Moore v Haynes [2008] NTCA 9

PARTIES:	MOORE, David Steven
	v
	HAYNES, Dylan
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 11 of 2008 (20733847)
DELIVERED:	16 October 2008
HEARING DATES:	29 September 2008
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & THOMAS JJ
APPEAL FROM:	Angel J, 19 August 2008

CATCHWORDS:

CRIMINAL LAW – APPEAL

Jurisdiction – practice and procedure – stay of proceedings – abuse of process – validity of proceedings – appeal allowed – cross appeal dismissed – proceedings null and void – sentences quashed.

Youth Justice Act 2005, s 4(q), s 21, s 21(1), s 21(2)(b), s 36, s 52, s 54, s 54(1), s 54(2); *Justices Act 1928*, s 52

The Queen v De Simoni (1981) 147 CLR 383, followed.

B & H [2001] 118 A Crim R 120; *Langtree v Trenerry & Ors* (1999) 9 NTLR 46; *Maxwell v The Queen* (1995) 184 CLR 501; *McDonnell v Smith* [1918] 24 CLR 409; *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355; *R v Brown* (1989) 17 NSWLR 472; *R v Janceski* [2005] 64 NSWLR 10; *R v Morias* (1988) 87 Cr App R 9; *R v Parker* [1977] VR 22, referred to.

REPRESENTATION:

Counsel:

Appellant:	R Coates and P Usher
Respondent:	R Wild QC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Northern Territory Legal Aid Commission

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

Moore v Haynes [2008] NTCA 9
No. AP 11/2008 (20733847)

BETWEEN:

DAVID STEVEN MOORE
Appellant

AND:

DYLAN HAYNES
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 16 October 2008)

The Court:

Introduction

[1] This is an appeal against an order made by a Judge of the Supreme Court setting aside sentences imposed by the Youth Justice Court in respect of counts 1, 2, 5, 6, 7, 9 and 11, but ordering that there be a stay of proceedings until further order and discharging the respondent from his bail.

[2] The respondent has cross-appealed against the decision of the Court to allow the appeal against the sentences imposed by the Youth Justice Court in respect of counts 1, 2, 5, 7, 9 and 11.

[3] On the hearing of the appeal before this Court, the prosecution identified a fatal flaw in the proceedings and properly conceded that no charges were ever validly laid against the respondent in the first place. As a consequence the proceedings against the respondent were null and void and the convictions and sentences were quashed.

[4] The Court was also of the opinion that his Honour had erred in finding that an abuse of process had occurred.

[5] During the hearing of the appeal we were invited by the respondent to make an order staying any future proceedings. We held that we had no power to do so. We reserved the question as to whether we would indicate a view as to the sentences which ought to have been imposed. We said that we would deliver detailed reasons later. We formally ordered that the appeal was allowed and that the cross appeal is dismissed. We ordered also that the orders of the Youth Justice Court and, to the extent necessary, the orders of the Judge on appeal were quashed and we quashed the proceedings brought against the respondent. We also reserved the question of costs in respect of the proceedings brought in the Youth Justice Court. We said that we would deliver detailed reasons at a later time. These are those reasons.

Background facts

[6] On 27 December 2007, the appellant purported to charge the respondent with 11 counts which were brought in respect of this matter in the Youth

Justice Court. On 4 March 2008, the respondent pleaded guilty to all of the counts except counts 4 and 10 which were withdrawn.

[7] The alleged offences occurred on 15 December 2007 when the respondent was 15 years and nine months of age.

[8] The Youth Justice Court has jurisdiction under ss 52 and 54 of the *Youth Justice Act 2005* (the Act) to deal with all charges of a summary or indictable nature against a youth who is alleged to have committed an offence. Section 54(1) of the Act provides:

> "The Youth Justice Court must hear summarily all charges of a summary or indictable nature unless the offence, if committed by an adult, would be punishable by imprisonment for life."

[9] However, certain indictable offences may only be dealt with summarily by the Court if the defendant consents.[1]

[10] Count 5 in its original form charged the respondent with aggravated unlawful entry with an offensive weapon. The maximum penalty for that offence is imprisonment for life. On the application of the prosecutor, count 5 was amended to omit the allegation that the unlawful entry occurred at night time and that at the time of the unlawful entry the respondent was armed with an offensive weapon. The charge as amended was within the jurisdiction of the Youth Justice Court to try summarily.

[1] See s 54(2).

[11] The following table sets out the charges and the sentences imposed.

Charge number	Description	Maximum penalty	Term of detention imposed
1	Trespass on premises (s 5 of the *Trespass Act 1987*)	6 months	14 days detention
2	Stealing mixed spirits valued at $30 (s 210(1) of the *Criminal Code 1983*)	7 years	7 days detention
3	Trespass on premises (s 5 of the *Trespass Act 1987*)	6 months	14 days detention
4	Withdrawn		
5	Unlawful entry of an occupied dwelling house with intent to steal (s 213(4) of the *Criminal Code 1983*)	10 years	1 month detention
6	Unlawful assault causing harm and whilst threatening with an offensive weapon, namely a hammer (s 188(2)(a) and (m) of the *Criminal Code 1983*)	5 years	3 months detention
7	Going armed in public with a star picket (s 69 of the *Criminal Code 1983*)	3 years	14 days detention
8	Unlawful entry of a dwelling house and unlawful damage to the dwelling house, namely to a screen door (s 226B(1) of the *Criminal Code 1983*)	7 years	14 days detention
9	Unlawful damage to a screen door (s 251(1) of the *Criminal Code 1983*)	2 years	14 days detention
10	Withdrawn		
11	With intent to cause fear, made a threat to kill (s 166(1) of the *Criminal Code 1983*)	7 years	3 months detention

[12] The learned Magistrate ordered that the sentences imposed in relation to counts 1, 2, 3, 5, 6 and 9 be served concurrently. The terms of detention in relation to counts 7, 8 and 11 were ordered to be concurrent with each other

but cumulative upon the terms imposed in relation to counts 1, 2, 3, 5, 6 and 9. In the result the learned Magistrate imposed a total effective term of detention of six months which was ordered to be suspended forthwith on conditions including supervision for a period of 12 months and subject to a curfew from 8.00 pm to 6.30 am.

[13] On appeal the Crown conceded before the learned Judge that the conviction on count 3 was a duplication of count 5 and should be quashed. The Crown also conceded that the facts on the plea had not established the elements of count 8 and that the conviction on that count should also be quashed and the sentence set aside.

[14] The principal ground of appeal before his Honour was that the sentences imposed were manifestly inadequate. His Honour was of the view that the sentences passed were manifestly inadequate and out of all proportion to the seriousness of the offending. His Honour decided to re-sentence the respondent and adjourned the proceedings to enable an updated pre-sentence report to be obtained. When the matter resumed on 23 July his Honour said:

> "The other thing I wish to mention is this. In the lower Court at the commencement of proceedings, the Crown by agreement, or the prosecution by agreement with then counsel for the accused withdrew the allegation that what occurred, occurred at night. That effectively halved the maximum penalty applicable. Notwithstanding that agreement, the prosecution facts read to the Court alleged what occurred, occurred at 1.40 am in the morning and that was agreed by the defence. On its face, that amounts to an abuse of process of the court. I want each of you to give some serious thinking to that aspect of this case during the interim. I am not going to do anything about it today, but I want you to give some serious thought to that because on its face it is an abuse of process."

[15] Subsequently the learned Judge referred counsel to the case of *R v Brown*[2] and the decision of the High Court in *Maxwell v The Queen*[3] and invited submissions as to why he should not stay the proceedings permanently.

[16] After hearing further submissions, his Honour said:

> "In the present case, I am of the view that the prosecution appears to have been acting in an irresponsible manner. No explanation has been given for the course that the prosecution took in withdrawing the allegation 'at night'. Having done so, it then alleged 'at night' in the presented facts. The prosecution was, it appears, abusing the process of the court, running a case in the face of the admitted facts, to circumscribing the court's sentencing discretion by reducing the maximum penalty from 20 years to 10 years with no apparent justification, and no responsible prosecutor, whose duty is to charge persons and bring them to account for the offences they have committed, would have so agreed."

[17] His Honour then made an order allowing the appeal quashing the convictions in relation to counts 3 and 8, setting aside the sentences of detention in relation to those convictions, setting aside the sentences in respect of the remaining counts and ordering a stay of proceedings until further order. He also discharged the respondent from his bail.

There was no abuse of process

[18] In our opinion a careful reading of the facts presented to the Youth Justice Court indicates that no particular time was alleged in relation to the unlawful entry the subject of count 5. The only reference to time related to the offences in relation to counts 1 and 2 at entirely different premises to those which related to count 5.

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[2] (1989) 17 NSWLR 472.
[3] (1995) 184 CLR 501.

[19] In any event, even if the facts established that the unlawful entry did occur at night time, this did not amount to an abuse of process by the prosecution. It commonly occurs that a sentencing judge will be called upon to pass sentence for a lesser offence when the facts, as they appear to the Judge would sustain a conviction for a more serious offence. *R v Brown*[4] was in fact such a case. In that particular case the sentencing Judge had said:[5]

> "The Crown undoubtedly has, and necessarily and desirably has, a wide discretion as to the charges it brings. I do not question that. However, where it elects, as it has in my opinion done in the present case, to present a charge with the unchallenged evidence establishes the commission of a greater offence, it is in my view, in the absence of due explanation, abusing the process of the Court. I see myself as having a duty to prevent any such abuse."

[20] The Court of Criminal Appeal in *Brown* unanimously held that the course taken by the prosecutor did not involve an abuse of process. Whilst accepting that there may be extreme cases in which such a consideration could justify a decision of this nature as an abuse of process, their Honours said:[6]

> "However, with respect to the learned Judge in the present case, we are unable to accept the proposition which led him to his decision, that is to say, that where the Crown elects to present a lesser charge notwithstanding that uncontested evidence establishes the commission of a more serious offence, that necessarily involves an abuse of the process of the Court. It is true that his Honour qualified that proposition by saying that it would apply 'in the absence of due explanation' but that qualification is unhelpful because it simply raises, whilst leaving unanswered, the question of what would constitute 'due explanation'. Indeed, it seems to involve the notion that there is some kind of general supervisory role for the trial judge

[4] Above n 2.
[5] Ibid 477.
[6] Ibid 479–480.

to play, in which his views as to what charges are to be preferred are those which must ultimately prevail. Presumably his Honour meant that it was for the trial judge to determine the adequacy of any explanation that was advanced, although the standards by reference to which that determination would be made but not spelled out."

[21] Subsequently their Honours said:[7]

"It is impossible to define the circumstances in which a decision to prosecute for a lesser offence might constitute an abuse of the process of the Court, and it would be undesirable to attempt to do so. Nor do we necessarily accept, as was indicated earlier, that the rubric of abuse of process is the only one under which the issues which arise, especially in a case where a judge feels impossibly constrained by the *R v De Simoni* principles (which was not this case), may be considered. It can be said, however, that although the discretion of the prosecuting authorities in this regard is not absolute and unfettered in a sense that the Court is powerless to intervene, the discretion is very wide and its exercise the authorities are entitled to take account of practical considerations including matters relating to the availability of resources. To describe a bona fide decision by the Director of Public Prosecutions as an abuse of the process of the Court is no light matter, and courts should pay due regard to the consideration that it is the executive which is entrusted with the primary responsibility of making decisions of this character."

[22] In *Maxwell v The Queen*[8] Dawson & McHugh JJ said:[9]

"In *R v Brown* the Court of Criminal Appeal recognised the substantial practical limitations upon the power of the courts to control the exercise by prosecuting authorities – in that case the Director of Public Prosecutions – of their discretion in such matters as the choice of the offence with which an accused is to be charged or the acceptance of a plea of guilty to a particular charge. The Court rightly observed that the most important sanctions governing the proper performance of a prosecuting authority's functions are likely to be political rather than legal. Nevertheless, the Court concluded that in an appropriate case a court may need to give effect to its own right to prevent an abuse of its process. That conclusion is undoubtedly correct, but the need for a court to exercise inherent

[7] Ibid 481.
[8] Above n 3.
[9] Ibid 513–514.

> power to protect its own process should in this context rarely, if ever, arise. A mere difference of opinion between the Court and the prosecuting authority could never give rise to an abuse of process. No doubt a court may, if it thinks desirable to do so, express its view upon the appropriateness of a charge or the acceptance of a plea and no doubt its view will be accorded great weight. But if a court does express such a view, it should recognise that in doing so it is doing no more than attempting to influence the exercise of a discretion which is not any part of its own function and it may be speaking in ignorance of matters which have properly motivated the decision of a prosecuting authority. The court's power to prevent an abuse of its process is a different matter and the question of its exercise can only arise in this context if the prosecuting authority were seen to be acting in an irresponsible manner. That, as experience happily tells, is seldom, if ever, likely to occur."

[23] Gaudron and Gummow JJ said:[10]

> "It follows from the nature of a criminal trial, in which the prosecution bears the onus of proving guilt behind reasonable doubt, that it cannot be an abuse of process to proceed on a lesser charge, whether by acceptance of a plea under s 394A of the Act or otherwise, merely because there is evidence which, if accepted, would sustain a conviction for a more serious offence. Similarly, it cannot be an abuse of process to proceed on a manslaughter charge if there was evidence which, if accepted, would support a finding of diminished responsibility in accordance with s 23A of the Act."

[24] In the present case there were no circumstances which enlivened the inherent jurisdiction of the Court to order a stay. There was nothing in the nature of fraud or bad faith by the prosecutor which may for example have enlivened the discretion.[11] If in fact the prosecutor had alleged as part of the facts that the offence had occurred at night time, which is an aggravating

[10] Ibid 535.
[11] *Langtree v Trenerry & Ors* (1999) 9 NTLR 46 (Riley J).

circumstance, the proper course for the sentencing Magistrate was simply to ignore that allegation.[12]

[25] It follows that the appeal must be allowed on that ground.

The Youth Justice Court did not have jurisdiction to deal with the charges

[26] Section 21 of the Act provides as follows:

> "**21 Authorised officer must consent to prosecution**
>
> (1) A youth must not be charged with an offence without the consent of an authorised officer.
>
> (2) A document that charges a youth with one or more offences must-
>
> (a) indicate that the charges have been consented to by an authorised officer; and
>
> (b) identify the authorised officer.
>
> (3) The document is evidence that –
>
> (a) the officer named is an authorised officer; and
>
> (b) the youth has been charged with the offence or offences with the consent of the authorised officer.
>
> (4) Subsection (1) does not affect a requirement under any other law to obtain consent to a prosecution."

[12] *The Queen v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ, Mason & Murphy JJ concurring).

[27] Section 36 of the Act provides for authorised officers as follows:

> "**36 Authorised officers**
>
> The Commissioner of Police, a Deputy Commissioner of Police or Assistant Commissioner of Police may authorise any of the following police officers to act for this Part:
>
> (a) an officer of or above the rank of Senior Sergeant;
>
> (b) an officer who is in charge of a police station;
>
> (c) an officer who from time to time –
>
> (i) holds a specified rank; or
>
> (ii) performs specified duties (including duties as the officer in charge of a specified police station)."

[28] We observe that it is rather unusual that the Director of Public Prosecutions is not an authorised officer for the purposes of the Act. In our opinion this is something which should be drawn to the attention of the legislature for reconsideration.

[29] In this matter the actual charges alleged that the complainant or the officer bringing the charge did so with the consent of an authorised officer but did not identify the authorised officer as required by s 21(2)(b).

[30] The Director of Public Prosecutions, Mr Coates, has frankly conceded that the appellant who brought the charges was not an authorised officer under s 36 of the Act at the relevant time and that the charges were not authorised

by an authorised officer as required by s 21(1). The Director also frankly conceded that the proceedings were null and void. Notwithstanding that concession, we are required to determine whether, as a matter of statutory construction, that concession was correct and the failure by the prosecutor to obtain the consent of an authorised officer resulted in the proceedings being null and void.

[31] The issue of statutory construction in this case depends on the purpose or intention of the legislature. The legislature always intends that procedural stipulations will be complied with, but that does not necessarily mean that it intends that every failure to comply was such a stipulation has the consequence that a failure to so comply renders the proceedings invalid.

[32] In their joint judgment in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* [13] McHugh, Gummow, Kirby and Hayne JJ said:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties holding void every act in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

[13] (1998) 194 CLR 355, 388–389.

Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with a condition is regarded as mandatory, and failure to comply with condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory. In *Pearse v Morrice*, Taunton J said 'a clause is directory where the provisions contain mere matter of direction and nothing more'. In *R v Loxdale*, Lord Mansfield CJ said '[t]here is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory'. As a result, if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity. However, statements can be found in the cases to support the proposition that, even if the condition is classified as directory, invalidity will result from non-compliance unless there has been 'substantial compliance' with the provisions governing the exercise of the power. But it is impossible to reconcile these statements with the many cases which have held an act valid where there has been no substantial compliance with the provision authorising the act in question. Indeed in many of these cases, substantial compliance was not an issue simply because, as Dawson J pointed out in *Hunter Resources Ltd v Melville* when discussing the statutory provision in that case: 'substantial compliance with the relevant statutory requirement is not possible. Either there was compliance or there was not'.

In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with the statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid… A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'."

[33] There are many cases where provisions similar to s 21(1) have been held to be of the kind with which failure to comply results in invalidity.[14] These authorities provide some guidance but essentially the question is still one of statutory interpretation for this Court.

[34] In our opinion the purpose of s 21 is to ensure that only authorised officers would be in control of the decision whether or not to lay charges and that the identity of the authorised officer approving the laying of a charge should be manifest to the defendant. This is consistent with s 4(q) of the Act which deals with one of the principles which must be taken into account in the administration of the Act namely that "unless the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter".

[35] Part 3 of the Act provides for diversion of youth. Without going into Part 3 in detail, suffice it to say that unless the offending is a "serious offence" as defined by the Regulations, consideration must be given under the Act to that course.

[36] Another of the objects which was intended to be achieved by s 21 was to prevent proceedings being commenced by any member of the public. Clearly the legislature had in mind that only experienced police officers authorised under s 36 could validity authorise the commencement of proceedings. We note also, that the language of s 21(1) uses the imperative

[14] See *R v Janceski* [2005] 64 NSWLR 10; *McDonnell v Smith* [1918] 24 CLR 409; *R v Morias* (1988) 87 Cr App R 9; *R v Parker* [1977] VR 22; *B & H* [2001] 118 A Crim R 120, 125–126.

"must not". In the result we conclude that the intention of the legislature was, amongst other things, to ensure only appropriately authorised officers appointed under s 36 could validly approve the commencement of proceedings.

[37] This conclusion is further supported by s 21(2). The purpose of that sub-section is to identify who the authorised officer may be. Statements in the charge in compliance with s 21(2) are evidence that the officer named is an authorised officer and that the youth has been charged with consent of the authorised officer. This clearly implies that evidence to the contrary may be brought.

[38] Accordingly we came to the conclusion that the legislature did intend that a failure to comply with s 21(1) rendered any proceedings commenced in breach thereof null and void, and that the whole of the proceedings both in the Youth Justice Court and on appeal are a nullity and must be set aside.

The respondent's application for a stay

[39] The respondent submitted that in all of the circumstances this Court should order a stay of any further proceedings. That submission was predicated upon a number of considerations including the following matters. First it was submitted that the sentences actually imposed by the learned Magistrate were not manifestly inadequate. It was submitted that the respondent had been on bail from the period from 16 December 2007 until the order was made staying these proceedings on 19 August 2008 when his bail was

discharged. It was put that he was on bail under strict conditions including a curfew, which were enforced by random attendances by Correction Officers at his home premises three or four times a week. He also had to report to the police station once a week.

[40] In suspending the period of six months detention the learned sentencing Magistrate imposed a supervisory period of 12 months with the normal conditions plus a daily curfew from 8.00 pm until 6.30 am unless the respondent was in the company of his mother. It was put that the respondent complied with the conditions rigorously for a period of eight months until the order was discharged.

[41] Next it was put that some of the charges which have now been quashed are subject to limitation periods vide s 52 of the *Justices Act*. Undoubtedly as some of the convictions were quashed on appeal in the Court below and at least one other of the charges is possibly statute barred, there is good reason to suppose that the charges which the respondent may have to face in the future if the proceedings are not stayed will be somewhat different from the charges which were dealt with by the learned Magistrate.

[42] Without going in to all of the matters that were put on the respondent's behalf in relation to the granting of a stay by this Court, we consider that no stay is possible. Once it is determined that the proceedings were null and void, there are no proceedings left to stay. The matter of whether or not further charges will be laid is a matter which must be left to an authorised

officer at this stage. It would be inappropriate for this Court to indicate whether or not the respondent should be charged again. The matters which were submitted by Mr Wild QC are matters which the respondent is able to take up with the authorised officer.

[43] So far as the actual sentences are concerned, we were asked by Mr Wild QC to indicate a view as to whether or not they fell within the discretion of the learned Magistrate. We do not think that there is any point in discussing that question. If the matter does proceed by the laying of further charges in the Youth Justice Court, the learned Magistrate will be dealing with different charges as well as quite different circumstances personal to the respondent many of which have arisen since the date upon which the respondent was initially sentenced. The question of the appropriate sentence or sentences to be imposed will have to be considered in the light of those fresh circumstances.
