CITATION:	*Andalong v O'Neill* [2017] NTSC 77
PARTIES:	ANDALONG, Samuel v O'NEILL, Wayne
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	REFERENCE from SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	No. LCA 1 of 2017 (21558707)
DELIVERED:	19 October 2017
HEARING DATES:	29 August 2017
JUDGMENT OF:	Grant CJ, Southwood and Riley JJ

CATCHWORDS:

CRIMINAL LAW – CRIMINAL LIABILITY AND CAPACITY – DRIVING OFFENCES – PLEA OF *AUTREFOIS CONVICT*

Whether defence to a charge that accused had already been found guilty of a "similar offence" – common law plea of *autrefois convict* requires comparison between elements of the two offences under consideration – statutory defence required comparison between the offence charged and "an offence in which the conduct therein impugned is substantially the same" or which "includes the conduct impugned in the offence to which it is said to be similar" – definition of "similar offence" imported same comparison between the elements or ingredients of the two offences – offence under s 34(1) of *Traffic Act* (NT) with which the appellant was charged not a

"similar offence" within the meaning of s 18 of the *Criminal Code* (NT) to the offence under s 33(1) of *Traffic Act* to which the appellant pleaded guilty.

Criminal Code (NT) s 17, s 18, s 20
Motor Vehicles Act (NT) s 13, s 45
Supreme Court Act (NT) s 21
Traffic Act (NT) s 33, s 34, s 51

Ashley v Marinov (2007) 20 NTLR 33, *Connelly v Director of Public Prosecutions (UK)* [1964] AC 1254, *Hallion v Samuels* (1978) 17 SASR 558, *Haywood v Dodd* (unreported, Supreme Court the Northern Territory, Thomas J, 24 October 1997), *Knight v The Queen; Cassidy v The Queen* [2010] NTCCA 15, *Pearce v The Queen* (1998) 194 CLR 610, *The Queen v Barlow* (1997) 188 CLR 1, *R v Hofschuster* (1994) 4 NTLR 179, *R v O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219, *R v P, NJ (No 2)* (2007) 99 SASR 1, *Vallance v R* (1961) 108 CLR 56, *Watson v Chambers* [2013] NTSC 7, referred to.

Thomson Reuters, *The Laws of Australia.*

REPRESENTATION:

Counsel:

Appellant:	M Aust with P Coleridge
Respondent	M Nathan SC with L Hopkinson

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent	Office of the Director of Public Prosecutions

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

Andalong v O'Neill [2017] NTSC 77
No. LCA 1 of 2017 (21558707)

BETWEEN:

SAMUEL ANDALONG
Appellant

AND:

WAYNE O'NEILL
Respondent

CORAM: GRANT CJ, SOUTHWOOD and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 19 October 2017)

THE COURT:

[1] The issue for determination concerns the operation of s 18 of the *Criminal Code* (NT), which provides relevantly that it is a defence to a charge to show that the accused has already been found guilty or acquitted of the same or a similar offence. The matter is the subject of a reference to the Full Court pursuant to s 21 of the *Supreme Court Act* (NT).

The agreed facts and issues

[2] The agreed facts placed before this court reveal that on 25 November 2015 the appellant was apprehended while driving a motor vehicle along the Stuart Highway near Katherine. The appellant was intoxicated at the time.

It was later discovered that the appellant was disqualified from driving a motor vehicle, that the vehicle he was driving was unregistered, and that no compulsory compensation contribution had been paid in relation to the vehicle.

[3] The appellant was charged with a range of offences under the *Traffic Act* (NT), including driving whilst disqualified; driving with a high range breath alcohol content; driving an unregistered vehicle on a public street; and driving a vehicle in relation to which a current compensation contribution had not been paid. It is those last two charges with which this reference is concerned.

[4] On 4 August 2016, the appellant entered pleas to the offences of driving disqualified and driving with a high range breath alcohol content and was sentenced in relation to those matters. He indicated that he would plead guilty to the offence of driving an unregistered motor vehicle, but contended that the offence of driving a vehicle which did not have a current compensation contribution was a "similar offence" within the meaning of s 17 of the *Criminal Code* giving rise to a defence under s 18(b) of the *Criminal Code*.

[5] On 25 October 2016, the Local Court published reasons rejecting this contention and found the appellant guilty of both offences.

[6] It is an agreed fact that in the Northern Territory fees for the registration of a motor vehicle and the compulsory compensation contribution are paid in

the form of a single fee at the time of registration. A sum representing the compulsory compensation contribution is then withheld by the Registrar of Motor Vehicles and paid to the Motor Accidents (Compensation) Commission.

[7] On 22 November 2016, a notice of appeal was filed in the Supreme Court. The sole ground of appeal is that the Local Court erred "in finding that the defence in section 18 of the *Criminal Code* (NT) did not apply to [the offence of driving a vehicle in relation to which a current compensation contribution had not been paid]".

[8] The issue arising for determination in the appeal is as follows:

> Is the offence under s 33(1) of the *Traffic Act* (NT) of which the appellant was found guilty a "similar offence" within the meaning of s 18 of the *Criminal Code* (NT) to the offence under s 34(1) of the *Traffic Act* (NT) of which the appellant was also found guilty?

The statutory provisions

[9] Section 18 of the *Criminal Code* provides:

> **Defence of previous finding of guilt or acquittal**
>
> Subject to sections 19 and 20, it is a defence to a charge of any offence to show that the accused person has already been found guilty or acquitted of:
>
> (a) the same offence;
>
> (b) a similar offence;
>
> (c) an offence of which he might be found guilty upon the trial of the offence charged; or
>
> (d) an offence upon the trial of which he could have been found guilty of the offence charged.

[10] It is paragraph (b) with which the present matter is concerned. Section 17 of the *Criminal Code* defines "similar offence" for the purposes of the Division in the following terms:

> ***similar offence*** means an offence in which the conduct therein impugned is substantially the same as or includes the conduct impugned in the offence to which it is said to be similar.

[11] Section 33(1) of the *Traffic Act* creates the offence of driving an unregistered vehicle in the following terms:

> A person shall not:
>
> (a) drive; or
>
> (b) employ, permit or suffer a person to drive,
>
> on a public street or public place a motor vehicle which is not registered.
>
> Penalty: 20 penalty units or imprisonment for 12 months.

[12] Section 34(1) of the *Traffic Act* creates the offence of driving an uninsured vehicle in the following terms:

> Subject to subsection (4), a person shall not drive or permit to be driven on a public street or public place a motor vehicle in respect of which a current compensation contribution has not been paid under Part V of the *Motor Vehicles Act*.
>
> Penalty: If the offender is a natural person – 100 penalty units.
>
> If the offender is a body corporate – 500 penalty units.
>
> In both cases, the minimum penalty is:
>
> (a) for a first offence – 5 penalty units; and
>
> (b) for a second or subsequent offence – 10 penalty units.

[13] Both offences are specified to be regulatory offences by s 51 of the *Traffic Act*, with the effect that s 20 of the *Criminal Code* does not exclude any defence that would otherwise be available under s 18 of the *Criminal Code*.

[14] The criminal responsibility provisions in Part IIAA of the *Criminal Code* do not apply to either offence under the *Traffic Act*.

A statutory form of *autrefois convict*

[15] The competing contentions concern whether the phrase "conduct therein impugned" appearing in s 17 of the *Criminal Code* requires only that the act, omission or event constituting the offending behaviour for each offence be substantially the same or included in each, or requires that the legal ingredients of each offence be substantially the same or included in each.

[16] The overarching rule or principle at common law is the double jeopardy doctrine, which was described by Gummow J in *Pearce v The Queen* in the following terms:[1]

> The third principle concerns the injustice to the individual which would be occasioned by a requirement to litigate afresh matters already determined by the courts. The maxim, *nemo debet bis vexari pro una et eadem causa* (it is the rule of law that a man shall not be twice vexed for one and the same cause), appears in *Sparry's Case* (1589) 5 Co Rep 61a [77 ER 148]. (The maxim applies not only to *res judicata* doctrines but also to vexatious litigation and abuse of process. Kersley, *Broom's Legal Maxims*, 10th ed. (1939) at 220.) In its application to criminal proceedings, it "has become known as the rule against double jeopardy': *Rogers v The Queen* (1994) 181 CLR 251 at 277.

1 *Pearce v The Queen* (1998) 194 CLR 610 at 625 [54].

[17] The double jeopardy doctrine has a number of different aspects with different operation, including the pleas of *autrefois acquit* and *autrefois convict* and the rule against double punishment. Section 18 of the *Criminal Code* enacts a statutory form of *autrefois convict* and *acquit*.[2]

[18] The plea of *autrefois convict* will lie at common law in bar of a charge alleging the same, or substantially the same, offence of which the accused has already been convicted.[3] Where the second offence charged was not identical to the offence for which the earlier conviction was entered, the test traditionally adopted was whether the facts constituting the second offence were sufficient to procure conviction on the first charge.[4] Conversely, the plea was not made out simply because the same facts or evidence were relied on in the proof of both charges. The accused must have been in jeopardy for the same, or substantially the same, crime.[5] On that test it was the "legal characteristics" of the facts which required comparison rather than the offending behaviours.[6]

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2 By incorporating the concept of a "similar offence", the defence created by those provisions would appear to be broader in scope than the pleas contemplated by ss 346 and 347 of the *Criminal Code*.

3 *Connelly v Director of Public Prosecutions (UK)* [1964] AC 1254 at 1305, 1330–1332, 1339–1340, 1362–1365; *R v O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219 at 221–224, 239–248, cited in Thomson Reuters, *The Laws of Australia*, 16 Evidence, 1 General Principles of Evidence' [16.1.960].

4 *Connelly v Director of Public Prosecutions (UK)* [1964] AC 1254 at 1305, 1309-1310, 1333; *R v O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219 at 221–224, 239–248, cited in Thomson Reuters, *The Laws of Australia*, 16 Evidence, 1 General Principles of Evidence' [16.1.960].

5 *Connelly v Director of Public Prosecutions (UK)* [1964] AC 1254 at 1306, 1309, cited in Thomson Reuters, *The Laws of Australia*, 16 Evidence, 1 General Principles of Evidence' [16.1.960].

6 *Hallion v Samuels* (1978) 17 SASR 558 at 563; *R v O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219 at 225-226, 296, cited in Thomson Reuters, *The Laws of Australia*, 16 Evidence, 1 General Principles of Evidence' [16.1.960].

[19] More recently, in *Pearce v The Queen*[7] the High Court considered circumstances occurring in New South Wales in which an accused was charged with both maliciously inflicting grievous bodily harm with intent to do so, and breaking and entering a dwelling house and inflicting grievous bodily harm while therein. The two charges arose out of a single episode and involved the same victim. There was no legislation in New South Wales dealing directly with the situation, and the matter was governed by the common law. The plurality described the nature of double jeopardy in the following terms (footnotes omitted):[8]

> The expression "double jeopardy" is not always used with a single meaning. Sometimes it is used to refer to the pleas in bar of *autrefois acquit* and *autrefois convict*; sometimes it is used to encompass what is said to be a wider principle that no one should be "punished again for the same matter". Further, "double jeopardy" is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment.

[20] The plurality went on to make the following observations in relation to double prosecution (footnotes omitted):[9]

> Further, when it is said that it is enough if the offences are "substantially" the same, this should not be understood as inviting departure from an analysis of, and comparison between, the elements of the two offences under consideration.
>
> ....
>
> ... Moreover, there are sound reasons to confine the availability of a plea in bar to cases in which the elements of the offences charged are

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7 (1998) 194 CLR 610.

8 *Pearce v The Queen* (1998) 194 CLR 610 at 614 [9] per McHugh, Hayne and Callinan JJ.

9 *Pearce v The Queen* (1998) 194 CLR 610 at 617 [21], 618 [24]-[26] per McHugh, Hayne and Callinan JJ.

> identical or in which all of the elements of one offence are wholly included in the other.
>
> Shifting attention to whether the offences arise out of the same conduct, or out of a single event or connected series of events, would be to substitute for a rule prohibiting prosecution twice for a single offence a rule that would require prosecuting authorities to bring at one time all the charges that it is sought to lay as a result of a single episode of offending.
>
> Those are not questions that admit of certain answers and, whatever criteria are adopted, are not questions that could readily be answered at the time an accused enters a plea. In any event, such a test would, as we have said, shift attention away from the principal focus of the rule underlying the pleas in bar which is a rule against repeated prosecution for a single offence. It would be a test which would deny operation to some or all of the three other forces at work in this area: that several different offences may be committed in the course of a single series of events, that an offender can be punished only for the offence charged, not some other offence, and that charges will usually be framed in a way that reflects all of the criminal conduct of the accused.

[21] As is apparent from that discussion, the availability of the pleas of *autrefois acquit* and *convict* will depend upon a comparison between the elements of the two offences under consideration. It is not sufficient that the two offences arise out of the same conduct, or out of a single event or connected series of events.

[22] The plurality went on to deal with the question of evidence in the following terms (footnotes omitted):[10]

> Inevitably, any test of the availability of the pleas in bar which considers the evidence to be given on the trial of the second prosecution except in aid of an inquiry about identity of elements of the offences charged would bring with it uncertainties of the kind identified by Scalia J [in *Grady v Corbin* (1990) 495 US 508]. The stream of authorities in this country runs against adopting such a test and there is no reason to depart from the use of the test which looks to the elements

10 *Pearce v The Queen* (1998) 194 CLR 610 at 619 [28] per McHugh, Hayne and Callinan JJ.

> of the offences concerned. Each of the offences with which the appellant was charged required proof of a fact which the other did not. It follows that no plea in bar could be upheld.

[23] As is apparent from that discussion, the fact that the evidence in support of the second charge is the same as that which supports the first charge is not sufficient to engage the pleas of *autrefois convict* and *autrefois acquit*. That comparison is useful only for the purpose of identifying the elements of the two offences.[11] The rule at common law is limited to cases in which the elements of the offences charged are identical, or substantially the same. The charges will be substantially the same where all the elements of one offence are wholly included in the other. Moreover, the test is whether the elements of one offence are necessarily wholly included in the other offence, not whether the elements are possibly wholly included in the other offence.[12]

[24] These principles have application to the stages of prosecution and conviction. Different considerations may apply at the stage of punishment. As the plurality in *Pearce* went on to observe (footnotes omitted):[13]

> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries

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11 See also *R v P, NJ (No 2)* (2007) 99 SASR 1 at 12.

12 Thomson Reuters, *The Laws of Australia*, 11 Criminal Procedure, 4 Summary Proceedings [11.4.500]; *R v P, NJ (No 2)* (2007) 99 SASR 1 at 12.

13 *Pearce v The Queen* (1998) 194 CLR 610 at [40]-[42] per McHugh, Hayne and Callinan JJ.

> will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.

[25] These observations are to the effect that while a single course of conduct might give rise to criminal liability and convictions for more than one offence, the rule against double punishment requires that when sentencing the offender the court should be careful in structuring sentence not to punish twice for the commission of elements common to both offences.

[26] The principles expressed in *Pearce v The Queen*[14] constitute the common law position in Australia. The defence created by ss 17 and 18 of the *Criminal Code* clearly reflects the common law doctrines, but is *sui generis* in its terms.[15] It may be accepted that in the interpretation of those terms care must be taken to ensure that recourse to the common law is for the purpose only of throwing light on the context in which the provisions were enacted.[16] That recourse cannot be for the purpose of ascertaining how the law stood before statutory enactment to see if the language of the code will bear an interpretation which would leave the law unaltered.[17] But this is not

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14 (1998) 194 CLR 610.

15 Some restatement of the doctrine of *autrefois convict* has been incorporated into most of the Criminal Codes in Australia, but in different terms: see *Criminal Code Act 1995* (Cth) s 71.18; *Criminal Code 1899* (Qld) ss 16, 17 and 602; *Criminal Code 1924* (Tas) ss 11 and 355; *Criminal Code Act Compilation Act 1913* (WA) Sch, s 17. There is no equivalent provision in the *Criminal Code 2002* (ACT), but the principle is applied by the *Crimes Act 1900* (ACT), s 283.

16 The *Explanatory Notes on the Criminal Code* provide no assistance in determining the proper interpretation of ss 17 and 18 of the *Criminal Code*.

17 See, for example, *Brennan v The King* (1936) 55 CLR 253 at 263; *R v Falconer* (1990) 171 CLR 30 at 65-67; *Drago v The Queen* (1992) 8 WAR 488 at 492.

to say that the common law may not be influential in the interpretive process. As Windeyer J observed in *Vallance v R*:[18]

> It comes to this: The Code is to be read without any preconception that any particular provision has or has not altered the law. It is to be read as an enactment of the Tasmanian Parliament. And, interesting though it is to compare it with other codes, such as that of Queensland from which it is derived, or with projected codes such as *Stephen's* Code, they cannot govern its interpretation. But it was enacted when it could be said of the criminal law that it was "governed by established principles of criminal responsibility". And for that reason we cannot interpret its general provisions concerning such basic principles as if they were written on a *tabula rasa*, with all that used to be there removed and forgotten. Rather is ch. iv of the Code written on a palimpsest, with the old writing still discernible behind.

[27] This principle of interpretation was subject to consideration and elaboration by Kirby J in *The Queen v Barlow* in the following terms:[19]

> At least in matters of basic principle, where there is ambiguity and where alternative constructions of a code appear arguable, this Court has said that it will ordinarily favour the meaning which achieves consistency in the interpretation of like language in the codes of other Australian jurisdictions [cf *Vallance v R* [1951] HCA 42; (1961) 108 CLR 56 at 75-76; *Parker v The Queen* [1997] HCA 15; (1997) 186 CLR 494 at 517-519]. It will also tend to favour the interpretation which achieves consistency as between such jurisdictions and the expression of general principle in the common law obtaining elsewhere [*Zecevic v Director of Public Prosecutions (Vic)* [1987] HCA 26; (1987) 162 CLR 645 at 665]. This principle of interpretation goes beyond the utilisation of decisions on the common law or on comparable statutory provisions to afford practical illustrations of particular problems and the approaches adopted in resolving them [*Jervis* [1993) 1 Qd R 643 at 647]. It represents a contribution by the Court, where that course is sustained by the language of the code in question, to the achievement of a desirable uniformity in basic principles of the criminal law

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18 (1961) 108 CLR 56 at [75]-[76]. It may be noted in this respect that some of the earlier decisions of the Queensland Full Court decided the operation of the Queensland provisions concerning double jeopardy by reference to the common law: see *Dray v Mitchell* [1932] St R Qd 18; *Kilcullen v Sammut* [1946] St R Qd 152; *Kelly v Raynbird; Ex parte Kelly* [1961] QWN 25.

19 *The Queen v Barlow*(1997) 188 CLR 1 at 32.

> throughout Australia. Variations in local opinion may result in divergencies in matters of detail in the criminal law. But in matters of general principle, it is highly desirable that unnecessary discrepancies be avoided or, at least, reduced.

[28] The principles of double jeopardy and *autrefois convict* are basic principles of the common law. Counsel for the appellant drew attention to the decision of the High Court in *Connolly v Meagher*[20] in aid of the uncontroversial proposition that the operation of a criminal code may or may not be identical with the common law. The matter will depend upon the construction of the code in question. It may be noticed that the court was there dealing with s 16 of the Queensland *Criminal Code*, which provided that no person shall be twice punished for the same act or omission. The point of the court's observation was that the terms of the section did not reflect the common law defence of *autrefois convict*. Rather, it was a statutory statement of the rule against double punishment, which extends beyond the plea of *autrefois convict*.

[29] In *Connolly v Meagher*[21] the High Court made particular mention of the fact that ss 17 and 598 of the Queensland *Criminal Code* allowed the defence of *autrefois convict*, quite apart from the rule against double punishment in s 16, with no suggestion that the operation of the provisions concerning *autrefois convict* was not identical with the common law. As has already been observed, s 18 of the Northern Territory *Criminal Code* enacts a

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20 (1906) 3 CLR 682 at 684.

21 (1906) 3 CLR 682 at 684.

statutory form of *autrefois convict* and *acquit* rather a general rule against double punishment.[22]

[30] The operation of s 18 of the *Criminal Code* was considered by the Court of Criminal Appeal in *R v Hofschuster*.[23] Gray AJ (with whom Kearney and Angel JJ agreed) made the following observations:[24]

> It is important to bear in mind that the "similar offence" referred to in the definition is the charge of murder and its alternatives of which the accused has been acquitted. The "conduct therein impugned" can only mean the conduct which gives rise to the criminal liability. In this case, that means the acts of the accused and the accompanying states of mind which constitute the elements of the offence.
>
> ....
>
> In my view, the construction of s 18 and the s 17 definition do not give rise to any ambiguity and I feel no impulse to turn to dictionary meanings of the words used. Section 18 and the definition of "similar offence" appear to me to substantially reproduce the common law doctrine as laid down in the judgment of Lord Morris of Borth-y-Gest in *Connelly v DPP* [1964] AC 1254 at 1305-1306. The fundamental principle is that a person is not to be prosecuted twice for the same criminal conduct. It is quite apparent, in my view, that if the accused is hereafter convicted of any of the offences charged in the present indictment, he will not have been prosecuted in breach of the stated principle.
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> ....
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> As I have already said, I am of the opinion that "conduct therein impugned" means the facts alleged to constitute the legal ingredients of the offence and does not include facts which merely provide evidence tending to prove the presence of the essential ingredients.

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22 Prior to the enactment of the *Criminal Code* (NT) the matter was governed in the Northern Territory by s 18 of the *Criminal Law Procedure Act* (NT). Leaving aside certain qualifications in relation to Commonwealth offences, it stated that where an act or omission constituted an offence under two or more laws, no person was to be punished twice for that same act or omission. It was in terms similar to s 16 of the Queensland *Criminal Code* which was considered by the High Court in *Connolly v Meagher* (1906) 3 CLR 682 at 684. Section 18 of the *Criminal Code* (NT) has a markedly different operation. .

23 (1994) 4 NTLR 179.

24 *R v Hofschuster* (1994) 4 NTLR 179 at 183-184.

[31] The next consideration of the issue by a bench of three in this jurisdiction occurred in *Ashley v Marinov*.[25] The appeal was conceded by the prosecution, and both the reasons and the result must be read in that light. In the course of those reasons the court observed:[26]

> In *R v Hofschuster* [1994] NTSC 73; (1994) 4 NTLR 179 Gray AJ (with whom Kearney and Angel JJ agreed) said at 183:
>
> > "In my view, the construction of s 18 and the s 17 definition do not give rise to any ambiguity and I feel no impulse to turn to dictionary meanings of the words used. Section 18 and the definition of "similar offence" appear to me to substantially reproduce the common law doctrine as laid down in the judgment of Lord Morris of Borth-y-Gest in *Connelly v DPP* [1964] AC 1254 at pp 1305-1306. The fundamental principle is that a person is not to be prosecuted twice for the same criminal conduct."
>
> At the same page his Honour said:
>
> > "The "conduct therein impugned" can only mean the conduct which gives rise to the criminal liability. In this case, that means the acts of the accused and the accompanying states of mind which constitute the elements of the offence."

[32] The court in *Marinov* took no issue with that statement of principle, and appears to have adopted it. Although there was no express reference to Gray AJ's formulation that "conduct therein impugned" means the facts alleged to constitute the legal ingredients of the offence, the adoption of that formulation is implicit in the acceptance of his Honour's earlier statements concerning the reproduction of the common law doctrine. There is no inconsistency between the two decisions at the level of principle, although it

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25 [2007] NTCA 1; 20 NTLR 33.

26 *Ashley v Marinov* (2007) 20 NTLR 33 at [11]-[12].

may be accepted that the result conceded in *Marinov* would appear to be at odds with that principle.[27]

[33] The issue was then subject to consideration by the Court of Criminal Appeal in *Knight v The Queen; Cassidy v The Queen*.[28] The court implicitly accepted that the principles expressed by the High Court in *Pearce* govern the operation of s 18 of the *Criminal Code*, at least in the circumstances there presenting. The court stated:[29]

> A similar problem arose in *Pearce v The Queen*, where their Honours discussed the rule against double prosecution. In that case, their Honours held that there was no double prosecution if the offences with which the accused was charged required proof of a fact which the other did not.

[34] There is also no inconsistency between that approach and the one adopted in *Hofschuster*.

[35] It is not asserted in the present matter that the accused had already been found guilty of the "same offence". Accordingly, the matter turns on the proper construction of "similar offence" as defined in s 17 of the *Criminal Code*. That definition admits of two categories of offence which might give rise to a bar. The first category is an "offence" in which "the conduct therein impugned is substantially the same as … the conduct impugned" in

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27 A similar approach was adopted in *Watson v Chambers* [2013] NTSC 7, and in *Haywood v Dodd* (unreported, Northern Territory Supreme Court, Thomas J, 24 October 1997), in which *Hofschuster* was followed without any express comparison of the legal ingredients of the relevant offences.

28 [2010] NTCCA 15.

29 *Knight v The Queen; Cassidy v The Queen* [2010] NTCCA 15 at [129].

the second offence. The second category is an "offence" in which "the conduct therein impugned … includes … the conduct impugned" in the second offence.

[36] The appellant's contention in relation to the proper construction of the provision may be summarised as follows. While the term "offence" is not defined in the *Criminal Code*, s 2 of the Code provides that an offence is committed when a person in possession of the requisite mental element (if any) "does, makes or causes the act, omission or event" constituting the offence. It is said to follow that for the purposes of the definition in s 17 of the *Criminal Code* "the conduct impugned" in an offence means the particular act, omission or event which is proscribed, together with any necessary state of mind.[30] This is said to focus the comparison on the "conduct aspects" of the two offences, to the exclusion of extrinsic elements which may constitute the offence. That result is said to be consistent with the wording of the section, which in its terms is concerned solely with a comparison of conduct.

[37] The term "offence" is capable of two meanings in this context. As the plurality observed in *The Queen v Barlow*:[31]

> "Offence" is a term that is used sometimes to denote what the law proscribes under penalty and sometimes to describe the facts the existence of which render an actual offender liable to punishment. When the term is used to denote what the law proscribes, it may be

30 There is no relevant mental ingredient for regulatory offences.

31 (1997) 188 CLR 1 at 9.

> used to describe that concatenation of elements which constitute a particular offence (as when it is said that the Code defines the offence of murder) or it may be used to describe the element of conduct (an act or omission) which attracts criminal liability if it be accompanied by prescribed circumstances or if it causes a prescribed result or if it be engaged in with a prescribed state of mind (as when it is said that a person who *strikes another a blow* is guilty of the offence of murder if the blow was unjustified or was not excused, if death results and if the blow is struck with the intention of causing death).

[38] The term "offence" in s 17 of the *Criminal Code* is clearly used in that first sense, being what the law proscribes under penalty. Accepting that to be so, the "conduct … impugned" by the offence must include not only the bare act, omission or event which constitutes the offence, but also those other matters which are the necessary ingredients of criminal liability under the provision. The appellant concedes that those ingredients would include any prescribed state of mind, even though that matter would not fall within "conduct" in its narrowest conception. Those ingredients must also include any circumstances or results of the conduct which condition criminal liability. Together they constitute the circumstances in and by which the conduct is impugned.

[39] It may be noted in this respect that s 2 of the *Criminal Code*, on which the appellant relies, provides that the commission of an offence involves the prescribed mental element, the act, omission or event in question, and the circumstances in which that act, omission or event takes place. As counsel for the respondent contended, if the phrase "conduct therein impugned" was limited in its scope to bare acts or omissions it would be meaningless. The phrase only assumes meaning if it comprehends the ingredients giving rise

to the contravention of the offence provision, because it is by the combination of those ingredients that the conduct is impugned. That contention should be accepted.

[40] The appellant points to two aids to construction which he says give rise to a different result.

[41] The first is the principle that words in a provision should not be considered to be superfluous. It is suggested that if the phrase "conduct therein impugned" was intended to encompass the ingredients of the offence it would have sufficed for the definition of "similar offence" to speak only of "an offence substantially the same or similar". That conclusion does not follow. The reference to "conduct therein impugned" qualifies the matters for comparison and is not superfluous. Without those words of qualification the matters properly taken into account in determining whether an offence was substantially the same as or similar to an offence of which an accused has already been found guilty or acquitted would be at large.

[42] The second matter to which advertence was made is the presumption that words in a statute are used consistently. The appellant points to the use of the word "element" in the duress provision in s 40 of the *Criminal Code* as an indication that the formulation "conduct therein impugned" is properly taken to mean something other than the elements or ingredients of the comparator offence. Again, that conclusion does not follow. It is unsurprising that s 40 of the *Criminal Code* uses the term "element" with

reference to serious harm or an intention to cause serious harm in addressing a discrete issue concerning criminal liability. It may also be noted in this respect that s 2 of the *Criminal Code* does not use the word "element" except in the description of the mental ingredient. There is no relevant presumption arising from these variations in the use of language.

[43] Accordingly, where the definition speaks of an "offence" and "the conduct therein impugned" it is describing "that concatenation of elements which constitute a particular offence" under the legislation which creates it. It is not describing the bare act or omission which, in a given case, is said to constitute the breach of that particular offence provision.

[44] The result is that the operation of the defence requires a comparison between the elements of the two offences under consideration. It will have application only where the elements of the offences charged are substantially the same, or where the elements of the "similar" offence include all the elements of the offence charged. In either case, it is necessary that all the elements of the offence charged are wholly included in the first offence. That result derives from a plain reading of the words used in s 17 of the *Criminal Code*. Although the result is derived independently by that reading, it is also entirely consistent with the position at common law as enunciated in *Pearce*. That is unsurprising.

[45] While the High Court in *Pearce* was addressing the question whether two offences were "substantially the same", and s 17 of the *Criminal Code* limits

the application of the defence in s 18(b) to an offence in which the conduct impugned in substantially the same, there is no material distinction. For the reasons already described, a comparison of the conduct impugned in an offence is a comparison of the elements or ingredients which give rise to criminal liability.

[46] It is necessary then to consider the application of those principles to the offences here in question.

The subject offences

[47] As extracted above, the first offence is contained in s 33(1) of the *Traffic Act*, which provides that "[a] person shall not: (a) drive… on a public street… a motor vehicle which is not registered". The second offence is contained in s 34(1) of the *Traffic Act*, which provides that "a person shall not drive… on a public street… a motor vehicle in respect of which a current compensation contribution has not been paid under Part V of the *Motor Vehicles Act*".

[48] The appellant's argument in relation to these particular offences may be summarised as follows. The requirements for registration of motor vehicles are contained in the *Motor Vehicles Act* (NT). Section 13(1) of the Act requires that prescribed fees shall be paid prior to the registration or the renewal of registration of any motor vehicle. Further, s 45(1) of the *Motor Vehicles Act* precludes the Registrar from granting or renewing the registration of a motor vehicle unless the relevant amount of compensation

contributions as declared under the Act has been paid. The fact that applicable compensation contributions had not been paid meant that the vehicle could not be lawfully registered.

[49] The argument followed that for the purposes of s 18 of the *Criminal Code*, the impugned conduct of the appellant in relation to each of the two offences was that he drove the vehicle on a public road "when the vehicle did not have a particular attribute" required by the *Motor Vehicles Act*. The conduct comprising each offence was the same; the question of the appellant's mental state was irrelevant given that each offence was regulatory in nature; and the attributes of the vehicle in relation to registration and insurance were not matters which attached to the accused's conduct in the relevant sense.

[50] The appellant contended further, or in the alternative, that for the purpose of the offence under s 33(1) of the *Traffic Act* the missing attribute was the registration of the vehicle. For the purpose of the offence under s 34(1) of the *Traffic Act* the missing attribute was the payment of the current compensation contribution. Each of those missing attributes was an essential element of the right to drive a vehicle on a public road, with the consequence that the conduct impugned in the two offences was substantially the same, and they were therefore "similar offences" for the purposes of the *Criminal Code*.

[51] It was argued in addition that a failure to pay the current compensation contribution was a prerequisite for lawful registration of the vehicle and, therefore, "failure to pay the current compensation contribution is conduct which is included within a failure to register". As all other elements of the two offences are the same, the conduct impugned by the offence under s 34(1) of the *Motor Vehicles Act* "includes the conduct impugned" by the offence under s 33(1) the *Motor Vehicles Act* within the meaning of s 18 of the *Criminal Code*.

[52] The appellant's argument is predicated on the proposition that the relevant comparators for the purpose of s 18 of the *Criminal Code* are not the elements of the two offences, but the particular acts or omissions perpetrated by the appellant and which are relied upon to establish the commission of each offence. That proposition should be rejected for the reasons already given. The operative comparison is between the elements or ingredients of each offence. As the plurality observed in *Pearce*, a comparison of the evidence and facts in support of each charge is useful only for the purpose of identifying the elements of the two offences.

[53] For the offence under s 33(1) of the *Traffic Act* it is necessary to establish that the vehicle was not registered at the relevant time. In relation to the offence under s 34(1) of the *Traffic Act* it is necessary to establish that, at the relevant time, a current compensation contribution had not been paid in relation to the vehicle. The administrative arrangements that permit the fees

and the contribution to be paid at the same time do not elide or conflate those distinct elements.

[54] It may be accepted that the two offences exhibited common features. Both were constituted by the appellant driving a motor vehicle with particular attributes on a public street. The offences nevertheless remain distinct and address discrete obligations imposed under traffic laws for the protection of the community. As the respondent has identified, under s 33(1) the *Traffic Act* the vehicle must not be driven unless it is registered in order to ensure the roadworthiness of motor vehicles and to protect the safety of road users. In contrast, under s 34(1) of the *Traffic Act* a vehicle must not be driven unless a current compensation contribution has been paid to ensure that those road users affected by motor vehicle accidents have access to a compensation scheme.

Disposition

[55] It is sufficient for the purposes of this reference to answer the issue arising for determination in the appeal.

Question: Is the offence under s 33(1) of the *Traffic Act* (NT) of which the appellant was found guilty a "similar offence" within the meaning of s 18 of the *Criminal Code* (NT) to the offence under s 34(1) of the *Traffic Act* (NT) of which the appellant was also found guilty?

Answer: No.
