The Queen v Whittington [2006] NTSC 64

PARTIES:	THE QUEEN v WHITTINGTON, ROBERT GREGORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No 20304540
DELIVERED:	11 August 2006
HEARING DATES:	10-11 August 2006
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – whether section 162 of the Police Administration Act applies – whether the Criminal Code repeals section 162 of the Police Administration Act – Indictment quashed

Criminal Code Act (NT) s 5, s 23, s 28, s 28(a), s 28(b), s 28(d), s 28(e), s 66, s 66(6), s 154, s 154(1), s 154(3), s 339
Police Administration Act (NT) s 162(1)

Dossett v T J K Nominees Pty Ltd (2003) 218 CLR 1
Hamilton v Halesworth (1937) 58 CLR 380-381;
Little v The Commonwealth (1947-1948) 75 CLR 94;
Maxwell v Murphy (1956-1957) 96 CLR 261
R v Rushton [1967] VR 842
State of South Australia v Tanner & Ors (1988-1989) 166 CLR 161
The Queen v T (1985) 38 SASR 428
Webster & Anor v Lampard (1993) 177 CLR 598

REPRESENTATION:

Counsel:

Plaintiff:	J Tippett QC and D Lewis
Defendant:	M L Abbot QC and I Rowbottam

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Withnalls

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

The Queen v Whittington [2006] NTSC 64
No. 20304540

BETWEEN:

THE QUEEN
Plaintiff

AND:

ROBERT GREGORY WHITTINGTON
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 11 August 2006)

[1] The accused presently stands charged upon indictment with one count of dangerous act, namely that on 23 October 2002 at Wadeye he discharged a firearm that caused serious actual danger to the life of Robert Jongmin in circumstances where an ordinary person similarly circumstanced would clearly have foreseen such danger and not have done that act. It is also averred that the dangerous act involved a circumstance of aggravation, namely that the accused thereby caused the death of Robert Jongmin.

[2] The offence and circumstance of aggravation alleged concern an alleged breach of s 154(1) and s 154(3) of the Criminal Code. Counsel for the accused has moved pursuant to s 339 of the Criminal Code that the

indictment be quashed. At this stage, no plea has been taken to the indictment.

[3] I should mention that originally the indictment preferred a charge of manslaughter as well as dangerous act. However, the Crown has elected not to proceed with manslaughter and has instead preferred only the current charge upon a fresh indictment.

[4] The basis of the motion to quash is that proceedings brought against the accused are out of time.

[5] Section 339 of the Code provides:

> "**339. Motion to quash indictment**
>
> (1) The accused person may before pleading apply to the court –
>
> (a) to quash the indictment on the ground that it is calculated to prejudice or embarrass him in his defence to the charge or that it is formally defective; …"

[6] No point was taken by Mr Tippett QC that this provision did not apply to a situation such as the present. On the contrary he submitted that the appropriate course would be for the indictment to be quashed if the accused was entitled to the benefit of the time limit prescribed by s 162(1) of the Police Administration Act. The submission of counsel was supported by the decision in *R v Rushton* [1967] VR 842 at 846, where a Full Court of the Supreme Court of Victoria held that where a presentment has been presented without jurisdiction, the proper course is for the presentment to be quashed:

see also *The Queen v T* (1985) 38 SASR 428 at 431 per King CJ, with whom Jacobs and O'Loughlin JJ agreed, where King CJ held that such an indictment is invalid, i.e. "formally defective".

[7] Section 162(1) of the Police Administration Act provided, at the relevant time, as follows:

> "(1) Subject to this section, all actions and prosecutions against any person for anything done in pursuance of this Act shall be commenced within two months after the act complained of was committed, and not otherwise."

[8] It is not in contention that the accused was a serving police officer acting in pursuance of the Police Administration Act at the time that he discharged the firearm on 23 October 2002. The Crown does not assert that the police officer was acting *mala fides*. It is common ground that the prosecution for any offence arising out of the events on 23 October 2002 against the accused for any alleged offence committed by the accused was not commenced within the two month period. It is conceded by Mr Tippett QC for the Director of Public Prosecutions that if the accused is entitled to the benefit of s 162(1), the motion to quash should be granted. It is not suggested by Mr Tippett QC that the accused was acting otherwise than according to what he believed to be the lawful execution of his duty at the relevant time. It is therefore not necessary to discuss the many cases which deal with provisions similar to s 162(1) such as *Hamilton v Halesworth* (1937) 58 CLR 380-381; *Little v The Commonwealth* (1947-1948) 75 CLR 94 at 109-111; and *Webster & Anor v Lampard* (1993) 177 CLR 598 at 605-607.

[9] The argument of Mr Tippett QC is that there is no time limit for the bringing of a prosecution whether against a police officer or anyone else for an offence against s 154 because the limits of an accused's liability for an offence are to be found within the limits of the Criminal Code; that the Criminal Code provides for no time limits in a case such as this; alternatively that the passage of the Criminal Code Act in 1984 impliedly repealed s 162(1) to the extent that it is inconsistent with the provisions of the Criminal Code.

[10] In support of the first submission, Mr Tippett QC referred to s 28 of the Criminal Code, which provides the circumstances in which force causing death or grievous harm may be justified. Sub-sections 28(a), s 28(b), s 28(d) and s 28(e) specifically refer to cases involving police officers. These provisions are as follows:

> "In the circumstances following, the application of force that will or is likely to kill or cause grievous harm is justified provided it is not unnecessary force:
>
> (a) in the case of a police officer when lawfully attempting to arrest or to assist with the arrest of a person whom he reasonably believes to be a person who –
>
> (i) unless arrested, may commit an offence punishable with imprisonment for life;
>
> (ii) has taken flight to avoid arrest; and
>
> (iii) [Omitted]

> (iv) the person has been called upon by the police officer or another police officer to surrender and has been allowed a reasonable opportunity to do so;
>
> (b) in the case of a police officer when attempting to prevent the escape or the rescue of a person from lawful custody whom he reasonably believes to be a person who, unless kept in lawful custody, may commit an offence punishable with imprisonment for life and provided the police officer first calls upon the person attempting to escape or to rescue to surrender or to desist and allows him a reasonable opportunity to do so; …
>
> (d) in the case of a police officer when attempting to suppress a riot, provided the proclamation to disperse has been read or an attempt to read it has been made and it appears on reasonable grounds to such police officer that a person not participating in such riot is in danger of death or grievous harm because of such riot or that an offence in relation to property is being committed punishable with imprisonment for life and, in either case, provided such police officer, if practicable, first calls upon the rioters to desist and allows them a reasonable opportunity to do so;
>
> (e) in the case of a police officer, or a person acting by his authority, when attempting to prevent a person committing or continuing the commission of an offence of such a nature as to cause the person using the force reasonable apprehension that death or grievous harm to another will result;"

[11] Mr Tippett QC submitted that the Criminal Code by these provisions circumscribe the circumstances which justify the use of lethal force by a police officer acting in the execution of his duty and that therefore s 162(1) has no application.

[12] In my opinion, this argument cannot be accepted. Section 162(1) does not provide a further justification for an offence committed by a police officer. As is well recognised in *Webster & Anor v Lampard* (supra) at 605-606, the defence under such statutory provisions is not confined to the case where the

accused's conduct was actually justified as being in pursuance of the execution of some statutory provision or in the discharge of some public duty or office. The purpose of the provision is not to make lawful that which would otherwise be unlawful. All that s 162(1) does is provide a time bar for the bringing of a prosecution. As Dixon and McTiernan JJ said in *Hamilton v Halesworth* (supra) at 381:

> "The question is not whether what the defendant did was justified in law but whether it was done in pursuance of the Police Offences Act, and this means in purported or assumed pursuance thereof."

[13] Section 28 of the Criminal Code deals with an entirely different matter than s 162(1) of the Police Administration Act. As Mr Abbott QC put it, where the provisions of s 28 apply lethal force by a police officer is justified and therefore the act is not a crime. But s 162(1) says nothing about the elements of a crime or whether a person is not guilty of an offence because his act is authorised, justified or excused: see s 23 of the Criminal Code.

[14] There is nothing in the Criminal Code either at the time it was passed or at any subsequent time to indicate that a time limit fixed for the prosecution of an offence had to be found solely within the terms of the Criminal Code itself. Section 5 of the Criminal Code Act provides:

> "On and from the commencement of the respective Parts of the Code, those Parts shall be the law of the Territory in respect of the various matters therein dealt with."

[15] There are no provisions in the Code which touch upon the question of time limits, although there is in relation to s 66(6) a time limit provided for the

prosecution of an offence against s 66. However the existence of such a time limit does not imply, in my opinion, that any time limits to be found in other legislation must of necessity be excluded.

[16] Mr Tippett QC's alternative submission that s 162(1) has been impliedly repealed must likewise be rejected. It is plain that there is no inconsistency between the provisions of the Code and the provisions of s 162(1). Where s 162(1) applies, it does not make lawful that which would otherwise have been unlawful. There is no reason why the two provisions cannot be read together: see *State of South Australia v Tanner & Ors* (1988-1989) 166 CLR 161 at 171; and *Dossett v T J K Nominees Pty Ltd* (2003) 218 CLR 1 at 14.

[17] I should add that both sides relied in support of their submissions upon the fact that s 162(1) has been significantly altered by an amendment passed in 2005. The provision now reads:

> "(1) Subject to section 148F(4)(c), an action against the Territory under Part VIIA or a prosecution against a member for an offence against this Act must be commenced within 2 months after the act or omission complained of was committed, and not otherwise."

[18] Clearly so far as prosecutions are concerned, s 162(1) now applies only to prosecutions against police officers for offences committed against the Police Administration Act. Although sometimes it is appropriate for a court to refer to a subsequent amending provision for the purposes of ascertaining the meaning to be given to the pre-existing one, in my opinion, this is not one of those cases. In my opinion, s 162(1) was very clear as it was

originally drafted and contained no such limitation as is presently to be found in s 162(1) namely that the protection is limited to cases where the member has committed an offence against the Police Administration Act.

[19] I should also mention that there was no submission made that because s 162(1) has since been amended the provision in force in 2002 did not apply. In my opinion, Mr Tippett QC was right not to make such a submission in the light of s 12 of the Interpretation Act: see also *Maxwell v Murphy* (1956-1957) 96 CLR 261.

[20] Accordingly I find that the defendant is entitled to the benefit of s 162(1) of the Police Administration Act, that the prosecution in this case has not been brought within the time limit thereby prescribed, and is therefore defective. The indictment is therefore quashed.