PARTIES:	ANDREW JOHN SALMON v JOHN HENRY CHUTE and PHILLIP KEITH DREDGE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION
FILE NOS:	No. SC 26 of 1993
DELIVERED:	Darwin, 22 February 1994
HEARING DATES:	28 July and 12 August 1993, at Alice Springs
JUDGMENT OF:	Kearney J

CATCHWORDS:

Appeal - General Principles - Appeal from Court of Summary Jurisdiction - Nature of the appeal - Whether exercise of original jurisdiction is involved when fresh evidence admitted on appeal

Justices Act (NT), ss163(1)(b) and 176A
J.K. v Waldron (1988) 93 FLR 451, followed
Seears v McNulty (1987) 28 A Crim R 121, referred to
Duralla v Plant (1984) 54 ALR 29, applied

Appeal - Criminal law and procedure - Appeal after plea of guilty - What appellant must establish

R v Murphy [1965] VR 187, applied
O'Connor v The Queen (1992) 59 A Crim R 278, applied

Criminal Law and Procedure - Indictable offence triable summarily - Prerequisites to summary trial

Justices Act (NT), ss121A, 121B, 121C and s122A

R v Cavit; ex p. Griffiths (1986) 39 NTR 1, followed
R v Coe [1969] 1 All ER 65, referred to

R v King's Lynn Justices; ex p. Carter [1969] 1 QB 488, referred to
R v Canterbury and St. Augustine's Justices; ex p. Klisiak [1981] 2 All ER 129, referred to
Griffiths v The Queen (1976-77) 137 CLR 293, applied
R v Harris and Daly [No.1] (1975) 12 SASR 264, applied
R v Johnson and ors (1978) 19 SASR 157, applied
R v Highbury Corner Metropolitan Stipendiary Magistrate; ex p. Weekes [1985] QB 1147, applied
R v Justices of Bodmin; ex p. McEwen [1947] KB 321, applied

Criminal Law and Procedure - Whether charge in Information bad for duplicity - Types of duplicity - Whether duplicity a question of fact and degree - Whether Code s155 creates only one offence

Justices Act (NT), s186

Criminal Code (NT), s155
Romeyko v Samuels (1971-2) 2 SASR 529, followed
Ex p. Polley; re McLennan (1947) 47 SR(NSW) 391, followed
DPP v Merriman, [1973] AC 584, followed
Ministry of Agriculture, Fisheries & Food v Nunn Corn (1987) Ltd [1990] Crim. L.R. 268, followed

Criminal Law and Procedure - General principles - Criminal liability and capacity - History of "failure to rescue" provision in Criminal Code - meaning of "callously fails"

Criminal Code (NT), ss31 and 155
Crack v Post; ex parte Crack (1984) 2 Qd. R 311, considered
Pregelj v Manison (1987) 51 NTR 1, applied

Criminal Law and Procedure - Appeal after plea of guilty - What appellant must establish

R v Murphy [1965] VR 187, applied
O'Connor v The Queen (1992) 59 A Crim R 278, applied

Criminal law and Procedure - Indictable offence tried summarily - Plea of guilty - Considerations relevant to acceptance of plea

Justices Act 1928 (NT) ss121A(1), (1A) and (1B)

Statutes - Interpretation - Mischief rule - When reference to Hansard permissible - Whether Code s155 creates a single offence

Criminal Code (NT), s155
Maynard v O'Brien (1991) 78 NTR 16, followed
Romeyko v Samuels (1971-2) 2 SASR 529, followed

Ex p. Polley; re McLennan (1947) 47 SR(NSW) 391, followed
DPP v Merriman, [1973] AC 584, followed
Ministry of Agriculture, Fisheries & Food v Nunn Corn (1987) Ltd [1990] Crim. L.R. 268, followed

REPRESENTATION:

Counsel:

Appellant:	S.G. Stewart
Respondents:	A.M. Fraser

Solicitors:

Appellant:	Stewart & Company
Respondents:	Director of Public Prosecutions

Judgment category classification: CAT A

Court Computer Code:

Judgment ID Number: kea94002.J

Number of pages: 35

kea94002.J

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. SC 26 of 1993

IN THE MATTER of the Justices Act

AND IN THE MATTER of an appeal against a conviction and certain sentences of the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

ANDREW JOHN SALMON
Appellant

AND:

JOHN HENRY CHUTE and
PHILLIP KEITH DREDGE
Respondents

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 22nd day of February 1994)

This is an appeal under s163 of the Justices Act from a decision of the Court of Summary Jurisdiction at Alice Springs. It was argued before me on 28 July 1993. On 12 August I ordered, for reasons to be published in due course, that:-

1. The appeal against the conviction and sentence for the offence against s155 of the Criminal Code be allowed, the conviction quashed, the sentence of 12 months imprisonment imposed for that offence set aside, and the charge for the offence under Code s155 be remitted to the

Court of Summary Jurisdiction, for rehearing ab initio.

2. The appeal against the length of the non-parole period of 6 months be allowed and the order fixing that period be set aside.

3. The appeal against the sentence of 4 months imprisonment imposed for the offence [of failing to report the accident] under Reg. 138(1)(d) of the Traffic Regulations be dismissed, and that sentence be affirmed.

I now publish the reasons for that decision. *[This report deals only with the reasons for allowing the appeals in 1 and 2 above]*.

The appeal

On 18 May 1993 the appellant was convicted on his plea of guilty to 5 offences in all, including an offence under Code s155. The provisions of Code s155 are set out at p3.

The information charging the offence under Code s155 was as follows:-

> "That on 14 April 1993 - - being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person, namely Clinton Abbott, whose life may be endangered if it is not provided, callously failed to do so."

[His Honour then set out the appeals mentioned above, the grounds of appeal, the material relied on by the appellant as the background to his pleas of guilty, and continued:-]

The appeal against the conviction for the Code s155 offence

Code s155, described by a previous Attorney-General in the Legislative Assembly as "the Good Samaritan provision", provides as follows:-

> "Any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of a crime and is liable to imprisonment for 7 years."

This maximum punishment is the heaviest for any corresponding offence anywhere in the world. The offence charged is set out on p2.

(a) Three preliminary issues

Before addressing Mr Stewart's submissions in support of grounds Nos. 1-3, it is convenient first to deal with three important issues raised by counsel during the hearing of this appeal, viz:

i) The procedure required to be followed when the Court exercises the jurisdiction to deal summarily with an indictable offence with the consent of the accused under s121A of the Justices Act, with particular reference to the accused pleading guilty, and the Court's acceptance of that plea;

ii) Was the Information bad for duplicity?; and

iii) The nature of this Court's appellate jurisdiction under s163(1) of the Justices Act.

I deal with these, seriatim.

(i) Procedure when exercising jurisdiction under s121A of the Justices Act

This raises a threshold question whether the Court had jurisdiction to hear and determine the charge of a Code s155 offence, and whether the learned Magistrate followed the

correct procedures before accepting the appellant's plea of guilty to that charge.

Section 121A of the Justices Act gives the Court jurisdiction to hear and determine summarily certain minor indictable offences, provided the conditions precedent set out in the section itself are met. *[His Honour referred to observations by Rice J in R v Cavit; ex p. Griffiths (1986) 39 NTR 1 at pp7, 8 and continued:-]*

For present purposes s121A embodies 2 relevant sets of conditions precedent: s121A(1)(c) and (d), and s121A(1A) and (1B). Section 122A must also be taken into account; it deprives the Court of jurisdiction to hear and determine under s121A a charge of an offence which "appears to - - - him ought to be tried in the Supreme Court" because of certain circumstances - see p8.

Section 121A(1) sets out factors about several of which the Magistrate must reach an affirmative opinion before jurisdiction exists under s121A; as far as relevant, it provides:-

> "(1) Subject to sections 121B and 122A, where
>
> (a) a person is charged before the Court with an indictable offence;
>
> (b) in the opinion of the Court, the charge is not one that the Court has jurisdiction, apart from this section, to hear and determine in a summary manner;
>
> (c) the evidence for the prosecution is, in the opinion of the Court, sufficient to put the defendant on his trial;
>
> (d) the Court is of the opinion that the case can properly be disposed of summarily;

(e) the defendant consents to it being so disposed of;

- - -

the Court has jurisdiction to hear and determine the charge in a summary manner, and pass sentence upon the person so charged." (emphasis mine)

Section 121A(1A), which is subject to ss(1B), allows an accused who is represented by a legal practitioner to plead guilty to a charge being dealt with summarily under ss(1) "at any stage of the proceedings". Ms Fraser of counsel for the respondents submitted in effect that these words should be given their full effect, and meant that the plea could be made at an early stage in the proceedings, as it was here (see p6). She submitted that to interpret s121A otherwise would mean that a Magistrate was unable to allow a plea of guilty to be made without first hearing, for example, prosecution evidence for the purpose of reaching the opinion required by s121A(1)(c). Ms Fraser submitted that the fact that s121A(1A) and (1B) had been added by amendment in 1983 supported the view that the plea of guilty by a legally represented accused could be made literally "at any stage", the object being to save unnecessary expense. I accept this submission.

Account must also be taken of the overriding prohibition in s121A(1B) which provides that:-

"The Court hearing a charge being dealt with in the manner referred to in subsection (1) shall not - - - accept a plea of guilty under and in accordance with subsection (1A) from the person the subject of the charge unless it is of the opinion that it is proper to do so." (emphasis mine)

The combined effect of ss121A(1)(c), (d), (1A) and (1B), in my opinion, is that before the Court accepts the plea there must

be sufficient evidence adduced before the Court by the prosecution, or facts admitted, to enable the Magistrate to form the necessary opinion under s121A(1B) "that it is proper" to accept the plea. To form that opinion the Magistrate must ask himself whether on that evidence or the admitted facts, the accused could lawfully be convicted of the offence charged. A Magistrate cannot simply rely on the fact that the defendant was legally represented, to conclude that it was proper to accept the plea of guilty. It is desirable at this point to state briefly the sequence of events in the Court.

Before the learned Magistrate on 18 May 1993, Ms McCrohan of counsel announced that she appeared for the appellant and that "this matter is ready to proceed by way of a plea". I observe, with the benefit of hindsight, that the prosecution should not have acquiesced in summary proceedings, merely for the sake of convenience and expedition; such was the nature and novelty of the Code s155 offence that it was clearly not in the best interests of society to do so - see, for example, *R v Coe* [1969] 1 All ER 65 at 67, *R v King's Lynn Justices* [1969] 1 QB 488 at 494 and *R v Canterbury Justices* [1981] 2 All ER 129 at 136. The prosecutor was given leave to withdraw a charge, the charges were then read, the prosecutor asked the appellant how he pleaded, and he replied "Guilty". Immediately after that plea, the facts alleged were read out by the Prosecutor. Defence counsel admitted that those facts were correct, with one minor exception of no present relevance. Matters in mitigation of punishment were then presented in part by Ms McCrohan, on being called on by the

Magistrate. The hearing continued that afternoon; Ms McCrohan made further submissions on 19 May, and her Worship proceeded to sentence immediately.

From this sequence of events, it is clear in my opinion that the Magistrate, immediately prior to the commencement of defence counsel's submissions in mitigation, had implicitly accepted the appellant's plea of guilty for the purpose of the summary hearing; see the observations of Barwick CJ in *Griffiths v The Queen* (1976-77) 137 CLR 293 at 302-3, and Aickin J at pp334-5.

It is I think a fair conclusion from reading the transcript that it was not until the submissions in mitigation were being made that the participants in the Court process, including the learned Magistrate and counsel, first realized that there were problems involved in the elements of the offence under Code s155. This is not surprising given the novel nature of the provision; it does not exist in Australia or in other common law countries.

This Court has the benefit of approaching those problems with hindsight. Given that benefit, the sequence of events during the hearing, and the difficulties to which Code s155 was seen to give rise, I consider it can now be seen that the Magistrate ought to have later decided not to hear the charge summarily under s121A(1) - that is, to change her earlier decision - because it had then become clear that the opinion required by s121A(1B) for jurisdiction, that it was proper to accept the plea to the charge, could not be properly held. It lacked a proper basis in that on the admitted facts,

the accused could not, without more, properly be convicted of the offence. I discuss this latter point later; see pp16-35.

On this basis - that there was ultimately no proper basis to accept the plea - the appeal against conviction for the offence under Code s155 would succeed.

It is pertinent at this point to deal briefly with s122A of the Act, an important provision in a case of this nature. Section 122A provides, as far as relevant:-

> "- - - a Magistrate shall not have jurisdiction to hear and finally determine a charge under - - - s121A, <u>if it appears to - - - him - - - having regard to its seriousness or the intricacy of the facts or the difficulty of any question of law likely to arise at the trial or any other relevant circumstances</u>, ought to be tried by the Supreme Court". (emphasis mine)

Ms McCrohan rightly informed the Court that Code s155 is a novel provision in the law. As noted above, the requirements of its provisions ultimately caused considerable confusion in the Court. With the advantage of hindsight, it can now be seen that the better course of action would have been for the learned Magistrate to have declined, after hearing the plea in mitigation, to hear and determine the charge, applying s122A.

On the principles applicable in reaching the opinion required under s122A see *R v Harris and Daly [No.1]* (1975) 12 SASR 264 at pp268-9; *R v Johnson and ors* (1978) 19 SASR 157; *R v Highbury Corner Magistrate; ex p. Weekes* [1985] QB 1147; and *R v Justices of Bodmin; ex p. McEwen* [1947] KB 321.

(ii) <u>The Information - was it "bad for duplicity"?</u>

Mr Stewart submitted that the Information charging the Code s155 offence was "bad for duplicity". He contended

that it was a charge of several quite distinct offences and that this had embarrassed the appellant in his plea.

[His Honour set out the charge (p2) again, and continued:-]

It can be seen that this follows the wording of Code s155 (p3); but that alone would not save it from duplicity - see *R v Molloy* [1921] 2 KB 364, and s186 of the Justices Act. Ms Fraser submitted that the Information was not duplicitous.

The rule against duplicity, its purpose and the consequences of its breach, are succinctly set out in *J.B. Bishop's* 'Criminal Procedure' (1983) at p141:-

> "- - - a statement alleging an offence must allege one offence only - - -. The purpose of the rule is to avoid confusion and unfairness by ensuring that the defendant knows the charge he has to answer. Breach of the rule is regarded as a serious matter: the charge cannot proceed as laid and <u>any conviction based on a duplex charge is bad</u>." (emphasis mine)

A count in an Indictment can be duplex, in two ways: see *Romeyko v Samuels* (1971-2) 2 SASR 529 at pp533-4, per Bray CJ. In terms of that analysis, Mr Stewart's submission is that the Information as framed alleges more than one offence, stated disjunctively, and is therefore bad for duplicity in the sense of uncertainty. That is, he asks, which of 5 offences in Code s155 was the appellant being charged with: failing to rescue, or failing to resuscitate, or failing to provide medical treatment, or first aid, or succour of any kind? The previous question is: does Code s155 create more than one offence?

Separate offences are not necessarily created by the presence of "or" in the relevant provision of a statute; see

Ex p. Polley; re McLennan (1947) 47 SR(NSW) 391 and *Romeyko v Samuels* (supra).

In *Ex p. Polley* Jordan CJ said at p392:-

> "The question whether an enactment creates one offence or several depends upon its subject matter and language considered in the context.
>
> [His Honour then gave some examples, and continued:]
>
> - - -
>
> But the mere use of the word "or" does not show that it is intended to create two offences. It may sufficiently appear that it is intended to create only one offence of a particular type and to supply one or more instances."

His Honour then gave several examples, including:-

> "Where a statute made it an offence to be in charge of a motor vehicle whilst under the influence of drink or a drug, to such an extent as to be incapable of having proper control of it, it was held that there was here only one offence, that of being in charge whilst incapable, drink or drugs being instances as causes of incapacity: *Thomson v Knights* [1947] 1 All E R 112."

In Romeyko (supra) the provision in question, s107(c) of the Post and Telegraph Act 1901 (C'th), was as follows:-

> "Any person who knowingly sends or attempts to send by post any postal article which -
>
> - - -
>
> (c) has thereon or therein or on the envelope or cover thereof any words marks or designs of an indecent obscene blasphemous libellous or grossly offensive character, shall be liable to a penalty - - -."

Bray CJ noted that the first question was whether s107(c) "creates - - - one or several offences." His Honour observed at p552 that where a legislative provision contains a series of alternatives:-

> "The true distinction - - - is between a statute which penalises one or more acts, in which case two

> or more offences are created, and a statute which penalises one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics. Of course, there will always be borderline cases and if it is clear that Parliament intended several offences to be committed if the act in question possesses more than one of the forbidden characteristics, that result will follow."

It can be seen that the use of "or" may merely specify different ways in which a single offence may be committed. The difficulties in construction are manifest, and minds may reasonably differ; see the cases collected in Archbold, (1992) Vol.1, at pp77-84, from which it is difficult to ascertain a clear principle. The approach is that the question of duplicity is one of fact and degree in each case. As Lord Diplock put it in *DPP v Merriman*, [1973] AC 584 at p607:-

> "The rule against duplicity, viz that only one offence should be charged in any count of an indictment . . . has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the 18th century, to charge them in a single count of an indictment".

It is a reasonable approach to ascertain the gist of Code s155 and then decide whether its specification of rescue, resuscitation etc reveals an intention to create separate offences or merely characteristics of the same offence.

Code s155 (see p3) in my opinion imposes a general legal duty, novel to the law of Australia, on a person with

certain ability, who "callously fails" to exercise that ability in certain circumstances; that is, it makes it an offence for any person who is able to provide certain direct or indirect assistance - "succour of any kind" - to a person urgently in need of it and whose life may be endangered if it is not provided, to callously fail to provide that assistance. It can be seen that by its nature the Code s155 offence is a crime of omission, consisting of inactivity, failing to act, and hence rather more easily regarded as "single" in nature than a crime of activity; see *Ministry of Agriculture, Fisheries & Food v Nunn Corn (1987) Ltd* [1990] Crim. L.R. 268.

The matters set out in s155 "- - - rescue, resuscitation, medical treatment, first aid or succour of any kind - - -" are in my opinion examples of different forms of direct or indirect assistance; in terms of Bray C.J.'s analysis in *Romeyko* they are the "forbidden characteristics" of a single act. I therefore reject Mr Stewart's submission on this point; I consider that the Information for the Code s155 offence is not bad for duplicity.

(iii) <u>The nature of this Court's appellate jurisdiction under s163(1) of the Justices Act</u>

This appeal against conviction follows a plea of guilty. The law in those circumstances is as stated in *R v Murphy* [1965] VR 187: the appeal will only be entertained if it appears that there has been a miscarriage of justice below in that, for example, the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty, or on the admitted facts he could not in law be

convicted of the offence charged. If any of these matters are shown, there has been a miscarriage of justice because a plea of guilty must flow from a genuine consciousness of guilt; and the conviction must be quashed.

Relying on *Seears v McNulty* (1987) 28 A Crim R 121, Ms Fraser submitted that this Court was exercising original jurisdiction in hearing the appeal and as a consequence the onus lay on the appellant to establish one or other of the matters mentioned in *R v Murphy* (supra). It is trite that in an appeal the appellant bears the burden of establishing his grounds of appeal. On an appeal against conviction following a plea, he must also establish one or other of the matters in *Murphy*, to have his appeal entertained.

It is therefore not strictly necessary that I express an opinion on the submission that this Court is exercising original jurisdiction in this appeal. However, I venture to repeat certain remarks I made in *J.K. v Waldron* (1988) 93 FLR 451 at pp455-6:-

> "Section 163(1) of the Justices Act is now in a very different form to the provision considered by the Full Court in 1981 in *Messel v Davern* (1981) 54 FLR 376. The Full Court there noted (at p280-281) that the corresponding provision in South Australia provided for a full appeal on both facts and law; it was held that the then s163(1) provided for an appeal by way of rehearing which could involve a hearing de novo. <u>It seems clear enough that the substitution of the present s163(1) in 1983 was designed to abrogate the decision in *Messel v Davern* by providing for the appeal under s163(1) to be an appeal in the strict sense</u>. As a result I do not think that *Messel v Davern* is now authoritative as to the nature of a justices appeal in this jurisdiction." (emphasis mine)

In my opinion this Court sitting on an appeal under s163(1)(b) is exercising only appellate jurisdiction, and not original

jurisdiction. Where it receives fresh evidence on appeal under s176A of the Justices Act, its approach to the exercise of that appellate jurisdiction is necessarily different to that where the evidence is the same as that before the Court below, because it must determine the appeal on the (now different) evidence. However, whether or not fresh evidence is received, for an appeal to succeed the appellant must establish an "error or mistake" by the Court below (s163(1)(b)); see *Duralla v Plant* (1984) 54 ALR 29 at pp41-44, per Smithers J.

I turn to Mr Stewart's submissions directed to establishing the grounds of appeal.

(b) <u>The submissions by the appellant</u>

In *O'Connor v The Queen* (1992) 59 A Crim R 278 the Court of Criminal Appeal (Vic.) held that a miscarriage of justice must be established before an appellate court will interfere to set aside a conviction following upon a plea of guilty. I accept that proposition; see p15.

Mr Stewart submitted that there was a miscarriage of justice in this case. He relied on two grounds to establish that submission:-

1. that the appellant did not appreciate the nature of the charge alleged or did not intend to admit he was guilty; and
2. that on the admitted facts he could not in law be convicted of the offence charged.

The respondent rightly conceded that either ground, if established, meant that a miscarriage of justice had occurred; see *Murphy* (supra.) I turn to the grounds, in turn.

Ground 1: failure to appreciate the nature of the charge, or to intend to admit guilt

Although this ground was not set out in the amended Notice of Appeal, no objection was taken and I will deal with it. Mr Stewart should have applied to amend the Notice of Appeal to incorporate the ground; see r83.06(c).

Mr Stewart submitted that *O'Connor v The Queen* (supra) established that advice by counsel to an accused as to how he should plead is not necessarily a bar to establishing Ground 1.

[His Honour discussed O'Connor, and continued:-]

I respectfully agree with the observations in *O'Connor* (supra); it is clear, in my opinion, that the correct principle is as stated by Sholl J in *R v Murphy* (supra). I apply that principle to this appeal.

To ascertain if the appellant can establish a miscarriage of justice in terms of Ground 1 it is necessary to examine the proceedings in the Court and to consider the affidavit of the appellant in relation thereto. *[His Honour considered these matters, and concluded that]* overall, they show that the charge of this offence clearly resulted (understandably, given its novelty) in misunderstandings by all parties concerned, as to the nature of the offence.

Ms Fraser submitted that the appellant cannot discharge his burden of proof by the mere assertion that he

did not understand the charge fully. I accept that. Ms Fraser submitted that it was clear from the submissions in mitigation that Ms McCrohan clearly understood the nature of the Code s155 charge and properly advised the appellant in relation thereto, and therefore the appellant understood the charge. I do not accept that submission, for the following reasons.

It is the state of affairs at the time the Court tacitly accepted the plea of guilty which must be examined in considering whether the accused has shown that he did not understand the nature of the offence to which he had pleaded guilty. There is no single matter that establishes that the appellant misunderstood the nature of the Code s155 offence. However, reviewing the transcript, and in particular taking into account the obvious uncertainty of both counsel and the learned Magistrate as to the nature of the offence (for example, as to what the requirement of a callous intention entails), I am satisfied that the appellant misunderstood the nature of the charge when he pleaded guilty to the offence. Consequently, there was a miscarriage of justice in the proceedings before the Court.

Ground 2: that on the facts the appellant could not be convicted

Code s155 is set out at p3. Mr Stewart submitted that this is a novel provision in the criminal law of Australia and had not hitherto come before this Court. That is correct; it is instructive to examine the background to

Code s155 before considering the submission as to what its elements require by way of proof.

(i) 'Failure to rescue' provisions in the criminal law

In the history of civilization many societies have considered that a bystander has a moral obligation, as a human being, to aid a person in danger. See, for example, the Biblical story of the Good Samaritan in Luke 10:30-35. Not every society has sought to enshrine this moral obligation in law, so as to impose a legal duty on the bystander to rescue. But many have; a fairly general legal duty positively to aid persons in danger is not unique either to the Code or to this century.

In ancient Egyptian law and in Indian law there are provisions for the punishment of those who fail to aid persons in danger. In contrast, Roman law knew little of general criminal liability for omissions to act; nor did traditional scholastic thought. The few delicts in Roman Law involving omission to act were particular in their nature: for example, the law punished the failure of a slave to defend his master from assault, the failure of a soldier to assist a superior officer captured by the enemy, and the failure of a husband to prevent his wife from becoming a prostitute. The common law follows this approach of particularity: positive legal duties are owed only to a limited group with whom a special relationship exists which creates a responsibility. Ultimately, this approach founds on conceptions of individual autonomy and liberty, with duties imposed on citizens being

the minimum necessary to permit peaceful co-existence within society. It is said that the law should not enforce altruism or legislate morality. See generally on the history of criminalizing omissions to act: Graham Hughes 'Criminal Omissions' (1958) 57 Yale Law Journal 590.

In modern times, a 'failure-to-rescue' offence appeared first in the Russian Criminal Code of 1845 and later in the Codes of Tuscany (1853), the Netherlands (1891) and Italy (the Zanardelli Code of 1889). In the first half of this century other Codes conformed to this pattern. Usually, they make it an offence voluntarily to fail to render to a person in peril assistance which the accused could have given without incurring personal danger or creating danger to others which is certain, serious and imminent. It is said that they do not require heroism but punish indifference, and recognize the limits of what can fairly be asked of people. Since WWII almost every new Criminal Code, in the Civil Law countries, contains a 'failure-to-rescue' offence: see F.J.M. Feldbrugge 'Good and Bad Samaritans: Comparative Survey of Criminal Law Provisions' (1966) 14 American Journal of Comparative Law 630-631. As to the Codes see also A. Ashworth, "The Scope of Criminal Liability for Omissions", (1989) 105 LQR 424; and A. Ashworth and E. Steiner, "Criminal omissions and public duties: the French experience", (1990) 10 Legal Studies 153.

As noted, the common law countries have imposed criminal liability only for certain omissions to act; for example, in 1558 in England it was made a religious offence

not to go to church. A modern example of this approach is s149(b) of the Code read with s153 and other provisions, viz:-

> 149. "It is the duty of every person having charge of a child under the age of 16 years or having charge of any person who is unable to withdraw himself from such charge by reason of age, sickness, unsoundness of mind, detention or other cause - - -
>
> (b) - - - to take all reasonable action to rescue such child or other person from such danger.
>
> 153. A person who omits to perform any duty imposed upon him by this Division is held to have caused any consequences to the life or health of any person to whom he owes the duty by reason of such omission, but whether or not he is criminally responsible therefor is to be determined by the other provisions of this Code."

This is clearly directed, inter alia, to the type of situation which arose at common law in *R v Russell* [1933] VLR 59. The most general category of duty to act, recently recognised by the common law, arises where an accused has inadvertently created a danger, realizes its existence, and fails to take measures which lie within his power to counteract it; see *R v Miller* [1983] 2 AC 161. In that case, Lord Diplock said at p175:-

> "The conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal; and if it ever were to do so there would be difficulties in defining what should be the limits of the offence." (emphasis mine)

In short, the common law countries have not as yet introduced a more general offence of 'failing to rescue', on the basis that it is both unnecessary and unworkable. Hence the path-breaking nature of Code s155: in a jurisdiction whose legal system is based on Australian common law concepts and approaches there now exists an offence otherwise to be found

only in jurisdictions based on the Civil Law. Its basis lies in a concept of social responsibility: where another's life is endangered, it is seen that a person is socially and legally responsible to take such steps as he is able to avert that result, even though the endangered person is a stranger to him, and he had nothing to do with creating the dangerous situation.

(ii) <u>The elements of the offence in Code s155</u>

The offence comprises 4 elements. It makes it an offence for:-

1. any person who, being able to provide
2. rescue, resuscitation, medical treatment, first aid or succour of any kind
3. to a person urgently in need of it and whose life may be endangered if it is not provided
4. callously fails to do so.

It can be seen that an accused need not have been involved in any way in creating the peril which endangered the other person's life, in contrast with the common law. Possible applications of Code s155 are cases involving motorists and others who fail to assist victims of accidents, doctors who fail to make home visits to sick or injured persons and parents who fail to summon medical attention for their sick children. The scope of Code s155 is uncertain and broad.

(iii) *[His Honour related part of the proceedings, and continued:-]*

The Prosecutor then stated the facts on which the prosecution relied; the appellant later acknowledged them to

be correct for the purposes of his pleas. As far as relevant the facts were as follows:-

> "At about 6.21 pm on - - - 14 April 1993 the defendant - - - was the driver of a sedan which was being driven north along Gap Road - - -. As the defendant passed the Gap Resort Motel - - - a child on the defendant's left-hand side ran on to the road in front of the defendant's vehicle. The defendant applied heavy brakes and swerved the vehicle towards the left in order to avoid hitting the child. The child struck the right-hand front fender of the defendant's vehicle causing the child to be thrown some distance in an easterly direction landing on the bitumen.
>
> The defendant continued driving north along Gap Road failing to stop or rendering any assistance. - - The child was conveyed to the Alice Springs Hospital for treatment for injuries received during the collision. The child died some 40 minutes later. The defendant drove the vehicle to the Stuart Caravan Park - - -. As a result of information received police attended at the park at 9.24pm, some 3 hours after the accident.
>
> The defendant was spoken to and as a result arrested and held under section 137 of the Police Administration Act, conveyed to the police station where he was later spoken to in a taped record of conversation in which he fully admitted the offences stating: 'The boy just ran out in front of me'. When asked for a reason for failing to stop [an offence under Reg.138(1)(a)] and failing to report the accident [an offence under Reg.138(1)(d)] the defendant replied, 'I panicked'. The defendant admitted to be a disqualified driver, [having lost] his licence in Victoria in January 1993 for a period of 15 months.
>
> When asked for a reason [why he was driving that day] the defendant replied, 'I had to get to work'. The defendant was not recorded as having a Northern Territory driver's licence. At the time of the offence Gap Road [was] a public street, et cetera, Your Worship. The vehicle was inspected by a transport inspector and found to be unroadworthy being the back left tyre is bald. The left indicator doesn't operate, Your Worship.
>
> MS McCROHAN: Those facts are admitted except Mr Salmon says the left-hand indicator worked before that night."

Ms McCrohan was then called on, and made submissions in mitigation.

(iv) <u>The admitted facts and the elements of the Code s155 offence</u>

<u>Element 1 (p20)</u>

This element delineates the person on whom the 'duty to rescue' falls.

The width of the words "any person" is confined by the requirement that he be "able to provide" one of the forms of succour set out in element 2. To be "able to provide" is a requirement that the accused be able to provide direct or indirect assistance or help to a victim. For an accused to be shown to have this ability would appear to involve proof that he met three criteria, in terms of capacity, proximity and knowledge. That is to say,

(a) the accused must have both the physical and mental capacity to provide help or assistance to the particular victim, the help required of him by law being limited by his capacity, by what he can give in the particular situation, and by what is reasonable in that situation;

(b) there must be some degree of physical proximity between the accused and the victim in terms of physical presence or, possibly, in the form of communication such as a telephone; and

(c) the accused must know that the victim requires aid, assistance or help.

The admitted facts of this case permit inferences to be drawn that the appellant is a man of average intelligence, physically able, and physically proximate to the victim at the time of the accident. The admitted facts include the following:-

> "The defendant applied heavy brakes and swerved the vehicle towards the left in order to avoid hitting the child. The child struck the right hand front fender of the defendant's vehicle."

The inference open to be drawn from this is that the appellant must have realised at the time, that is, had actual knowledge, that the accident would be likely to result in potentially serious injuries to the child. This inference is reinforced by the fact that the appellant was travelling on a bitumen road at "about 50 kilometres" per hour at the time of the accident.

Element 2 (p20)

The ambit of the assistance or help envisaged by the section is very wide.

In the Oxford Dictionary, 2nd ed., the following meanings are assigned to the words used:-

""Rescue"	-	to deliver or save (a person or thing) from some evil or harm; to afford deliverance or safety:
"Resuscitation"	-	restoration to life; restoration of consciousness in one almost or apparently drowned or dead; revival, restoration or renewal of something to life.
"First aid"	-	assistance given on the spot in the case of street accidents and the like, before proper medical treatment is procured.
"Succour" [of any kind]	-	aid, help, assist; to give assistance to; shelter, protection."

The words are to be read noscitur a sociis, in their context. They envisage a person either directly or indirectly aiding or assisting a victim. Direct assistance or help is where, for example, a person personally administers first aid, resuscitation, medical treatment, or simply drags the victim to safety. Indirect assistance or help is given where, for example, a person telephones for an ambulance or merely calls for help.

As to element 2 Mr Stewart submitted:

1. that the prosecution had failed to discharge its onus of proof with respect to element 2, as the admitted facts did not bear upon proof of what this element entailed; or
2. that even if the admitted facts were relevant to proof of element 2, the accused was unable to assist in any of the ways envisaged by the element and that inability constitutes a defence to Code s155.

In support, Mr Stewart noted that Ms McCrohan had submitted that "- - - [the accused] didn't have any first aid skill." Further, he relied on *[the appellant's contention that he would not have known what to do]*.

Ms Fraser submitted that the admitted facts establish element 2. She noted in support that it was admitted that:-

> "The defendant continued driving north along Gap Road failing to stop or render any assistance."

I reject Mr Stewart's submissions. I accept Ms Fraser's submission that the admitted facts permit a clear

inference that the appellant, at the time of the accident, was a compos mentis responsible adult driving a motor vehicle on a road, in a position to render either direct or indirect assistance or help to the child, and capable of so doing. The fact that bystanders went to the child's aid after the appellant left the scene of the accident does not retrospectively absolve the appellant from performance of his duty to provide such aid or help.

Element 3 (p20)

It is incontestable that a young child - or indeed any person - hit by a motor vehicle travelling at approximately 50 kilometres per hour is a person "urgently in need" of some type of assistance. Mr Stewart, rightly in my opinion, did not contest this proposition. "Urgently" connotes that the danger to life must be such as to require immediate action.

As to the second limb of this element - "whose life may be endangered if [the assistance] is not provided" - Mr Stewart submitted that the admitted facts did not bear upon its proof. He submitted that:-

> "- - - there was no evidence whatsoever that the life of the deceased was or might have been endangered by any failure to provide any of these enumerated items [of assistance]."

This submission is based on the premise that a causal link must be established between the failure to rescue and the endangering of life.

Mr Stewart submitted that the injury the child sustained on impact with the motor vehicle was of a fatal nature and nothing the appellant could have done by way of aid

or assistance would have prevented the child from dying. Consequently, the argument ran, the child's life could not be said to have been endangered by the appellant's failure to provide aid or assistance, for death was inevitable. The child died some 40 minutes after the accident. In effect, the submission was that a person is not required by Code s155 to render aid in a case where that aid cannot achieve its purpose, that is, to save the victim's life.

Ms Fraser submitted that Code s155 does not require that causal link; it simply creates a positive duty to provide assistance, the circumstance in which it must be fulfilled being that life may be endangered if the assistance is not provided.

I accept Ms Fraser's submission. I consider that the duty under Code s155 exists even though the victim is doomed to die. To construe Code s155 otherwise is to construe it contrary to its clear intention; as long as the victim is alive, he is in danger. It does not distinguish between a victim who ultimately dies and a victim who ultimately survives. The words "to a person - - - whose life may be endangered if it is not provided" merely indicate the circumstances in which the duty arises; they seek to distinguish between the situation where a person sustains a minor non-life-threatening injury, such as a simple fracture of the arm sustained on a sporting field, when the duty under Code s155 does not arise, and the situation where the duty arises - where a victim suffers a potential or actual life-threatening injury, as here.

Element 4 (p20)

Elements 1 to 3, read alone, cast a duty enforceable by the criminal law on a very large number of people in the community; at first glance it appears to have very few practical limitations. The fourth element, introducing the requirement of callousness, restricts the application in practice of Code s155; for present purposes, it is the nub of the offence. It is necessary to consider this aspect of Code s155 in the context of other provisions of the Code dealing generally with criminal responsibility.

Section 155 of the Criminal Code is one of two provisions in Division 2 of Part VI of the Code; the other is s154, which criminalizes certain dangerous acts or omissions. Section 31(3) of the Code expressly excludes the offences in Division 2 of Part VI from the ambit of s31 which provides generally for the circumstances in which a person is excused from criminal responsibility for unintended acts or unforeseen consequences.

The issue to be resolved is what, if any, is the standard of criminal responsibility in s155 embodied by the requirement of "callously fails".

Mr Stewart submitted that, as a consequence of s31(3), s155 sets up its own scheme, which requires a subjective intent; as he put it, the accused must be shown to have had a "callous intent." Mr Stewart submitted that s31(3) removed "- - - the normal general [criminal] intent that is required to be proved, - - - and [replaced] it with a much stronger burden, - - - [a] stronger subjective intent that

has to be proved by the prosecution." In support, Mr Stewart relied on three matters, to which I now turn.

(i) In the Macquarie Dictionary 'callous' is defined as - "hardened in mind, hardened in feelings". (emphasis mine)

I also note its definition in the Oxford Dictionary, 2nd ed.:

'callous' - hardened state of mind, conscience etc.; want of feeling, insensibility. (emphasis mine)

I accept these meanings of "callous".

(ii) The Hansard of the Legislative Assembly debate of Wednesday 24 August 1983.

Mr Stewart submitted that it was permissible to look to Hansard as there was an ambiguity within Code s155 as to the meaning of "callously fails". In support, he relied on *Maynard v O'Brien* (1991) 78 NTR 16. Ms Fraser objected to a reference to Hansard on the basis that "the interpretation of Code s155 was on its face perfectly clear".

In *Maynard v O'Brien* (supra) at pp19-20, Angel J said:-

> "In 'Statutory Interpretation in Australia', 3rd ed., D.C. Pearce and R.S. Geddes, the learned authors, state at p24:
>
> > "According to this traditional approach, it is only when a study of language itself leaves the Court in doubt as to the meaning of the Act that a regard may be paid to the reasons why an Act was passed."
>
> The learned authors point out that the approach of the court seems to be changing, and later (p29) they

> state: "The comments of Mason and Wilson JJ in *Cooper Brookes* [(1981) 147 CLR 297 at pp319-321] appear to deal with the vexed question whether it is permissible to embark upon an inquiry as to the purpose of the Act in the absence of ambiguity or doubt as to the meaning on the face of the Act itself. If the literal approach may be departed from in any case in which it fails to yield a result which is consistent with the purpose of the Act (or legislative intent), as Mason and Wilson JJ suggest, a priori, it must be permissible in any case to seek to discover that purpose - - -. On the other hand, it has nearly always been assumed that an ambiguity must have arisen before it is permissible to call in aid the purpose approach - - -".
>
> There seems to be a growing practice to allow the use of the second reading speech where a bill was introduced to remedy a mischief [various authorities were then cited] It seems that the weight of authority is in favour of allowing recourse to the minister's second reading speech to search for the reasons an Act was passed and to eke out the mischief sought to be remedied." (emphasis mine)

I respectfully agree with those observations; the analysis applies equally to a provision of an Act.

Accepting the approach, I consider that this Court can have recourse to Hansard to aid in construing Code s155; it is a novel provision, and Hansard may assist in establishing the mischief sought to be remedied by the legislature.

Mr Stewart referred to p755 of Hansard where the then Attorney-General said:-

> "Another area of apparent concern is within s31(3). Under this clause a person is excused from criminal responsibility for an act, omission or event, unless it is intended or foreseen by him as a possible consequence of his conduct. This section, however, does not apply in relation to - - - [ss154 and 155] of the proposed Code.
>
> - - -
>
> In relation to proposed s155, failure to rescue - intent is relevant. But, for a person to be convicted for an offence against this section, the

degree of intent must be more than normal intent required in constituting an offence. The intent must be callous intent." (emphasis mine)

The problem remains, of what this "more than normal" intent is.

(iii) Mr Stewart sought to distinguish the meaning of "callous" as construed in *Crack v Post; ex parte Crack* (1984) 2 Qd. R 311. That case arose from the usual provision in motor traffic legislation which required a driver involved in an incident resulting in an injury or death to any persons to remain at the scene and, inter alia, "render all reasonable assistance to that person." It is similar in effect to Reg.138(1)(b) of the Traffic Regulations. However, in Queensland, if in the Court's opinion the offender had shown a "callous disregard" for the dead or injured person, a minimum punishment of not less than 3 months imprisonment applied. The Magistrate held that he was unable to conclude that the hit-run driver had displayed more than "unfeeling neglect" for the pedestrian he had struck, noting that the evidence showed he was then in a state of panic. The Full Court of the Supreme Court of Queensland held that the words "callous disregard" were to be construed according to their ordinary meaning, and that whether or not a driver had shown "callous disregard" was to be determined by an objective appraisal, the test being whether his conduct offended common standards of decency, respect and kindness, such that a reasonable man would regard him as having shown callous disregard. That is, the Court was to look at all the circumstances, including the driver's subsequent conduct, and then decide (applying the

test mentioned) whether his conduct at the scene amounted to callous disregard for the dead or injured person. The majority considered that panic was relevant only if it went to the driver's capacity to control his actions.

Mr Stewart submitted that *Crack v Post* (supra) dealt with a provision very different from Code s155. Ms Fraser conceded that the provision in question was distinguishable. Nevertheless, I consider their Honour's observations are useful, in considering Code s155.

Ms Fraser submitted that s155 laid down an objective test. In support, she relied on *Pregelj v Manison* (1987) 51 NTR 1, submitting that s31 was the 'mens rea' provision in the Code and did not apply to Code s155, which set out its own regime. She submitted that the offence in Code s155 on its face was an offence of strict liability.

I do not accept Ms Fraser's submission. In *Pregelj v Manison* (supra), Nader J, after reviewing the concept of 'mens rea' under the common law, proceeded (at p12) to consider the Code position and said:-

> "It is clear from cases concerning the Queensland Criminal Code - - - that the Parliament intended it to codify the law pertaining to criminal responsibility to the extent that it intended to lay down minimum exculpating criteria. <u>The common law has no role</u>." In *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 981 Griffiths CJ said:-
>
> > "- - - under the criminal law of Queensland, as defined in the Criminal Code, <u>it is never necessary to have recourse to the old doctrine of mens rea</u> - - -. The test now to be applied is whether the prohibited act was, or was not done accidentally or independently of the exercise of the will of the accused person (s23)."
>
> (emphasis mine)

I respectfully agree; in discussing the Code I consider that the sooner the terminology of 'mens rea' and 'actus reus' is abandoned, the better. The Code provisions must be looked to, and not the common law, to establish the requisite criminal responsibility. It is correct that s31(3) excludes s155 from its ambit, but this does not mean that therefore the offence in Code s155 automatically becomes an offence of strict liability; it is a matter of construing the provisions of the section, and, properly construed, the offence is not one of strict liability.

Recourse must be had to the language of s155 to ascertain whether the Legislative Assembly intended a subjective or purely objective test for "callously fails". In construing s155, the Dictionary meaning of "callous", and the legislative intention behind "callously fails" as made clear in the Attorney-General's speech, establish that an accused must be shown to have had a subjective intention, in the sense that he must have had an actual intention of a particular quality.

I accept Mr Stewart's submission that Code s155 places a heavier burden on the prosecution than does s31(1); it requires the prosecution to prove beyond reasonable doubt that the appellant had acted callously when he failed to provide aid or assistance to a person urgently in need of it and whose life might be endangered by his failure. To my mind, to "callously fail" involves a deliberate and conscious choice by an informed accused not to provide aid or assistance to the victim; it does not involve an impulsive or an

unconscious choice. But, further, I consider that "callous" also requires proof that the accused's failure was such as to offend common standards of respect, decency and kindness in the sense that a reasonable person would regard the accused's failure as callous.

Mr Stewart submitted that the admitted facts provided no evidence that the appellant had callously failed to provide assistance or help to the victim. In the admitted facts, the only facts relevant to "callously fails" are:-

> (1) The defendant continued driving after the accident, failing to stop or render any assistance.
>
> (2) When asked for a reason for failing to stop and failing to report the accident the defendant replied: 'I panicked'.
>
> (3) As a result of information received Police attended at the park at 9.24pm, some 3 hours after the accident.

Ms Fraser asserted that these facts, in particular (1) and (3), can sustain an inference that the appellant acted callously in that:

> (1) he knew he had struck the child, but continued to drive on; and
>
> (2) he failed to make any positive attempt to notify the Police or the Ambulance Service in the ensuing 3-hour period of time.

I do not consider that these facts, without more, necessarily sustain an inference of callous failure. The probable inference from these facts is that the appellant panicked at the scene of the accident, and as a consequence

left without rendering assistance or help to the victim. This inference is supported by:

1. pars8, 12 and 13 of the appellant's affidavit; and
2. the two newspaper articles (dated 11 May 1993 and 20 June 1993) which further support paragraph 8 of the affidavit. (The newspaper articles were admitted into evidence in the Court and were before this Court, without objection by Ms Fraser)

The inference that the appellant panicked is not consistent with what is required to satisfy the requirement of "callously fails". When a person panics he has at that time no ability consciously and deliberately to choose to help or assist; Code s155 requires that it be proved that a person deliberately and consciously chose not to provide help or assistance. In *Crack v Post* (supra) Macrossan J at p322, in respect of the 'defence' of panic advanced in that case, where a plea of not guilty had been entered, that:-

> "It is possible to imagine a shock so intense and overwhelming that <u>for a brief period</u> a driver of a vehicle <u>may become effectively prevented from exercising his will and, in this sense, also from controlling his actions</u> - - -". (emphasis mine)

I respectfully agree. The degree and duration of any panic which the accused felt were left unexplained in this case by his plea; the question whether there had been operative panic to an extent which involved loss of will on his part, and the length of any period during which the panic lasted, was not properly addressed. Further, it is not clear that the Court

gave full consideration to the application of the community standards I have mentioned, when considering whether his failure was callous though her Worship noted "the abhorrence, with which the community reacts to these offences", and that the accused's offending was "against normal human decency."

The foregoing are the reasons for orders nos.1 and 2 made on 12 August 1993 (pp1,2) *[His Honour then proceeded to deal with the appeal referred to at 3 on p2.]*
