That was not called in question in that case, nor this.

[4] In this case, it is said that there was evidence to raise questions as to whether the prosecution could deprive the appellant of the benefit of par (a) or par (c) and that the prosecution had not negatived them. In other words, the prosecution had failed to show, on the evidence, that the offence did not occur at premises or a place where good are sold, or that the appellant was not lawfully in the premises or at the place at the time of the offence.

[5] The factual basis from which the learned Chief Magistrate proceeded to arrive at his decision lay in statements of fact by the respondent before him, admitted by the appellant, and some additional and uncontested statements of fact advanced by the appellant in the course of submission. I will return to that second group of facts later.

[6] The facts put forward by the respondent and admitted by the appellant were as follows:

[7] In the early hours of the morning of Thursday 14 May 1998, the defendant was drinking at the Victoria Hotel in Smith Street, Darwin, when he was requested to leave due to his level of intoxication. The defendant did so, returning at some time after 3am; at that time he made his way to the rear door of the premises and entered the premises through a staff doorway. Once inside he made his way up a flight of stairs to a coolroom area. He located a turned off coolroom; inside he removed eight bottles of Stoli from a closed carton, the bottles were valued at $2.04 each, and placed them near a table. He then drank from one of the bottles of Stoli. He was apprehended by a staff member. At that time it was not known that any property had been stolen and the defendant was told to leave the premises, which he did.

[8] He was taken into custody a short time later in Knuckey Street taxi rank under s 128 of the *Police Administration Act* 1979 (NT). On Monday, 18 May 1998, the defendant was arrested and interviewed, during which he stated he was too drunk to remember. He did say that he recalled drinking a

lemon flavoured drink whilst upstairs at the Vic. He declined to answer further questions on the basis of legal advice. He was charged and bailed in respect of the offence. He did not have permission to take the bottle. (It appears to be common ground that the offence occurred during the time the hotel was open for business).

[9] Counsel for the appellant before his Worship added some further facts which, as already mentioned, were not contested:

> "My client stupidly about an hour or so after being asked to leave, tried to get back into continued socialising. There is a fire exit at the rear of the Vic Hotel; the doors aren't locked. There's a big sign above it. He's walked in; you walk up the stairs, there's a coolroom and then you enter the disco or the bar area and that's when he concedes he stupidly saw the bottle of Stoli. He's taken some out, he's consumed one, his wallet and his phone were there and were left at the scene.
>
> He was seen by a member of the staff. The band members and staff were continually walking through this area. He was asked to leave. It came to the attention of management that one of the bottles had been consumed, and police were noticed; of course the identity of the person was readily identifiable because of the phone and the wallet".

[10] Shortly after, in the course of submissions, counsel for the appellant said that his client had walked "in open doors" and the prosecutor, respondent here, said that was agreed.

[11] During the course of further submissions to his Worship, after an adjournment of four days, counsel for the appellant posed as the first question whether the offence occurred at premises where goods were sold and pointed to a difficulty as being whether the premises included the area

where the appellant was found, "in the fire exit area". His Worship interrupted by saying: "Fire exit storeroom area" and counsel responded "Yes. It's effectively the part where people leaving the Vic Hotel in the course of a fire would take"

[12] During the course of his address, counsel before his Worship tendered a photograph taken from a point inside what was described as a night club through a doorway with the familiar green exit sign over it, which it was said depicts the view through an adjoining room to another doorway with stairs adjacent, at the bottom of which was the door through which the appellant entered the premises. The place where the offence was committed is not depicted in the photograph. Such of the room through the doorway as can be seen shows items including gas cylinders which I would not think would be expected to be in a public area of a hotel.

[13] The appellant's submission before his Worship was that the material showed that the appellant was on premises from which goods were sold (par 1(a)) and was lawfully on those premises (par 1(b)). As to the first matter, it was put that since the whole of the hotel was licensed premises under the *Liquor Act* 1981 (NT) and goods were sold from those premises, thus the offence took place at premises from which goods were sold. His Worship found that the liquor was stored in the variously described "coolroom", "store room", and "staff area" and was not for sale there, but for being brought into the public areas for sale "in another place, another part of the premises". He expressed doubt as to whether he could hold the room to be "part of the

premises" as submitted by the appellant. He did not make a finding in respect of that issue, but it cannot be doubted that goods were sold at the hotel. It is not put that his Worship erred in his finding that the coolroom was not a place where goods were sold. That is not inconsistent with the proposition that the coolroom was part of the hotel and the hotel was premises where goods were sold.

[14] The question then raised was whether the appellant was lawfully in the premises or place at the time of the offence. As to the lawfulness of the appellant's presence in the place from which the property was stolen, his Worship held that there was an implied invitation to the public to enter the hotel during the hours it was open for business, but only to the public areas of the hotel, that is, the area used by patrons to purchase and consume alcohol. There was no evidence to suggest that the coolroom was such a place.

[15] The exceptions in par 1(a) and par 1(c) of the schedule depend upon the offence occurring at premises or at a place where goods are sold. There was an argument, if I understood it correctly, which suggested that since his Worship had made no finding about whether goods were sold at the premises or place, it was not open for him to go on to make a finding that the offender was not lawfully at the premises or the place where goods were sold at the time of the offence. I am not persuaded by that. In the first place it was the appellant's uncontestable submission that goods were sold from the "premises", which included the coolroom. Secondly, if the appellant was

not lawfully at the premises or place where the offence occurred, it does not matter whether it was a place from which goods were sold.

[16] The principal argument on behalf of the appellant is that there was no evidence upon which his Worship could make to the findings of fact leading to his conclusion of law.

[17] The submissions arose in the context of an appeal from the Court of Summary Jurisdiction in which the appellant had pleaded guilty to the offence charged and was seeking to avoid the statutory consequence of conviction and sentence to prison for 14 days. In doing so, he relied upon par 1(a) and par 1(c) of sch I. In that regard his admission of the facts going to the circumstances and elements of the offence also amount to an admission for the purposes of sentencing. Uncontraverted statements of fact were also made by the appellant to bring those matters to the attention of the court and rely upon them. Once uncontraverted material is before a sentencing tribunal it can be used for the purposes of both the prosecution and in the offender's case.

[18] All the matters to which a court shall have regard in sentencing an offender, as detailed in s 5(2) of the *Sentencing Act*, are usually brought to the attention of the court by way of informal statements of fact from the bar table. An offender cannot resile from factual material before the court by way of statement from the bar table if the court uses those facts and any others properly before it as a basis upon which to apply the law.

Uncontraverted facts, by whomsoever advanced, can be used for those purposes. Once the facts are properly before the court, in whatever form and from whatever source, the court is entitled to have regard to them.

[19] As to the process of fact finding in the sentencing stage of criminal proceedings, see particularly *R v Storey* (1998) 1 VR 359 and *R v Olbrich* (1999) 166 ALR 330. In *Storey* for example, at p 371:

> "Much of what is relied on in sentencing is not the subject of evidence given on the plea. Judges have always relied heavily on what is asserted from the bar table and we see no reason why that practice should not continue".

[20] As in Victoria, so here, and there is no reason why proper inferences should not be drawn from what is accepted from the bar table as opposed to what is proved by evidence strictly called.

[21] I will treat the appellant as having successfully discharged the evidential burden of "getting past the Judge" so as to entitle him to have the question of fact as to the circumstances of his being in the coolroom at the time of the stealing raised for determination. There is some material to support his claim that he was lawfully on the premises or at that place, he having entered by an open door into licensed premises during its opening hours and then into a room to which there was no barrier to access. Adopting the test which has been accepted, at least in the Court of Summary Jurisdiction, it lies upon the prosecution to prove beyond reasonable doubt that his presence

in the premises or the place at which the offence occurred at the time it occurred was not lawful.

[22] In his reasons his Worship did not deal with the factual material before him in detail. However, he directed himself to the law to be found in the judgment of Mildren J in *Dureau and Dureau v Trenerry* wherein his Honour construed "lawfully in the premises" as not encompassing a civil trespasser, that is, a person who is a trespasser is not lawfully in the premises. He proceeded to apply by analogy, the implied invitation providing lawful authority for entry into the area of a shop to which the public is ordinarily admitted during the hours in which the shop is open for business. Applying that to the premises in question, his Worship held that the appellant, as a member of the public, was invited to attend and stay in those parts of the premises which patrons use to both purchase and stand and consume alcohol.

> "I do not think that any fair-minded person could reasonably and properly maintain a civil right to go into the staff section of a hotel or the fire exit … except during times of emergency exit, particularly when it is clear from Exhibit 2 (the photograph) that those rooms behind the door were rooms which are clearly not intended for public use".

[23] His Worship made it clear that that was one of the grounds upon which he found the appellant was not lawfully in the place where the offence occurred, and went on to consider in addition to that whether the right to be in the hotel at all had been terminated by his removal earlier in the night, holding that he knew he was not allowed to go back and that was why he

reentered through the rear door. His worship concluded his remarks by saying: "So for all of those reasons I find that you were a trespasser … ", but given what had already passed from his Worship, I do not understand him to mean that it was the combination of the two reasons given that caused him to come to the view that the appellant was a trespasser.

[24] Although nowhere in the course of his reasons did his Worship expressly cite the agreed facts or so much of them as he relied upon, it is clear from the commencement of his remarks that he had them freshly in mind:

> "I have listened to the facts as they were put initially to the court, and from time to time as the submissions have gone on there is some additional concession by both sides as to what the facts are. I read the facts out a few moments ago and it seems that the additional ones really are that there was probably something in the order of an hour between the time he first left the premises and when he came back."

[25] He dismissed from his mind the reference to there being a sign on the door depicted in the photograph indicating it was only for staff use, not knowing when that sign was placed there. There was no contest between the parties as to the facts, and although it may have been preferable for his Worship to have made specific reference to the facts leading to his conclusions, I do not think that that of itself led to error on his part in the circumstances of this case. The transcript shows that, as his Worship asserted, he had read the facts to the court shortly before proceeding upon the decision making process. He had done that so as to ensure that fresh counsel then appearing for the prosecution could be in no doubt as to what the agreed facts and additional facts were.

[26] An implied licence to enter upon land is in favour of anyone entering for a legitimate purpose onto those parts of the land apparently open to the public, Hallsburys Laws of Australia, vol 26, par 415-525. The appellant does not point to any evidence that his licence to enter upon the hotel was other than implied. It is important to focus on the fact that the place where the offence occurred was that which has been called the coolroom. That was an agreed fact. Whether entry by the open rear door and along the stairs and passage leading past the coolroom was unlawful need not be decided, for the offence of stealing the bottle of Stoli did not happen in any of those places.

[27] *Barker v The Queen* (1983) 153 CLR 338, is a case having to do with entry upon land as a trespasser in the context of the crime of burglary, and much of what is said by their Honours must be regarded in that light. However, in the course of their reasons, a number of statements were made affirming the law as to trespass generally. Justice Mildren held in *Dureau* that when an offender is a trespasser on a place where an offence is committed, then he is not lawfully in that place. With respect, I agree. It is not possible to attempt an exhaustive definition of what is lawful in this context, but it is beyond doubt that if an offender has the leave and licence, express or implied, of the occupier, or, if there is no occupier, of the owner, to be in the premises or place, then that would be lawful. In *Barker* at p 345 Mason J drew attention to what fell from Lord Atkin in *Hillen and Pettigrew v ICI (Alkali) Limited* [1936] AC 65 at p 69 that so far as an invitee "sets foot on so much of the premises as lie outside the invitation or uses them for

purposes which are alien to the invitation he is not an invitee but a trespasser". What must be determined is the scope of the authority to enter, which the licence or invitation confers, p 346. I too would apply by analogy what was said by Brennan and Deane JJ at p 361 that "the implied invitation to enter which a shopkeeper extends to the public may ordinarily be limited to public areas of the shop and to hours in which the shop is open for business."

[28] The limited use to which the coolroom was put to be gleaned from the agreed facts deny that that place was open to the public who have an implied licence to enter the hotel premises. The appellant was not lawfully at the place at the time of the offence.

[29] His Worship also noted that the appellant had been removed from the hotel earlier that night and that the appellant knew he was not meant to return later. "I think you knew that you were not welcome and that was why you entered by the rear door." By that I take it that his Worship was finding that the implied invitation had been withdrawn, at least for the remainder of the hours the hotel was open to the public on that night. It is not necessary to decide that question.

[30] The appeal is dismissed.
