Nationwide News Pty Ltd v Pryce [2001] NTSC 27

PARTIES:	NATIONWIDE NEWS PTY LTD v LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 51 of 2000 (9914983)
DELIVERED:	19 April 2001
HEARING DATES:	11 April 2001
JUDGMENT OF:	GALLOP A/J

REPRESENTATION:

Counsel:

Appellant:	Mr M Abbott QC
Respondent:	Mr W J Karczewski

Solicitors:

Appellant:	Ward Keller
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	16

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

Nationwide News Pty Ltd v Pryce [2001] NTSC 27
No. JA 51 of 2000

IN THE MATTER of an appeal under the ***Justices Act***

BETWEEN:

NATIONWIDE NEWS PTY LTD
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: GALLOP A/J

REASONS FOR JUDGMENT

(Delivered 19 April 2001)

[1] This is an appeal against a conviction in the Court of Summary Jurisdiction at Alice Springs on 20 July 2000 for an offence against s 11(2) of the *Sexual Offences (Evidence and Procedure) Act*.

[2] The terms of the complaint are as follows:-

> "NATIONWIDE NEWS PTY LTD, () of 2 HOLT STREET, SURREY HILL NSW.
>
> On the 30th day of March 1999
>
> At ALICE SPRINGS in the Northern Territory of Australia.

> 1. By a statement published in the Centralian Advocate otherwise than in a report concerning an examination of witnesses or a trial, revealed the address and the place of employment of a complainant involved in a sexual offence matter."

[3] By letter dated 30 November 1999, the prosecution supplied requested particulars in the following terms:-

> "The particulars in relation to the complaints concerning the abovenamed are that on 30th March 1999 at Alice Springs in the Northern Territory in a statement published in the Australian Advocate, the statement revealed the address and the place of employment of Dr Claire McGrath, a complainant in a sexual offence matter of Police v Timothy Giles. Claire McGrath was a medical practitioner at Kintore in the Northern Territory in March 1999. She was sexually assaulted by Timothy Giles at Kintore on 26th March 1999."

[4] The hearing of the complaint was held on 3 December 1999. At the end of the prosecution case, senior counsel for the appellant applied for the dismissal of the complaint on the grounds that a prima facie case had not been made out. Several grounds were relied upon.

[5] On 17 February 2000, the Magistrate held that a prima facie case had been established.

[6] On 2 June 2000, senior counsel for the appellant announced that the appellant did not propose to call any evidence and made several submissions in support of the complaint being dismissed because the Magistrate should not be satisfied beyond reasonable doubt of several elements of the prosecution case. The Magistrate reserved her decision.

[7] On 20 July 2000, the Magistrate found the appellant guilty of the offence and adjourned the further hearing for sentence to a date to be fixed.

[8] On 25 August 2000, the Magistrate imposed a fine of $5,000.00. In the Notice of Appeal to this court there was an appeal against penalty but on the hearing of the appeal that aspect was not argued. I assume therefore that the appeal against penalty has been abandoned.

RIGHT OF APPEAL

[9] The appeal is brought pursuant to s 163 of the *Justices Act* which reads:-

> "**163. Right of appeal to Supreme Court**
>
> (1) A party to proceedings before the Court may appeal to the Supreme Court from a conviction, order, or adjudication of the Court (including a conviction of a minor indictable offence but not including an order dismissing a complaint of an offence), on a ground which involves –
>
> (a) sentence; or
>
> (b) an error or mistake, on the part of the Justices whose decision is appealed against, on a matter or question of fact alone, or a matter or question of law alone, or a matter or question of both fact and law,
>
> as hereinafter provided, in every case, unless some Special Act expressly declares that such a conviction, order, or adjudication shall be final or otherwise expressly prohibits an appeal against it.
>
> (2) …"

[10] Sections 176 and 177 are relevant.

"**176. Evidence on appeal**

Subject to section 176A, no evidence shall be received on the hearing of the appeal other than such documents or exhibits as are mentioned in sections 174 and 175 and a record, made by means of sound-recording apparatus or shorthand, of the depositions of a witness in the relevant proceeding produced out of the custody of the clerk for the relevant district, except by consent of the parties."

"**177. Procedure and power of Supreme Court on appeal**

(1) Every appeal shall be heard and determined by the Supreme Court in a summary way, and according to the rules of practice in force with reference to the proceedings of the Court in that behalf, and the Supreme Court shall have all the powers and duties, as to amendment and otherwise, of the Justices whose decision is appealed from.

(2) Upon the hearing of the appeal the Supreme Court may –

(a) adjourn the hearing from time to time;

(b) mitigate or increase any penalty, forfeiture, or sum;

(c) affirm, quash, or vary the conviction, order, or adjudication appealed from, or substitute or make any conviction, order, or adjudication which ought to have been made in the first instance;

(d) remit the case for hearing or for further hearing before the Court of Summary Jurisdiction;

(e) make such further or other order as to costs or otherwise as it thinks fit; or

(f) notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) …"

THE APPEAL

[11] On the hearing of the appeal, senior counsel for the appellant acknowledged that his submissions against the sufficiency of the evidence to support proof of the elements of the offence beyond reasonable doubt were the same submissions which had been rejected in support of the submission of no prima facie case. The application of the standard of proof beyond reasonable doubt was explained in *May v O'Sullivan* (1955) 92 CLR 654 where the High Court said at 658:-

> "When, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there *is* a "case to answer" has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate, as is pointed out in *Wilson v Buttery* (1926) SASR 150 for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear: cf. *Morgan v Babcock & Wilcox*, per Isaacs J (1929) 43 CLR 163, at 178. But to say this is a very different thing from saying that the onus of proof shifts. A magistrate who has decided that there is a "case to answer" may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made "a prima facie case", but it does not follow that in the absence of a "satisfactory answer" the defendant should be convicted."

[12] The thrust of the appellant's arguments on appeal was that the Magistrate should not have been satisfied beyond reasonable doubt of several elements of the prosecution's case.

[13] For the purposes of the case, the elements of the offence which the prosecution had to prove beyond reasonable doubt were:-

(a) a person;

(b) by statement;

(c) published otherwise than in a report concerning examination of witnesses or a trial;

(d) revealed;

(e) the address and the place of employment;

(f) of a complainant at any time. "Complainant" is defined (s 3) to mean:-

"a person on or against whom a sexual offence is alleged to have been committed".

"Sexual offence" is defined to mean:-

"an offence against –

(a) Sections 128 to 132 (inclusive), 134, 135, 188(2)(k), 192, 192B or 201 of the *Criminal Code*; or

(b) Section 127 of the *Criminal Code*, in the circumstances referred to in subsection (2) of that section."

THE ARTICLE

[14] The article in which the statement was allegedly published appeared on page 6 of "The Centralian Advocate" on Tuesday, 30 March 1999 and was in the following terms:-

> "**Kintore man in court on sex charges**
>
> A man has been bailed to appear in Papunya Court in May in relation to an alleged rape at a remote community last week.
>
> The man, 23, appeared in Alice Springs Magistrates Court to face charges relating to an alleged sex attack on a female doctor at Kintore, 500km west of Alice Springs, last Wednesday.
>
> He has been charged with sexual intercourse without consent, and aggravated indecent assault.
>
> Police prosecutions contested the bail application, saying the man could return to the community where the woman was living.
>
> Magistrate Warren Donald granted the man unconditional bail.
>
> The case was adjourned to May 5 to set a committal hearing date."

APPELLANT'S SUBMISSIONS

[15] It was first submitted that as the complaint alleged that the appellant revealed both the address and the place of employment of the complainant, the prosecution had to prove both had been revealed, not one or the other.

Furthermore, it was submitted that the prosecution had not proved the revelation of either the address or the place of employment.

[16] I do not accept the submission that having charged the revelation of both the address and place of employment, the prosecution had to prove the revelation of both. It certainly had to prove one or the other as an element of the charge. In my opinion, the gravamen of an offence against s 11(2) of the *Sexual Offences (Evidence and Procedure) Act* is revealing any one of the details of the complainant namely, the name, address, school or place of employment. By charging the appellant with revealing the address and place of employment, the prosecution has actually charged the appellant with two offences against s 11(2) and could have been put to its election. However, the point was not taken at first instance and has not been taken on appeal.

[17] As to the second part of the submission that the article did not reveal either the address or the place of employment of the complainant, I think it is a fair reading of the article that both are revealed by the article. In the heading to the article the appellant is described as a "Kintore man". Kintore is described as a remote community 500km west of Alice Springs. The article describes the charges as "an alleged sex attack on a female doctor at remote Kintore". It goes on to say that in contesting the bail application the Police prosecutions [sic] said "the man could return to the community where the woman was living". In my opinion, the article would clearly establish in the mind of the ordinary reader that the woman's address and place of

employment were at Kintore. There was also evidence that the address and place of employment of the complainant were Kintore.

[18] The victim of the alleged assault gave evidence on 3 December 1999. She said in evidence that she started work for Pintubi Homelands Health Services on 10 February 1999 at Kintore. She was the only doctor at Kintore in March 1999 and she said that she was sexually assaulted by the appellant at Kintore on 24 March 1999. It was thus established by evidence that her place of employment was Kintore. She went on to say in her evidence that when she was working there her residential address was Kintore. It was thus established that her address was Kintore. Those were matters which were revealed by the article.

[19] It was so found by the Magistrate, although she appears to have arrived at those findings by reference to what the reasonable reader would be aware of so far as Kintore and its approximate size were concerned. All she had to be satisfied about beyond reasonable doubt was whether the evidence established that the victim's address and place of employment were Kintore and that they were revealed by the article. She was satisfied beyond reasonable doubt of those duplicitous elements of the prosecution case and there is no basis upon which this court can interfere with those findings of fact because they are based upon the uncontradicted evidence.

[20] The next submission on behalf of the appellant was that in the letter of particulars furnished to the appellant the sexual assault was alleged to have

occurred on 26 March 1999, whereas the evidence was that the alleged offence took place on 24 March 1999. It is to be noted that the particulars were furnished to the appellant by letter dated 30 November 1999. In the article published in the Centralian Advocate on Tuesday, 30 March 1999 the alleged sexual assault is said to have taken place "last Wednesday" which was 24 March 1999. The hearing of the complaint commenced on 3 December 1999 and on that day the victim gave evidence that she had been sexually assaulted on 24 March 1999. Notwithstanding that at least at that stage it must have been clear to the appellant and its legal representatives that the allegation was that the victim had been sexually assaulted on 24 March 1999 and not 26 March 1999 as alleged in the letter of particulars, no application was made by either side to amend the particulars.

[21] At the end of the prosecution case, it was submitted on behalf of the appellant that the prosecution had failed to prove the sexual offence alleged to have been committed against the victim. That the prosecution had the right to amend the particulars was acknowledged by senior counsel for the appellant in the course of his submissions to the Magistrate on 2 June 2000. That the prosecution had failed to prove an allegation of a relevant sexual offence was rejected when the Magistrate gave her ruling on 17 February 2000 on the sufficiency of the evidence to support a prima facie case. She dealt with the submission that there was not sufficient evidence that the incident described by the victim was in fact the incident which had been reported in the paper. The Magistrate noted the victim's evidence that the

incident had occurred on 24 March 1999 and concluded that although the date of the incident provided in evidence was at variance with that described in particulars, the incident itself was quite clearly that which the victim had described in her evidence. The submission was repeated in submissions that the Magistrate should not be satisfied beyond reasonable doubt. Again the Magistrate noted the variance and the particulars of evidence and was satisfied beyond reasonable doubt.

[22] In my opinion, the Magistrate was correct on both occasions. The variance should have been corrected by amendment on the application of the prosecution, but was not. The evidence was there and was not objected to as being outside the particulars furnished. It is not appropriate for a defendant to lie by and allow incorrect particulars to remain, thereby cherishing some imagined grievance for complaint at the end of the case.

[23] It is trite law that an accused person is entitled to have identified with precision the transaction upon which the Crown relies; he is entitled to be apprised not only of the overt acts alleged but also the legal nature of the charge against him and the particular act, matter or thing alleged as the foundation of the charge: *Johnson v Miller* (1937) 59 CLR 467 at 489, 495, 501-502. But in this case the particulars supplied were not part of the transaction upon which the prosecution relied. The particulars related to the allegation of sexual assault which was a component of the definition of "complainant". The prosecution had to prove that there was a "complainant" as defined. The appellant's argument was that the victim was

not a complainant because she was not a person on or against whom a sexual offence was alleged to have been committed on 26 March 1999 as particularised. But the evidence clearly established the element of "complainant".

[24] The next submission was that the prosecution had not proved that the sexual offence alleged to have been committed upon the victim within the meaning of the definition of "complainant" had been established as coming within the definition of "sexual offence" as defined.

[25] On 3 December 1999, the victim gave evidence that she was sexually assaulted by the appellant on 24 March 1999. She did not particularise further the nature of the sexual assault. She gave evidence that the matter was reported to police and charges were laid. The particulars of the sexual assault were set out in the transcript of the committal proceedings which was exhibit P2 on the hearing of the complaint. That transcript discloses that the prosecutor in the committal proceedings outlined to the Magistrate the circumstances of the alleged offence in the following terms:

> "In the evening of last Wednesday – the victim in this matter, Your Worship, is a 47 year old female doctor, working for the Pintubi Homelands Health Service at Kintore community. She was out on her evening walk. As she was walking near the dump the defendant allegedly approached her, Your Worship, and asked her to look at his sore foot.
>
> The doctor said that she was not on call and asked him to go to the clinic if he needed treatment. The defendant is alleged to have moved behind the victim, placed his hand on her bottom and said, 'Do you want sex?". The victim said, 'No' and pushed him away.

> He again placed his hand on the victim's bottom and asked again did she want sex. She again pushed him away. The defendant then pulled the victim backwards onto the ground and held her down. She began to struggle.
>
> The defendant moved between the – sorry, the defendant moved between the victim's legs and tried to remove her shorts and her underwear. The victim continued to struggle and managed to pull her shorts – but he managed to pull her shorts and underwear down to her thighs. It is then alleged, Your Worship, the defendant was able to place a finger partially inside the victim's vagina. The victim then allegedly kicked the defendant in the lower abdomen. The contact was broken. The defendant is alleged to have stood up and started to remove his pants, exposing his genitals. The victim was able to utilise that opportunity and ran away to a nearby house for assistance, while the defendant ran off into bushland."

[26] Sergeant Craig Ryan gave evidence that he was the prosecutor who appeared for the prosecution on 26 March 1999 in the case against the appellant. Upon being shown the transcript of the bail application, he said in evidence that it agreed with his recollection of what had occurred when he appeared on that day. This was first-hand evidence of what the allegation was. It is clear that the allegation as outlined by Sergeant Ryan and reproduced in the transcript was that the appellant had been charged with having sexual intercourse (as defined) with the victim without her consent. This offence, commonly referred to as rape, is created by s 192(3) of the *Criminal Code*.

[27] There was clearly evidence that the victim was a complainant within the meaning of the *Sexual Offences (Evidence & Procedure) Act* as a person on or against whom a relevant sexual offence was alleged to have been committed. The Magistrate was correct in being satisfied beyond reasonable doubt that the victim was a complainant as defined in the Act.

[28] It was next submitted on behalf of the appellant that there was no evidence, and if there was, the Magistrate should not have been satisfied beyond reasonable doubt, that the appellant published the Centralian Advocate on 30 March 1999. It was, as set out above, an element of the offence that the prosecution had to prove beyond reasonable doubt.

[29] The first argument advanced was that the copy of the Centralian Advocate of 30 March 1999, admitted into evidence as exhibit P3, was not what was tendered as an exhibit. The argument was that the tender was of the article only and not the whole edition of the Centralian Advocate of 30 March 1999. The transcript of the proceedings lends some support to that submission. However, the exhibit as marked was not only the article, but the whole edition of the newspaper. For reasons which I am about to express, I do not think anything turns upon this issue. If the whole edition of the newspaper was not admitted in evidence there was other evidence that the article had appeared in the issue of the Centralian Advocate on 30 March 1999.

[30] In the proceedings before the Magistrate, the prosecution sought to rely upon an admission made by the appellant as proof of the publication by the appellant on 30 March 1999. Apparently the appellant had been asked to admit by notice to admit that it published the Centralian Advocate on 26 March 1999. The appellant made that admission. When the prosecution sought to rely upon the admission, senior counsel for the appellant announced that the appellant was prepared to adhere to that admission but

was not prepared to make any admission with respect to publication on 30 March 1999 despite a concession by the prosecution that the notice to admit publication on 26 March 1999 had been an error.

[31] The prosecutor thereupon applied for an adjournment on the grounds that witnesses to prove publication on 30 March 1999 had been cancelled and were not available. Senior counsel for the appellant, in opposing the application for an adjournment, said

> "They wrote to us saying they wanted to amend the complaint to 30 March. We had no objection. After they did that, they served a notice to admit saying they wanted us to admit that we published the Centralian Advocate on 26 March and we agreed to that."

[32] The notice to admit was dated 12 November 1999. The adjournment was refused. It must have been obvious to senior counsel for the appellant before it was acknowledged by the prosecutor that the notice to admit publication on 26 March 1999 was a mistake. The appellant already had notice that the date of the offence alleged by the prosecution was 30 March 1999. Rather than raise with the prosecution the purpose of an admission of publication on 26 March 1999, which was irrelevant, and not 30 March, which was the relevant date, the appellant chose to remain silent about the relevance of the admission it had been asked to make and sought to exploit the obvious error, even after it had been announced there was indeed an error.

[33] I express my disapproval of that sort of conduct of litigation, especially by senior counsel, in a Court of Summary Jurisdiction. However, to return to the substance of the matter, the admission that the newspaper had been published by the appellant on 26 March 1999 gives rise to a proper inference that the appellant published the edition of the same newspaper on 30 March 1999. In the absence of any evidence to the contrary, that would have constituted sufficient evidence on which the Magistrate could have been satisfied beyond reasonable doubt.

[34] Nevertheless, counsel for the respondent relied upon a statement on the back page of the relevant edition, a statement that the edition had been published by Tony Nelson for the Centralian Advocate. Counsel then demonstrated by reference to a business names search, which was in evidence, that the Centralian Advocate was the registered business name of Nationwide News Pty Limited, the appellant, at the relevant time. It is unnecessary to repeat at length the details of that argument. In my opinion, the argument is persuasive and amounts to a complete answer to the submission that the prosecution had not proved publication by the appellant on 30 March 1999 beyond reasonable doubt.

[35] For these reasons I dismiss the appeal and affirm the conviction and orders of the Court of Summary Jurisdiction, Alice Springs with costs.

———————————————