PARTIES:	GILLIAN RUTH HAYWARD
	v
	DAWSON DODD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory Jurisdiction
FILE NO:	163/97 (9523487)
DELIVERED:	24 October 1997
HEARING DATES:	11 September 1997
JUDGMENT OF:	Thomas J

REPRESENTATION:

Counsel:

Appellant:	John Adams
Respondent:	Michael Jones

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	NAALAS

Judgment category classification:	C
Judgment ID Number:	tho97008
Number of pages:	8

tho97008

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

No. 163/97 (9523487)

BETWEEN:

GILLIAN RUTH HAYWARD
Appellant

AND:

DAWSON DODD
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 24 October 1997)

This case, reserving questions of law for the consideration of the Supreme Court of the Northern Territory, comes to the Court upon referral by a stipendiary magistrate pursuant to s162A of the *Justices Act* (NT).

The questions of law reserved for the Court's consideration are as follows:

(a) In this case does a conviction for an aggravated assault raise a defence pursuant to s18 of the Criminal Code in respect of a subsequent prosecution for 'Failure To Comply With a Domestic Violence Order' pursuant to s10 of the *Domestic Violence Act* where the same conduct

founds both charges and the DVO is in the same general terms as this case.

(b) Does a conviction for an aggravated assault raise any other defence of *autrefois convict* to a subsequent prosecution for "Failure To Comply With a Domestic Violence Order" pursuant to s10 of the *domestic Violence Act* where the same conduct founds both charges.

(c) Does a conviction for 'Failure To Comply With a Domestic Violence Order' pursuant to S.10 of the *Domestic Violence Act* provide a defence of *autrefois convict* to any offence against the person prescribed in Part VI of the *Criminal Code*.

The respondent entered into a Domestic Violence Order (DVO) on 21 June 1995 at Katherine in the Northern Territory of Australia. The DVO restrained him from "causing or threatening to cause personal injury to the applicant". The applicant was FC with whom the respondent had a de facto relationship. The order was to remain in force for 12 months from that date. It was tendered before this Court as Exhibit P1.

On 4 December 1995 a complaint was laid against the respondent for failing to comply with the terms of the DVO. The complaint alleged that on 2 December 1995 the respondent, being a person against whom a restraining order was in force in accordance with the *Domestic Violence Act*, failed to comply with the

terms of that order in that he assaulted FC at Pine Creek in the Northern Territory of Australia contrary to s10 of the *Domestic Violence Act*.

The facts of the assault as briefly summarised by Mr Adams, appearing on behalf of the applicant in this case, were that on 2 December 1995 the respondent and FC had a dispute, the respondent hit her around the face a few times and then they went off together.

On 20 June 1996 the respondent was convicted in the Supreme Court of the Northern Territory at Darwin of one count of aggravated assault pursuant to s188(1) and (2)(a)(b) of the Criminal Code. This conviction related to the assault on FC at Pine Creek on 2 December 1995.

On 28 August 1996 the complaint alleging "Failure To Comply With a Domestic Violence Order" came on for hearing before the stipendiary magistrate. The learned magistrate dismissed the complaint and at the request of counsel for the Crown reserved the above questions of law which arose in connection with the hearing.

It is important to note that it is common ground between the applicant and the respondent that the same conduct that constituted the aggravated assault conviction also founded the complaint alleging a breach of the DVO.

In the stated case the learned magistrate sets out that the respondent argued that the defence of *autrefois convict* was available since the same conduct

founded both charges. The applicant argued that the defence was not available since each charge was a separate offence, one dealing with an assault and the other with a breach of a court order. The learned magistrate then states that he concluded the defence of *autrefois convict* was available and dismissed the complaint alleging a breach of a DVO.

The applicant submits that the learned magistrate has misstated the case because, on a reading of the transcript of the decision, the complaint was dismissed on the ground that it was a "similar offence" pursuant to s18 of the Criminal Code. The applicant also submits that strictly speaking the defence of autrefois convict was not argued on behalf of the respondent on 28 August 1996, the respondent argued a defence based on s18 of the Criminal Code.

It appears from the submissions before this Court that the term *autrefois convict* and s18 were used interchangeably in the Lower Court. I agree that while this may have been a loose use of terminology it means little in this case and will not greatly effect the way in which this Court answers the questions reserved for consideration.

Mr Adams for the applicant submits that the learned magistrate was right and that I must answer "yes" to question (a). He submits there is no argument he can develop that s18 does not apply in these particular circumstances. He submits that the DVO was framed in such a way as to prohibit what was already prohibited under s188 of the Criminal Code. It is for this reason that the learned magistrate was right in dismissing the complaint pursuant to s18 of

the Code. Exactly the same course of conduct, the assault for which the respondent was convicted and sentenced, is relied upon to prove the breach of the DVO.

Mr Adams submits that if I accept his argument and answer "yes" to the first question there is no need to consider the next two questions as that will, based on the particular facts of this case, dismiss the stated case. This submission was supported by Mr Jones on behalf of the respondent.

This is an unusual stated case because the submissions on behalf of the applicant and the respondent are in essence the same. Mr Jones submits that I must answer "yes" to the first question and that, based on the particular facts of this case, there is no need to consider the other two questions.

Mr Jones submits that the learned magistrate correctly perceived the nature of the defence raised as one belonging within the terms of s18 of the Code and dismissed the complaint in question accordingly. He submits that the learned magistrate was correct in so doing because the same conduct that constituted the aggravated assault also founded the charge of breach of the DVO.

Section 18 of the Criminal Code states:

> "Subject to sections 19 and 20, it is a defence to a charge of any offence to show that the accused person has already been found guilty or acquitted of -
>
> (a) the same offence;

(b) a similar offence;

(c) an offence of which he might be found guilty upon the trial of the offence charged; or

(d) an offence upon the trial of which he could have been found guilty of the offence charged."

Section 17 defines a 'similar offence' as:

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

In *R v Hofschuster* [No 4] (1994) 121 FLR 81, a Northern Territory Court of Criminal Appeal case, Gray AJ discussing ss17 and 18 of the Code said at p84:

> "The 'conduct therein impugned' can only mean the conduct which gives rise to the criminal liability."

He goes on to say at pp84-85:

> "In my view, the construction of s18 and the s17 definition do not give rise to any ambiguity and I feel no impulse to turn to dictionary meanings of the words used. Section 18 and the definition of 'similar offence' appear to me to substantially reproduce the common law doctrine as laid down in the judgement of Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1305-1306. The fundamental principle is that a person is not to be prosecuted twice for the same criminal conduct."

In relation to the complaint alleging a breach of the DVO the "conduct therein impugned" would be the conduct constituting the aggravated assault. It would form the facts alleged to constitute the legal ingredients of the offence. As I

noted earlier it is common ground that the same conduct that constituted the aggravated assault conviction also founded the charge of breach of the DVO. It therefore seems clear to me that had the respondent been convicted for breaching the DVO he would have been prosecuted in breach of the stated principle.

The learned magistrate was right to dismiss the complaint pursuant to s18 of the Criminal Code.

I answer the first question "yes". This answer is strictly confined to this particular case. The wording of the DVO in this case permitted a defence to be raised under s18 of the Code. There are many cases where the DVO is framed in terms such that it would not permit a defence under s18 of the Code when a complaint has been laid alleging a breach of the order and the respondent has been convicted of an offence under the criminal law.

My answer to the first question dismisses the stated case and so an answer to the second question is not required. I do, however, offer the following thoughts which are strictly limited to the fact situation of this case. Gray AJ's comments in *R v Hofschuster* [No 4] quoted above in conjunction with s5 of the *Criminal Code Act* would seem to indicate that a common law plea of *autrefois convict* was not available to the respondent in this particular case.

The third question is quite irrelevant to this case and does not require an answer.

Accordingly, I would answer the stated case as follows:

(a) Yes.

(b) Irrelevant to the facts of this particular case and does not require an answer.

(c) Irrelevant to the facts of this particular case and does not require an answer.
