Hales v Rogers & Anor [2001] NTSC 82

PARTIES:	PETER WILLIAM HALES v WADE ROGERS and LEIGH RAUCH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	Nos. JA31 of 2001 and JA32 of 2001 (20015583 and 20015620)
DELIVERED:	20 SEPTEMBER 2001
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JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	A. Elliott
Respondent:	H. Spowart

Solicitors:

Appellant:	DPP
Respondent:	NT Legal Aid Commission

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Hales v Rogers & Anor [2001] NTSC 82
Nos. JA 31 of 2001 and JA32 of 2001
(20015583 and 20015620)

BETWEEN:

PETER WILLIAM HALES

Appellant

AND:

WADE ROGERS and
LEIGH RAUCH

Respondents

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 20 September 2001)

MILDREN J:

[1] These two appeals are brought by the Informant in respect of sentences imposed by the Court of Summary Jurisdiction upon the respondents. The respondents were each charged upon information they stole a home–made box trailer, contrary to s 210 of the *Criminal Code*. The defendants pleaded guilty and were dealt with summarily. The Informant contended that both of the respondents were required, vide s 78A(1) of the *Sentencing Act* to be convicted and ordered to serve a term of imprisonment of not less that 14 days imprisonment. The learned Magistrate found that the offences for which the respondents were convicted were not "property offences" within the meaning of s 3(1) of the Act, that therefore there was no requirement to

impose a mandatory minimum term of imprisonment, and imposed the following sentences:

1. In the case of the respondent Wade Rogers, his Worship recorded a conviction and ordered him to complete 80 hours of community service, and to pay $800 compensation.

2. In the case of the case of the respondent Leigh Rauch, his Worship declined to record a conviction and released him on a 6 month good behaviour bond, and ordered him to pay $800 compensation jointly with Wade Rogers and another co–offender.

[2] The grounds of appeal in each case are the same, and in effect complain that the learned Magistrate erred in law in failing to impose a mandatory sentence of imprisonment. There is no suggestion that the sentences imposed were otherwise inadequate.

The Facts

[3] The facts were as follows. The box–trailer in question was owned by a Mr Bancroft, the proprietor of a business called the Gecko Lodge situated at 146 Mitchell Street, Darwin. About a week prior to 21 September 2000, Mr Bancroft parked the trailer on the roadway in front of the Gecko Lodge, and lent a chalk board against it with the words "For Sale" written thereon. At about 3.30 am on 21 September 2000 the respondents together with a co–offender who was a juvenile were proceeding down Mitchell Street in a

Subaru Station wagon being driven by the respondent Leigh Rauch. They saw the trailer and decided to steal it. Rauch backed his vehicle up to the trailer whilst the other two co–offenders hitched the trailer to the Subaru. Afterwards, they drove off, and took the trailer to Buffalo Creek, where it was later found in a ditch in a burned–out condition. At the time of the offence, Mitchell Street was a public place. The learned Magistrate heard evidence from Mr Bancroft and based on that evidence his Worship found that Gecko Lodge was a place where backpackers stay, and that from time to time backpackers sell their motor vehicles in Mitchell Street in and around the Gecko Lodge. Mr Bancroft also gave evidence that he sold sarongs and T shirts in the office and reception area of the Lodge, but not in the street, and that he personally had not sold anything in that location before. There was no evidence placed before the Court as to whether or not Mr Bancroft himself lived at the Lodge, whether or not the Lodge was open for business at the time of the offence, or where Mr Bancroft might have been found at that time.

The Sentencing Act

[4] S 78A(1) provides that "where an offender who has been found guilty of one or more property offences is before a court to be sentenced in respect of those offences … the court must record a conviction and order the offender to serve one term of imprisonment of not less that 14 days …".

[5] "Property Offence" is defined by S 3(1) to mean "an offence specified in Schedule 1 that is committed on or after 8 March 1997."

[6] Schedule 1 provides, inter alia:

> "1. An offence against section 210 of the Criminal Code, except where –
>
> (a) the offence occurred at premises, or at a place, where goods are sold;
>
> (b) the offence was not part of a single criminal enterprise during which the offender committed an offence against part VI of the Criminal Code;
>
> (c) the offender was lawfully in the premises or at the place at the time of the offence; and
>
> (d) the offender was not employed at the premises or place at the time of the offence."

[7] Mr Elliott, for the appellant, conceded that the onus of establishing that the offence did not fall within at least one of the exceptions referred to in paragraphs 1(a) to (d) of Schedule 1 was upon the prosecution. I proceed upon that assumption. It was also conceded that the Crown had not negatived paragraphs 1(b) (c) or (d) of Schedule 1. Mr Elliott contended however that the Crown had negatived paragraph 1(a).

Did the offence occur at a place where goods are sold?

[8] The argument of counsel for the appellant was that the exception created by paragraphs 1(a) to (d) of Schedule 1 was intended to ameliorate the unduly harsh consequences of stealing were the mandatory sentencing regime to ensnare shoplifters whether from retail or wholesale premises or from

market traders. In support of this argument, he submitted that this construction was to be favoured because:

- Paragraph 1(a) referred to "premises" or "a place where goods are sold". Because "premises" is usually understood to mean enclosed premises, the legislature has included reference to "a place" in order to make it clear that the locus in quo was not restricted to enclosed premises such as a shop, but was intended to cover any other place where goods were sold, provided that the offender was lawfully on the premises or at the place at the time: see paragraph 1(d).

- The requirement that the offender be lawfully on the premises etc was designed to make it clear that persons who were burglars, for example, did not come within the exception. In *Dureau v Trenerry* (1998) 147 FLR 397 I held that a trespasser was unlawfully on the premises. I note that this decision was followed by Martin CJ in *Willoughby v Trenerry* (unreported, [2000] NTSC 57, at para 27).

- The requirement that the offender be not employed at the premises or place etc was designed to exclude stealing by a servant. I observe that this necessarily imports that the

employee be an employee of the trader, and not some other nearby trader.

- The expression "where goods are sold" suggests a continuing activity, i.e. that at the time of the offence, goods at the premises or place were being sold, or in the process of being sold. Thus, it was submitted that the locus in quo would not be a place where goods are sold if there were not then present goods being sold, or at least offered for sale. Thus, although the area occupied by the Mindil Beach markets would be a place where goods are sold on a Thursday evening when the markets are open, it would not be such a place on a Friday evening when there were no stall–holders present.

- It was submitted that the word "normally" should be read into para 1(a) after the word "goods".

- It was submitted that a literal interpretation of the provisions of para 1(a) to (d) would lead to absurdity. A number of examples were given and canvassed in argument. I do not consider it necessary to discuss these.

- Paragraph 1(c) was intended to ensure that where the offence was part of a single criminal enterprise during

which serious offences against the person were also committed, there would be no exception.

- Support for the argument was to be found in *Dureau v Trenerry* supra, at 400, were I said:

> "It seems to me that the purpose of cl 1(a)–(c) of the Schedule was to exclude shoplifting–type offences from the type of stealing which was to be subject to the exception."

- At the time of the offence, on the facts of this case, Mitchell Street was not a place where goods are sold because, although goods may have been sold in that vicinity in the past, the only activity at the time of the offence was to place a "For Sale" sign on the trailer.

[9] It is clear that the basis of his Worship's conclusion that the place where the trailer was parked was within the exception was because cars had been sold in the general area of the street outside of the Gecko Lodge from time to time in the past. The appellant's submission was that this was an insufficient basis for finding that the locus in quo fell within the exception.

[10] Counsel for the respondents, Ms Spowart, submitted that his Worship's approach to the interpretation to be given to the exception was correct. In support of that submission it was put:

- If the legislature had wished to confine the locus in quo to a place where goods were sold from shops or markets open at the time and engaging in trading it could easily have done so.

- As the learned Magistrate pointed out, the words "premises, or place, where goods are sold" are not defined and must be given their ordinary meaning.

- The words used by the Parliament are not ambiguous and there is no need to adopt a purposive approach.

- The exception was designed to ameliorate the strictures and draconian effects of mandatory sentencing. As such it should be given a broad, rather than a narrow interpretation: *Walden v Hensler* (1987) 75 ALR 173 at 198 per Dawson J.

- To introduce a mandatory scheme leading to compulsory imprisonment, Parliament must do so clearly and explicitly: *Trenerry v Bradley* (1997) 6 NTLR 175 at 179 per Martin CJ. Reference was also made during submissions to a number of other passages in this judgment, but it is not necessary to dwell upon them here.

- It is not necessary to read words into the exceptions which are not there, and this can only be done where such a necessity arises: *Thompson v Goold & Co* [1910] AC 409 at 420 per Lord Mersey; *Trenerry v Bradley*, supra, at 185–186 per Angel J.

- As to the absurdity argument, even the appellant's argument, if correct, would not avoid absurdity. A person who steals a lolly from a shop is not subject to a mandatory minimum sentence, but if the lolly is given to someone else and that person is convicted of receiving stolen property, that person would be subject to a mandatory minimum sentence.

- My observations in *Dureau v Trenerry*, supra at 400, were only obiter. Whilst part of the purpose of the exception may have been to exclude shoplifters and the like, there is no reason to confine the operation of the provision in this way.

Conclusions

[11] Since judgment was reserved in this matter, I have been referred to the decision of Angel J in *Prudham v Ryan* ([2001] NTSC 77, unreported). In that case the appellant was found guilty of stealing three blank prescription forms from the Alice Springs Hospital. The offence occurred in a room in

the Eye Clinic whilst alone in the room awaiting treatment. There was only one place within the hospital premises where goods were sold, and that was at the cafeteria, an area quite discrete from the location of the offending in the Eye Clinic. Angel J held that "it cold not have been the legislature's intention to exclude from the mandatory sentencing regime stealing on premises which in locality and subject matter, is quite unrelated to the sale of goods on the premises." I agree. Plainly this means that the locus in quo must be carefully defined. To take the example of the markets, a place where goods are sold would be confined to an individual stall or places where customers go to transact business with that stall. It would not include adjacent areas such as lawns, paths or roadways not immediately adjacent to the stall in question.

[12] I also accept the submission of Mr Elliott that the tense of the words used in paragraph 1(a) indicates that the intention of the legislature is that there must be goods being sold or offered for sale at the relevant place at the time of the offence, as part of sales or proposed sales of a continuing character there taking place. I therefore accept his submission that it is irrelevant that goods may have been sold in the general area from time to time in the past, although sales activity very close in time (such as on the day or night in question) may be relevant.

[13] The learned Magistrate did not accept that the locus in quo was a place where goods are sold if there was only a single item being sold or offered for sale. He concluded that to have that character, the place must be one

where goods are sold from time to time. I agree with his Worship's conclusion that the offering for sale of a single item on one occasion at the relevant place may not be enough to give it that character. Obviously if more than one item is being offered for sale or had been sold near to the time in question it may well have that character. Even if only one item is on display, the seller may be intending to use that item to sell others like it and may be engaged, depending on the facts, in selling goods at the locus in quo. Each case must be determined on its own facts bearing in mind all the relevant circumstances, on a case by case basis. In the instant case, all that was taking place at the time and place in question was the offering for sale of a single item, not as part of any continuous selling of goods, but merely to dispose of that single item. I consider that this is insufficient to show that the place in the street where the trailer was left was, at the relevant time, a place where goods are sold within the meaning of paragraph 1(a) of Schedule 1 and that the Crown has discharged the onus of proof which it has undertaken to bear.

[14] The appeals are therefore allowed and the sentencing orders quashed. I remit both matters to the Court of Summary Jurisdiction to be dealt with according to law.