

PARTIES: GARRY STEPHEN WILSON

v

THE QUEEN

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: 9523659

DELIVERED: 19 September 1997

HEARING DATES: 17 September 1997

JUDGMENT OF: Kearney J

**REPRESENTATION:**

*Counsel:*

Applicant: A. Young  
Respondent: G. O'Rourke

*Solicitors:*

Applicant: Withnall, Cavanagh & Maley  
Respondent: Office of the Director of Public  
Prosecutions

Judgment category classification: B  
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kea97024

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

No. 9523659

BETWEEN:

**GARRY STEPHEN WILSON**  
Applicant

AND:

**THE QUEEN**  
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 19 September 1997)

**The application**

On 23 August 1996 the applicant was committed for trial upon two charges of aggravated assault and a charge of the aggravated unlawful entry of a building, on 1 December 1995; the assault charges carry a maximum punishment of 5 years imprisonment, the unlawful entry 20 years. He appeared before the Court on 4 November 1996 when an Indictment was presented, his trial was fixed to commence on 3 November 1997, and he was

bailed to appear on 1 September. He did not present himself on that day; Mr Young of counsel appeared for him, indicated that he resided in Perth, and that he was instructed to apply to have the trial date of 3 November vacated. Eventually the application, opposed by the Crown was stood over to 17 September, to enable affidavits in support to be obtained and filed.

On 17 September the applicant sought an order that his trial be stayed or, alternatively, that the trial date be vacated. The application, supported by his own affidavit and that of his Perth-based solicitor Ms Browne, both of 15 September 1997, was then argued before me; I rule on it today.

The basis of the application was that if the trial commenced on 3 November the applicant could not then be legally represented. The application is what is known colloquially as a “Dietrich” application.

### **The background**

The circumstances of the offences alleged involve the applicant’s entry into a caravan occupied by a woman with whom he had had a prior relationship, an assault on her inside the caravan, and a subsequent assault on her outside.

At his committal, the applicant was represented by Ms Morris, a legal practitioner from the Legal Aid Commission. I am told that he applied to the Commission for legal representation at his trial. On 4 November 1996 he was represented in this Court by Ms Cox from the Commission. She informed the

Court that the Commission would probably not be providing legal representation for the applicant in the future. I was told on 17 September that the applicant was uncertain whether the Commission had granted him legal aid for his trial, or refused it; that a letter, explaining that his application for legal aid at trial had been unsuccessful, was sent to him by the Commission to his last-known Darwin address, at a time when he had already returned to Perth; that this letter had subsequently been returned, unopened, to the Commission; that late in August 1997 the applicant, still residing and working in Perth, became concerned as to whether he had to appear personally in Darwin on 1 September 1997; that he had telephoned the Commission - his first contact with it since 4 November 1996 - and spoken to Ms Cox; that it was only then that he became aware that the Commission had refused to grant him legal aid for his trial.

### **The submissions**

Mr Young of counsel for the applicant submitted that the applicant presently lacked sufficient funds to pay for legal representation at his trial, due to commence in about 6½ weeks. He had not taken any financial steps to obtain or set aside these monies from his earnings - for example, by saving since he commenced employment in January 1997 - as he had only ascertained that he needed to do so some 9 weeks prior to the scheduled commencement of his trial. Mr Young submitted that in due course the applicant could save the money to pay for his legal representation at trial; he needed more time to do so. Hence the application to vacate the date of 3 November 1997; if this were

granted, the state of the Court's lists would mean that he could not be brought to trial before June 1998, at the earliest.

Mr Young submitted that the application should be determined in the applicant's favour, in accordance with *Dietrich v The Queen* (1992) 177 CLR 292. The majority in the High Court there held that in the absence of exceptional circumstances, a judge faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault of his own, is unable to obtain legal representation, should adjourn, postpone or stay the trial until legal representation is available.

Mr Young submitted the applicant is indigent, charged with a serious offence, and not at fault as regards his present inability to obtain legal representation. I accept that one of his charges is of a serious nature.

The applicant's affidavit outlined his financial status. He has no investments or assets, other than a motor vehicle valued at \$1000. He earns \$300 per week net, his cost of accommodation is \$100 per week, and he has a personal loan repayment commitment of \$50 per week. Accordingly, Mr Young submits that the accused is 'indigent' in the sense that he cannot afford legal representation on 3 November 1997. I note that to be 'indigent', a

person need not be a pauper; he may possess some means, but they must be insufficient to cover the expense of his legal defence.

On the question of 'fault', Mr Young submitted that the applicant was disadvantaged in that he was not well educated and had difficulty understanding legal concepts. He had become aware for certain that the Commission would not provide legal representation for him at trial only some 9 weeks before the trial date. He then promptly took steps in Perth to try to obtain legal representation for his trial, and then became aware that he could not presently pay the heavily discounted legal costs which his lawyers in Perth were prepared to charge; he would undertake to take steps to fund his representation at a later time.

Mr Young conceded that an alert person, anxious to safeguard his own interests, may well have acted very differently to the applicant in preparing for trial. He submitted that the applicant's failure to obtain legal representation to date, though arguably due to his own inaction, should not be regarded as indicative of 'fault' on his part.

The Crown Prosecutor Ms O'Rourke submitted that *Dietrich* (supra) suggests that an indigent unrepresented accused, charged with a serious indictable offence, and refused legal aid, lacking sufficient means to fund the cost of proper legal representation at trial, must prove on the balance of

probabilities that his lack of representation was not due to his own fault. I accept that; see *Karounos* (1994-95) 77 A Crim R 479 at 485.

Ms O'Rourke opposed the reading of the affidavits of the applicant and his solicitor, as proof of his impecuniosity. She submitted that they showed a lack of particularity; there was also a lack of supporting evidence. She submitted that the applicant had made no attempt to explain, for example, why he could not obtain a personal loan from his brother, who employed him. She submitted that the materials provided were totally insufficient to establish that the applicant is indigent.

Ms O'Rourke submitted that *Attorney-General for New South Wales v Milat* (1995) 80 A Crim R 530 dealt with persons about to be tried for serious criminal offences who are forced to trial, unrepresented; it showed that the principle in *Dietrich* (supra) does not mean that an accused can secure a stay of his trial, or an adjournment, until he can secure the services of a lawyer of his own choice. I accept that; see *Gudgeon* (1995) 83 A Crim R 228. *Dietrich* (supra) is not concerned with any supposed right of an accused to the services of competent counsel. However, this is not a case of an accused who has neglected to take advantage of available legal representation.

## Conclusions

*Dietrich* (supra) is authority for the proposition that where an indigent accused is facing serious charges and his lack of legal representation at trial is not his fault, his trial should be adjourned, postponed or stayed until legal representation is available. This stems from an accused's right not to be tried unfairly. The question is whether if he is tried unrepresented on 3 November, his trial is likely to be unfair, bearing in mind what Deane J said in *Dietrich* (supra) at 335-6.

Despite Ms O'Rourke's submission I am satisfied that the applicant is indigent in the sense indicated on p5. Clearly, he is facing a serious charge. The key issue is whether his failure thus far to obtain legal representation for his trial is his own fault; he bears the onus of establishing that it was not.

The applicant has failed to take the steps which a more prudent or knowledgeable person would have taken. However, he can point to the fact that he was unsure as to whether he was to be represented at trial by the Commission; and to the fact that, belatedly becoming aware of the Commission's refusal, he took steps promptly in Perth to seek to secure legal representation, albeit unsuccessfully. I am satisfied, on the balance of probabilities, though with some hesitation, that the applicant has demonstrated an absence of fault on his own part, in failing to secure legal representation for his trial on 3 November.



I note that in *Craig v The State of South Australia* (1994-95) 184 CLR 163 at 184 the High Court said on the question of ‘fault’ on the part of an accused in not securing legal representation, that -

“not ... every instance of misbehaviour, improvidence or other fault on the part of an accused which had contributed to his or her lack of representation must automatically preclude entitlement to a stay.”

The Court agreed with the view expressed by Olsson J in the Full Court that:

“... what was in contemplation was a test which focused on the reasonableness of the conduct of an accused in all the circumstances; and excluded situations in which it could fairly be said that the accused, by his gratuitous and unreasonable conduct, had been the author of his own misfortune.”

I note that there are no exceptional circumstances which militate against a trial later than 3 November 1997; and that the applicant has no legal training.

All in all, I consider that the applicant’s failure to secure legal representation was not the result of ‘gratuitous and unreasonable conduct’ on his part.

The applicant has indicated that a particular Perth barrister could appear for him; his preference in that regard is only on the basis he may be able ultimately to afford to pay the discounted fee which that barrister is prepared to accept. I should say that I do not accept, without more, Ms Browne’s assertion in par15 of her affidavit that counsel could not be obtained in

Darwin who would undertake the case at a fee of less than \$1000 per day.

That is contrary to my knowledge of the local Bar.

In accordance with the foregoing, I order that the applicant's trial date of 3 November 1997 be vacated. I note the applicant's statement in par25 of his affidavit:

"I do not have the capacity to raise any monies up front for the payment of legal fees. In order to cover the costs outlined above [of legal representation], it will be necessary for me to save as much as possible and, very likely, raise a loan to cover the shortfall. No members of my family are in a position to assist me financially."

It is necessary that the applicant now firmly commit himself to carrying out these necessary financial steps. He is on notice that his legal representation will not be funded by the Commission. The reasons on which he has succeeded in this application will not suffice to negative the 'fault' element on any future application.

The applicant is bailed on the same terms and conditions as those he is already on, to appear by counsel and not in person, at 10am on the next arraignment day, 29 September 1997, when a new date will be fixed for trial in 1998.

Orders accordingly.

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