R v Law & Ors [2007] NTSC 45

PARTIES:	THE QUEEN v LAW, BRYAN JOSEPH MULHEARN, DONNA MAREE GOLDIE, ADELE MARGARET DOWLING, JAMES JOSEPH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	20529991, 20529995, 20529975 & 20529976
DELIVERED:	25 September 2007
HEARING DATES:	30 May - 14 June 2007
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Crown:	H Dembo and A Cooper
Defendants:	Self Represented
Secretary, Department of Defence and The Commissioner, Australian Federal Police:	M Maurice QC and T Begbie

Solicitors:

Crown:	Commonwealth Director of Public Prosecutions
Defendants:	Self Represented
Secretary, Department of Defence and The Commissioner, Australian Federal Police:	Australian Government Solicitor

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

R v Law & Ors [2007] NTSC 45
Nos. 20529991, 20529976, 20529975 and 20529995

BETWEEN:

THE QUEEN

AND:

LAW, BRYAN JOSEPH
MULHEARN, DONNA MAREE
GOLDIE, ADELE MARGARET
DOWLING, JAMES JOSEPH

CORAM: THOMAS J

REASONS FOR RULING

(Delivered 25 September 2007)

[1] At the conclusion of the evidence given by the four defendants and after hearing argument from Mr Dembo for the Crown and each of the four defendants, I made the following ruling on 12 June 2007:

> "No jury properly instructed should be asked to consider matters of public policy.
>
> Neither the defences under sections 10.3, 10.4 and 10.5 of the Commonwealth Criminal Code raised by each of the defendants or the additional defence raised by Ms Goldie that their actions are lawful under international law should be put forward for consideration by the jury in respect of any of the four defendants on the charges before the Court."

[2] I advised the parties that I would at a later time publish detailed reasons for this ruling. The following are the reasons.

[3] Each of the defendants seek to raise defences under s 10.3, s 10.4 and s 10.5 of the Criminal Code 1995 (Cth). The defendants bear an evidential burden with respect to these defences. This means under s 13.3 of the Criminal Code (Cth) the burden of adducing or pointing to evidence that suggests a reasonable possibility that the facts necessary to attract the operation of the defences exist (s 13.3(6) of the Criminal Code (Cth)).

[4] The relevant parts of s 10.3, s 10.4 and s 10.5 of the Commonwealth Criminal Code are as follows:

> "**10.3 Sudden or extraordinary emergency**
>
> **(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.**
>
> (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
>
> (a) circumstances of sudden or extraordinary emergency exist; and
>
> (b) committing the offence is the only reasonable way to deal with the emergency; and
>
> (c) the conduct is a reasonable response to the emergency.
>
> **10.4 Self-defence**
>
> **(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.**

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or

(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or

(c) to protect property from unlawful appropriation, destruction, damage or interference; or

(d) to prevent criminal trespass to any land or premises; or

(e) to remove from any land or premises a person who is committing criminal trespass;

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:

(a) to protect property; or

(b) to prevent criminal trespass; or

(c) to remove a person who is committing criminal trespass.

(4) This section does not apply if:

(a) the person is responding to lawful conduct; and

(b) he or she knew that the conduct was lawful.

However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

10.5 Lawful authority

A person is not criminally responsible for an offence if the conduct constituting the offence is justified or excused by or under a law."

[5] The Crown submitted that none of the defendants have discharged the evidentiary burden upon them and that these defences are not available to be considered by the jury.

[6] Each of the defendants have given evidence to the effect that they were extremely concerned about Australia's involvement in the situation in Iraq. All four defendants expressed their distress about the cruelty being perpetrated on the citizens of Iraq. Each of the defendants have given evidence that they have a belief that Pine Gap is an integral part of what they have referred to as the war in Iraq.

[7] Each of the defendants have given evidence they want Australia's involvement in the carnage being inflicted on the people of Iraq to cease. They have given evidence that for some years they have been involved in protest gatherings, holding public meetings, writing letters to newspapers, writing to politicians, distributing leaflets and in a whole variety of ways conducting, by peaceful means, opposition to the involvement of Australia through the facility at Pine Gap, in the situation in Iraq.

[8] The defendants argue that they took the action they did because of the extreme emergency in Iraq and/or in defence of the people of Iraq. It is the evidence of all of them that the reason they acted as they did in entering the Pine Gap facility was their desire to disrupt the involvement of Pine Gap in Iraq and to bring to the attention of the people of Australia what was actually happening at Pine Gap. They maintained that publicity was only one part of this effort to disrupt the involvement of Pine Gap in an illegal war.

[9] It is the position on behalf of the Crown that reasonableness in s 10.3 and s 10.4 of the Criminal Code (Cth) is not an open ended concept. It is governed strictly by matters of public policy.

[10] This is because, on the Crown argument, conduct engaged in for the purpose of disrupting the implementation of government policy can never be considered as reasonable for the purpose of s 10.3 and s 10.4 of the Criminal Code (Cth).

[11] It is the Crown submission that on public policy grounds no person can run an argument that they are entitled to break the law in order to challenge government policy by drawing attention to their beliefs or in order to disrupt the implementation of government policy.

[12] The argument for the Crown is that it would not be appropriate to allow such defences to be considered by the jury.

[13] There are cases where courts in Australia and England have ruled that it is not appropriate to have the jury consider a defence which is against public policy.

[14] The defendants argue that their conduct would bring to the attention of the public their beliefs and persuade members of the public to support them in their efforts to halt what they believe is the involvement of Australia in the situation in Iraq through the facility at Pine Gap. The defendants argued

they wanted to disrupt the operation of the Pine Gap facility and in that way, albeit for a short time, they would benefit the people of Iraq.

[15] Such an argument was dealt with by the Court of Criminal Appeal in Victoria in the matter of *John Charles Dixon Jenkins* (1985) 14 A Crim R 372 at 378 per Starke J:

> "… The flaw in the whole argument is this. It is predicated that society at present has a warmongering, mercenary attitude, that the publicity that the anti-nuclear adherent will achieve from these crimes and the ensuing publicity will change overnight, as it were, or in the very near future, that attitude into a peace-loving, caring outlook. The whole of human experience shows that when society holds, however wrongly, deeply rooted philosophic views it is quite impossible to eradicate those views except in the very long term, and accordingly, assuming there is an imminent peril for the purposes of the doctrine of necessity, which I doubt, it is in my opinion quite impossible to hold that that peril is removed or indeed any impact is made on it by the commission of these offences, and for that reason, which was very much the reason for the decision of the learned judge, I think that the argument as to the defence of necessity fails, and in my opinion the learned judge was quite right at the trial not to put it to the jury."

[16] Ms Goldie has sought to rely on international law and the Nuremberg principles. It is appropriate in this context to refer to the comments of Brennan J in the matter of *Citizen Limbo and Others* (1989) 92 ALR 81 at 82-83:

> "But when one comes to a court of law it is necessary always to ensure that lofty aspirations are not mistaken for the rules of law which courts are capable and fitted to enforce. It is essential that there be no mistake between the functions that are performed by the respective branches of government. It is essential to understand that courts perform one function and the political branches of government perform another. One can readily understand that there may be disappointment in the performance by one branch or another of

> government of the functions which are allocated to it under our division of powers. But it would be a mistake for one branch of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be corrected. Unless one observes the separation of powers and unless the courts are restricted to the application of the domestic law of this country, there would be a state of confusion and chaos which would be antipathetic not only to the aspirations of peace but to the aspirations of the enforcement of any human rights.
>
> International human rights are enforced in this country chiefly by the operation of our domestic law. The laws against genocide, to take one of the examples that have been discussed from the Bar table, are enforced in this country by the operation of our ordinary criminal law against homicide. It is a mistake to confuse the aspirations of a people with the means by which those aspirations can be legally discharged."

[17] In the matter of *Graeme Andrew Rogers* (1996) 86 A Crim R 542, the Court of Criminal Appeal in New South Wales unanimously agreed that the trial judge was correct to take the issue of necessity away from the jury.

[18] The issue in that case was whether the accused honestly believed on reasonable grounds that escape from prison was necessary in order to avoid death or serious injury.

[19] In coming to the conclusion that the issue of necessity should not have been left to the jury, Gleeson CJ stated at 546:

> "The corollary of the notion that the defence of necessity exists to meet cases where the circumstances overwhelmingly impel disobedience to the law is that the law cannot leave people free to choose for themselves which laws they will obey, or to construct and apply their own set of values inconsistent with those implicit in the law. Nor can the law encourage juries to exercise a power to dispense with compliance with the law where they consider disobedience to be reasonable, on the ground that the conduct of an accused person

serves some value higher than that implicit in the law which is disobeyed."

[20] Ms Mulhearn who relied in particular on s 10.4 of the Criminal Code (Cth) (self defence), placed great weight on the words "and the conduct is a reasonable response in the circumstances as he or she perceives them".

[21] In *R v Burgess* (2005) 152 A Crim R 100, a decision of the New South Wales Court of Criminal Appeal, the Court deliberated on whether the jury should have been allowed to consider whether what the appellants did was an act of self defence.

[22] The defence was raised under s 418 of the Crimes Act 1900 (NSW). This section is in similar, although not exactly the same, terms as s 10.4 of the Criminal Code (Cth). The section ends with the words " and the conduct is a reasonable response in the circumstances as he or she perceives them".

[23] Adams J quoted at par 18 from the ruling of Blackmore DCJ who was the trial judge:

"His Honour concluded -

> It must be emphasised that a claim to self defence is a claim of necessity. It is a claim that it was necessary to act in the way which was otherwise illegal to avoid a perceived threat. Even allowing that the belief in the necessity to act is subjective, a court will be very conscious [sic] to ensure that there is a proper objective relationship between the perceived threat and the actions carried out by the accused before a claim to acting in self-defence is left to a jury … [In] my view the objective evidence in this case does not support a claim of self defence sufficient to go to the jury."

[24] Adams J ruled that the trial judge was correct to not permit self defence to go to the jury. The other two judges on the Court of Appeal agreed with him. The facts in *R v Burgess* (supra) involved damage to property of a third party who was not responsible for the decision to go to war in Iraq. However, the interpretation of the words "and the conduct is a reasonable response in the circumstances as he or she perceives them" is applicable in this case and this Court has to be conscious to ensure that there is an objective relationship, not just a subjective relationship, between the perceived threat and the accused, before a claim is left to the jury.

[25] In support of a point separate from this issue Ms Mulhearn put forward the United Kingdom House of Lords decision of *R v Jones & Ors* [2006] UKHL 16. However, the House of Lords decision also dealt with the issue of justification for commission of the offence. This appeal involved 20 appellants on various charges, which were criminal offences, unless there was legal justification. The offences involved breaking into the Royal Airforce Base at Fairford in Gloucestershire and causing damage to fuel tankers and bomb trailers. Other appellants were charged with damage to the base and aircraft. There were other appellants charged with offences on other military sites.

[26] The justification raised was their wish to impede what they believed would be a crime by Her Majesty's Government or the Government of the United States against Iraq. The Lord Justices were unanimous in dismissing the appeals. Lord Hoffman stated at par 94:

> "The practical implications of what I have been saying for the conduct of the trials of direct action protesters are clear. If there is an issue as to whether the defendants were justified in doing acts which would otherwise be criminal, the burden is upon the prosecution to negative that defence. But the issue must first be raised by facts proved or admitted, either by the prosecution or the defence, on which a jury could find that the acts were justified. In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of protesters as to the legality of the acts in question is irrelevant and inadmissible, disclosure going to this issue should not be ordered and the services of international lawyers are not required."

[27] With respect to the defence of sudden or extraordinary emergency under s 10.3 of the Criminal Code (Cth) I also refer to *Morris v R* [2006] WASCA 142, a decision of the Supreme Court of Western Australia, CCA 203 of 2004, delivered 12 July 2006 where the court was dealing with the defence of duress under s 10.2 of the Criminal Code (Cth). The appeal was from a conviction on two counts of importing prohibited imports contrary to s 233B of the Customs Act 1901 (Cth).

[28] The court unanimously dismissed the appeal. McClure J referred to the passage in the judgment of Gleeson CJ in *Rogers* (supra) that I quoted at par [19] in these reasons for ruling and to a decision of King CJ in *R v Brown* (1986) 43 SASR 33. McClure J then went on to state at [156]:

> "I respectfully agree with these observations. There was nothing in the nature or circumstances of Hodge's offending to suggest he (and

> his associates) could not be neutralised. To the contrary, the appellant's evidence of his history of dealings with Hodge to which I have referred supports a positive finding that police protection would be effective and that the appellant ought to have known that to be so. I am satisfied that, even having regard to the appellant's chronological age, gender and maturity, it was not open to the jury to find, even as a reasonable possibility, that the appellant reasonably believed there was no reasonable way that Hodge's threat could be rendered ineffective. It follows the appellant could not reasonably believe that his conduct was a reasonable response to the threat."

[29] Buss JA stated at [170] that the trial judge should not have left the issue of duress to the jury. See also *Oblach v The Queen* (2005) 195 FLR 212, a decision of the Court of Criminal Appeal of New South Wales.

[30] With respect to the matter before this Court, I concluded on hearing the evidence of each of the defendants that there was no objectively reasonable belief of a sudden or extraordinary emergency nor was the response objectively reasonable under s 10.3(2) of the Criminal Code (Cth). Neither was the response under the defence of self defence, or defence of another or their property, an objectively reasonable response under s 10.4(2) of the Criminal Code (Cth). The defendants did not raise any other justification or excuse that would fall under the defence of lawful authority under s 10.5 of the Criminal Code (Cth). The reliance on international law and/or the Nuremberg Principles cannot be applicable for the reasons expressed by Brennan J in the matter of *Citizen Limbo & Ors* (supra) quoted at [16] in these reasons.

[31] Consistent with the authorities to which I have referred I considered it was not open on the evidence presented by the defendants to invite the jury to

speculate on whether government policy regarding Iraq is sound. It is not an issue justiciable by a court of law.

[32] I concluded that the actions of the defendants in attempting to disrupt the operations at Pine Gap, whether or not they did succeed in disrupting it for a short time, cannot be accepted by the court as reasonable in the sense of justifying a criminal offence.

[33] For those reasons I made the ruling as stated. Subsequently the jury were directed they could not consider any of the abovementioned defences in their deliberations.

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