English v R [2014] NTSC 38

PARTIES:	ENGLISH, Daniel James v THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – Attempt – conduct more than merely preparatory

CRIMINAL LAW – Permanent stay – abuse of process – manifestly foredoomed to fail

Criminal Code Act 1995 (Cth) s 11.1(2), s 307.6

Walton v Gardiner (1993) 177 CLR 378, applied

R v Smith [1995] 1 VR 10, followed

Handlen v The Queen (2011) 245 CLR 282; *R v De Silva* (2007) 176 A Crim R 238; *R v Nolan* (2012) 267 FLR 1, *R v Tranter* (2013) 116 SASR 521, referred to

Situ v The Queen (2008) 186 A Crim R 224, distinguished

REPRESENTATION:

Counsel:

Applicant:	I Read SC
Respondent:	J Johnston

Solicitors:

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

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

English v R [2014] NTSC 38
No. 21348773

BETWEEN:

DANIEL JAMES ENGLISH
Applicant

AND:

THE QUEEN
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 15 August 2014)

Introduction

[1] On 13 August 2014, I ordered that the prosecution of Daniel James English (the accused) on a single count on an indictment filed in Court on 12 August 2014 be permanently stayed and that the accused be discharged from his bail.

[2] The count pleaded:

> That between 5 April 2013 and 18 April 2013 at Gunn in the Northern Territory and elsewhere Daniel English attempted to possess a substance, being a substance that was unlawfully imported, the substance being a border controlled drug, namely alpha-pyrrolidinopentiophenone, a drug analogue of methcathinone, the quantity being a marketable quantity.

[3] Following are my reasons for decision.

Background

[4] On 4 April 2014 the Crown filed an indictment in the Supreme Court charging:

> Between 5 April 2013 and 18 April 2013 at Gunn in the Northern Territory and elsewhere, did aid, abet, counsel and procure the commission of an offence by Nathan Allwright, namely the offence of importing a substance, the substance being a border controlled drug, namely alpha-pyrrolidinopentiophenone, a drug analogue of methcathinone, the quantity imported being a marketable quantity.

[5] The trial was listed to commence on 12 August 2014.

[6] On 11 August 2014 I heard a number of preliminary arguments about the admissibility of some of the evidence which the Crown relied on to prove the case against the accused. During the course of those arguments an issue arose about whether the Crown could maintain the charge of aiding and abetting because it became apparent that, despite the expanded definition of 'import', the evidence available to the Crown could not exclude the reasonable possibility that any assistance provided by the accused to the commission of the offence by Nathan Allwright was provided after the principal offender had committed the offence of importing a border controlled drug into Australia because the assistance was provided after the drugs were intercepted by Customs.[1]

[1] *R v Nolan* (2012) 267 FLR 1; *R v Tranter* (2013) 116 SASR 521; *Handlen v The Queen* (2011) 245 CLR 282 at 298.

[7] On 12 August 2014 the Crown filed a nolle prosequi for the indictment dated 4 April 2014 and filed over the indictment charging the count of attempt against the accused. On 13 August 2014, senior counsel for the accused made the application for the permanent stay of the prosecution.

Crown case

[8] The Crown case against the accused was based on 19 mobile telephone calls and SMS texts between the accused and Nathan Allwright which were made between 21 March and 17 April 2013 and had been intercepted by the police; admissions by the accused contained in hospital notes about the accused's treatment in the Royal Darwin Hospital between 19 April 2013 and 26 April 2013; and the evidence of two police officers and one Forensic Medical Officer.

[9] It was common ground that on 5 April 2013 Nathan Allwright transferred €654.9 from his Commonwealth Bank Account to another account for the purpose of purchasing and importing 99.2 grams of alpha-pyrrolidinopentiophenone from Nanjing in China into the Northern Territory. On 10 April 2013 Customs intercepted the package containing the alpha-pyrrolidinopentiophenone. The consignment note on the package was addressed to the accused and the mobile telephone number on the consignment note was registered to the accused. That information was provided by Nathan Allwright. It seems that Nathan Allwright decided to import the 99.2 grams of alpha-pyrrolidinopentiophenone and arranged for it to be delivered to the accused's address. However, because the package was

intercepted by Customs it was not delivered to the accused's address. Instead, it was ultimately seized by the Federal Police.

[10] The intercepted mobile telephone calls and SMS texts contain statements which are capable of giving rise to the following inferences. Nathan Allwright and the accused knew each other well. Nathan Allwright was a drug dealer who from time to time supplied drugs to the accused.

[11] The various admissions attributed to the accused in the hospital notes are capable of giving rise to the following inferences. The accused was an intravenous drug user who had been seriously misusing methamphetamine and derivatives of methamphetamine for 14 weeks prior to 17 April 2013. The derivatives he used were sourced overseas.

[12] On 17 April 2013 Nathan Allwright telephoned the accused and the following discussion was recorded.

Accused: Hello

Allwright: Hey Dig

Accused: Hey

Allwright: Um are you home tomorrow eh

Accused: Yeah bud

Allwright: Yeah um something will come there tomorrow

Accused: Yeah

Allwright: Just fucking

Accused: Not a drama

Allwright: Yeah just if anything else comes with it even if you just fucking deny it or deny that it's your

Accused: No it's all good, it's all good bud

Allwright: Yeah um

Accused: Yeah

Allwright: just don't open it

Accused: No yeah

Allwright: Cause as soon as you open it if somebody rocks up you'll get in the shit

Accused: Yeah it's all good it's all good brother

Allwright: Yeah

Accused: Alright

Allwright: Alright I'll come and

Accused: Alright not a drama mate

Allwright: catch up with you tomorrow

Accused: Alright mate

Allwright: I'll let you know when it's coming anyhow I'll track it and see when it's on board a driver

Accused: Righto brother

Allwright: Alright then

Accused: Find out bye bye

Allwright: Alright cool

[13] The Crown relied solely on the accused's participation in this telephone conversation as the conduct that constitutes the conduct element of the count of attempt.[2] The Crown did not rely on the accused's presence at his home at the time of his arrest as being conduct in furtherance of an attempt to physically control the border controlled drugs that Nathan Allwright had imported into Australia.

[14] Despite having filed a nolle prosequi for the charge on the indictment dated 4 April 2014, the Crown contended that the conversation between the accused and Nathan Allwright on 17 April 2013 was not the first time they had discussed the delivery of the border controlled drugs to the accused. Counsel for the respondent submitted that this inference arose, not from any direct evidence of prior conversations between the accused and Nathan Allwright, but from the tone of the accused's voice during the telephone conversation and the immediacy of his acceptance of the information relayed to him by Nathan Allwright.

[2] Transcript 13 August 2014 p 8.

[15] In my opinion, the Crown's submission cannot be sustained. The only interpretation that can reasonably be placed on the conversation is that it is the first time that anything was said to the accused about this particular package of border controlled drugs. There were in excess of 100 telephone discussions and SMS texts between the accused and Nathan Allwright that were intercepted by the Police. None of them disclose any prior discussion whatsoever about the delivery which Nathan Allwright had organised to take place on 18 April 2013. The conversation was quite lengthy and involved all the matters that would be discussed if the delivery of the package was being discussed for the first time. The accused is asked by Nathan Allwright if he will be home tomorrow. He is told by Nathan Allwright that something will come there tomorrow. He is told that Nathan Allwright is monitoring the arrival time of the package and that Nathan Allwright will be back in contact to tell him the arrival time of the package. He is told not to open the package; to deny that it is his and, in effect, that Nathan Allwright will come and collect the package on 18 April 2013. The package is to be tracked and Nathan Allwright will find out when it is on board with a driver. As Nathan Allwright was the accused's drug dealer and they knew each other well it is not surprising that the accused immediately agreed with what was being proposed. If there had been any prior discussion about the arrival of this particular package, all Nathan Allwright needed to say to the accused was that the package will be there tomorrow and he would telephone the accused to confirm the likely arrival time.

[16] As there was no evidence of any discussion between the accused and Nathan Allwright about the package which was to be delivered on 18 April 2013 before the telephone conversation on 17 April 2013, the accused cannot be said to have formed an intention to take physical control of the package containing the border controlled drug before that telephone conversation.

[17] The pith and substance of the telephone conversation on 17 April 2013 is as follows.

1. The accused was asked if he would be home tomorrow. He answered yes.

2. He was told something would be delivered to his home tomorrow. He answered: yes, no drama.

3. He was told that if anyone came, he was to deny that the parcel was his. He agreed.

4. He was told not to open the package and he agreed not to do so.

5. He was told that Nathan Allwright would go to his house tomorrow and catch up with him.

6. He was told that Nathan Allwright would let him know when the package was arriving; and that Nathan Allwright would track the package and see when it was on board with a driver.

[18] All the accused did during the telephone conversation was to agree to be home when the package arrived so it could be received by him and then collected by Nathan Allwright. By so doing, the accused only expressed his intention to accept the delivery of the package which had been arranged by Nathan Allwright and do as he asked with the package. After the telephone

call, the accused took no step whatsoever towards obtaining physical control of the package.

[19] The police statements establish that shortly after 5.00 pm on 18 April 2013, the police entered and searched the accused's premises. The accused was at home at that time and he was arrested and taken to the Royal Darwin Hospital because he was suffering from severe withdrawal symptoms. He remained in hospital until 26 April 2013. It is most unlikely that a package would have been delivered after 5.00 pm.

Consideration of the respondent's submissions

[20] Counsel for the respondent, in effect, submitted that before 17 April 2013 the accused must have been aware that Nathan Allwright may make such a request of him and by agreeing to accept delivery of the package the accused engaged in conduct that was more than merely preparatory to the commission of the offence of possessing a border controlled drug. The telephone call occurred in close proximity to the planned delivery date of the package, the package was going to be delivered to the accused's house and there was nothing more for the accused to do. Alternatively, it was submitted that even if the accused was completely unaware that such a request may be made of him by Nathan Allwright, the simultaneous occurrence of the accused's expression of intention and the making of such an agreement on 17 April 2013 did not prevent the making of the agreement from being conduct that was more than merely preparatory to the commission of an offence of possessing a border controlled drug.

[21] I found there was no evidence that the accused was aware that such a request may be made of him by Nathan Allwright; nor was there any evidence that there had been any prior communication between Nathan Allwright and the accused about this package.

[22] In support of these submissions, reliance was placed on the decision of *Situ v The Queen*.[3] As I understand his submissions, counsel for the respondent contended that decision established that a request by a person to Customs to deliver a parcel constituted an act which was more than merely preparatory to the commission of an offence of possess goods that had been imported into Australia in contravention of the *Customs Act 1901* (Cth). If such a request could constitute conduct which was more than merely preparatory to the commission of such an offence, then an agreement to accept delivery of such a package was also capable of being an act which was more than merely preparatory to the commission of such an offence.

[23] The facts of *Situ v The Queen* are set out in the judgment of McClellan CJ at Common Law. They are as follows.[4]

> On 19 September 2004 a package was consigned in Guangzhou, China for carriage by air to Sydney via the Express Mail Service. The package carried a consignment note indicating that it was addressed to "Ben Chan" at 86 Mercury St, Narwee. The consignment note did not record, at least not in English, the nature and value of the goods. The package was given the bar code reference number EA473524526CN. The package arrived in Sydney on 21 September 2004 and was given the parcel post control reference number

[3] (2008) 186 A Crim R 224.
[4] (2008) 186 A Crim R 224 at 225 to 228.

N239542. It was then taken to the International Mail Handling Unit at Clyde.

All packages imported into Australia by post must be cleared by the Australian Customs Service before being released to the recipient. If the value of the goods is less than $1,000 the Customs Service requires an invoice describing the nature and value of the goods and an informal clearance can be given. However, if the value of the goods cannot be ascertained from the accompanying documents, the package is referred to the commercial area of the Sydney Gateway Facility at Clyde and only released after proof of the value of the goods has been provided.

On 22 September 2004 the Customs Service prepared and posted a document known as a First Notice in respect of the package. The notice recorded the reference number: N239542, as well as the fact that the declared contents and the sender of the package were "not readable in Chinese". It also recorded that the value of the goods was "not stated" and that demurrage in respect of the package would commence on 29 September 2004.

The First Notice was posted to 86 Mercury St, Narwee. The evidence disclosed that a person using the name "Ben Chan" but whose correct name was Chan Wai Choeng had lived at the boarding house at that address until 23 September 2004 when he flew from Sydney to Melbourne and then to Hong Kong.

By 29 September 2004 the copy of the First Notice which had been mailed to 86 Mercury St, Narwee was in the possession of the appellant. At 1.21 pm on that day, the appellant made a call from the vicinity of Chinatown on his mobile telephone. The call was made to a woman named Alice Guan. The police intercepted and recorded the call. The conversation was in Mandarin and the appellant said, inter alia, "No, I am right now in here where you guys are. Well, I want to ask you to make a phone call for me, is it okay?" and "No, you come down, you come downstairs to make a phone call for me. Is it okay? Now." The appellant concluded, "Okay, I shall wait for you down here, okay?"

Guan left her premises and went downstairs where she met the appellant on the footpath. She asked the appellant what the call was about. The appellant said that some friends in China had sent a package to him or to his friends and that he did not receive it. The

appellant asked her how he could obtain the package. Guan asked what the package contained. The appellant responded that it contained a belt that was filled with a traditional Chinese medicinal liquid that could be used for the treatment of sore backs. The appellant showed Guan the First Notice and asked her to make a telephone call and to enquire about how to obtain the package. The appellant told her that, if she was asked, she should state the value of the goods was about $200. The appellant told Guan that it was the last day on which the package could be obtained.

They went to a public telephone and, at 1.34 pm, in the presence of the appellant Guan dialed the telephone number that was printed on the First Notice. During the telephone call with a Customs Officer Guan said that she was calling on behalf of a friend who did not speak good English. To her question as to how the package could be retrieved, the Officer said that her friend should take identification to the post office.

After the call Guan repeated to the appellant the advice she had received. She told him that the appellant should take identification to the post office. The appellant said “It shouldn’t be like that”. Guan said “If you don’t believe me you can just make a phone call yourself and you can ask”. At 1.38 pm the appellant dialed the second number that was recorded on the First Notice (a 1800 number) and spoke to a Customs Officer by the name of Andrew Donnelly.

Mr Donnelly, in his evidence in chief, gave the following account of the conversation:

> Q — How did that conversation commence?
>
> A — It commenced with me answering the phone and I said ‘Good morning, Australian Customs’. The voice on the other end said ‘I’m calling about my package’. I asked for — I said, ‘Do you have a reference number’? The person said ‘What is the reference number’? I indicated the reference number would begin with an N followed by six digits. They then said the reference number is N239542. I then asked to put them on hold so that I could go to the receptacle to collect the corresponding card to that reference number.

Q — When you refer to the corresponding card, do you refer to the remaining part of the document that was kept by Customs after the perforated slip was removed from it?

A — Yes.

Q — And did you locate that card in the receptacle?

A — I did.

Q — What did you do then?

A — I then returned to the phone call and said ‘how can I help you with this’. The caller said ‘I want you to send me my package.’ I said ‘it must be cleared through Customs first’. They said ‘But you’ll send me my package’, and I said, ‘You will need to send us some documentation indicating what is in the parcel and how much it is worth’. He then said ‘I don’t have an invoice.’ I said, ‘We need to get something, you need to send something through either by fax or you have to attend the facility in person.’ They then said ‘I will get a friend to get an invoice’ and then terminated the phone call.

[W]hen cross examined [Mr Donnelly] gave the following evidence:

Q — You made it clear to the caller what it was Customs needed to clear the goods, correct?

A — Yes.

Q — When he was responding to what you were saying it was reasonably clear to you he did not understand precisely what you were saying, is that fair?

A — Yes.

Q — So you had to repeat yourself a number of times, correct?

A — Yes.

Q — For you to understand him he had to repeat himself a number of items, is that correct?

A — I would say yes.

Q — The upshot of the conversation was to the effect it was clear to you who ever the caller was he did not appear to be aware of Customs procedures, is that right?

A — That is correct.

Q — Whatever the upshot of the conversation that person, whoever the caller was, was asking questions as to how the goods could be released, is that correct?

A — They were not asking questions on how it was to be released.

Q — Just saying he was calling about having the goods released?

A — He was requesting them to be released, yes.

Q — If they had been released they would have been sent to 86 Mercury Street, Narwee wouldn't they?

A — I presume so, yes.

Q — That was the address you had in front of you, correct?

A — Yes.

Q — When the person spoke to you about whatever the parcel was he was saying the parcel is for somebody at 86 Mercury Street, Narwee, is that correct?

A — Yes.

Q — And even when you tried to remember on the 30 September you were not able to tell Felicity Galvin whether the person was asking for the goods for themself or for a friend of his, is that fair?

A — Um, he only said 'send the goods', send me the goods'.

Q — But you tried because you were asked by Felicity Galvin to tell her in your note whether or not he was asking for the goods for himself or for a friend and you actually made a note that you were not confident to say which it was, correct?

A — Yes.

Q — Once you had conveyed to the person an invoice was required to indicate the value of the goods the person said words to the effect he would get his friend to get the invoice and he hung up, is that correct?

A — That is correct.

Q — Well you are not confident to say whether or not he said he would get the invoice from the friend or get the friend to bring the invoice?

A — Yes, he said he would get his friend to get the invoice.

Q — Get his friend to get the invoice?

A — Yes.

[24] The Crown case in *Situ v The Queen*[5] relied on the evidence that the appellant had come into possession of the First Notice by 29 September 2004. It was the Crown case that the appellant in that case intended that the

[5] (2008) 186 A Crim R 224.

parcel would be delivered to the Narwee address and he asked Customs Officer Donnelly to arrange for the parcel to be delivered to that address.

[25] McClelland CJ at Common Law stated:[6]

> It was submitted that the statements made by the appellant in his conversation with Mr Donnelly could not constitute an attempt but, at their highest, were indicative of an act by the appellant which was merely preparatory. Secondly, it was submitted that the conclusion by her Honour that the appellant's words could be interpreted as a direction to "send it", that is, to send the parcel was erroneous.
>
> The foundation for the appellant's submissions was that without express identification by the appellant of where he required the parcel to be sent and to whom it was to be addressed, the appellant's exchange with Mr Donnelly could not constitute an attempt to commit the offence. It was submitted that there was nothing in the evidence to link the appellant with the premises at Narwee. It was further submitted that when the appellant said to Mr Donnelly "but you'll send me my package" he should be understood to be merely making an enquiry with respect to a potential future outcome rather than making a request that Mr Donnelly send the package.

[26] In my opinion, the case of *Situ v The Queen*[7] is clearly distinguishable from this proceeding. The submissions of the respondent referred to in par [22] above completely ignore the context in which the appellant requested Mr Donnelly to deliver the parcel. The appellant in that case formed the intention to obtain the package upon coming into possession of the First Notice and, after coming into possession of the notice, he engaged in a course of conduct which was more than merely preparatory to the commission of the offence. The appellant received a notice to collect the package. He procured a friend to inquire as to the procedure for doing so.

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[6] (2008) 186 A Crim R 224 at 230.
[7] (2008) 186 A Crim R 224.

The appellant contacted a Customs Officer as he was advised by his friend to do. The appellant asked for the package to be forwarded to him. In this proceeding all that could be established on the evidence taken at its highest was that the accused expressed his intention to do what was asked of him.

[27] McClellan CJ at Common Law held the following.[8]

> Before the appellant could be convicted of attempting to commit the relevant offence, the evidence was required to satisfy the test in s 11.1(2) of the Criminal Code (Cth) which provides that "the person's conduct must be more than merely preparatory to the commission of the offence." As the subsection indicates the question as to whether conduct is merely preparatory is one of fact. In the present case the appellant's conversation with Mr Donnelly was capable of the inference that the appellant was requesting that the package be sent to the address recorded on the First Notice, namely 86 Mercury St, Narwee. Had Mr Donnelly acted upon that request and arranged for the package to be released, having no other information, he could only have sent it to that address. Given that the appellant had possession of the First Notice which bore that address, there is reason to infer that he had sufficient contact with the Narwee premises to enable him to retrieve the package if it had been sent there. The appellant's actions in engaging Guan to make contact with Customs are consistent with him endeavoring, at least initially, to separate himself from the request of Customs. To the extent that he spoke of the involvement of a friend with Mr Donnelly, the jury was entitled to conclude that this was a further attempt to disguise his involvement in the illegal activity.

[28] In the proceeding before this Court, the accused did not engage in any conduct whatsoever after the telephone call with Nathan Allwright on 17 April 2013. The purpose of Nathan Allwright telephoning the accused was to tell him what was happening and to prepare him to take delivery of the package. Having been told what was going to occur, the accused did no

[8] (2008) 186 A Crim R 224 at 228 – 229.

more than express his intention during that particular telephone conversation. He engaged in no conduct to bring about him having physical control of the package. Whether and when he would obtain physical control of the package remained solely dependent on the actions of others.

[29] The elements of the offence of attempt include a conduct element. Mere intention to commit an offence is not an attempt. Before the accused could be convicted of attempting to commit the offence with which he was charged, the evidence was required to satisfy the provisions of s 11.1(2) of the *Criminal Code Act 1995* (Cth) which states that the person's conduct must be more than merely preparatory to the commission of the offence.[9] The accused must actually have embarked on the commission of the crime. The essence of an attempt is an intention to commit the offence and then beginning to put that intention into execution by some conduct adapted to its fulfilment which is more than merely preparatory to the commission of the offence.[10] In the circumstances of this proceeding, the respondent could not establish the conduct element of the offence.

Permanent stay of proceedings on an indictment

[30] Where it is plain beyond argument that there was no evidence available on some essential element of an offence, a trial judge, being satisfied of this at the outset can properly determine that the prosecution should be stayed as an

[9] *Situ v The Queen* (2008) 186 A Crim R 224 at 228.
[10] *R v De Silva* (2007) 176 A Crim R 238 par [14].

abuse of process.[11] It has long been established that regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can clearly be seen to be foredoomed to fail.[12] However, the "no case test" simpliciter is not the appropriate test for the granting of a permanent stay of prosecution. For there to be a successful application for a permanent stay of prosecution the case must not merely be incapable of success but must be clearly and manifestly foredoomed to fail.[13]

[31] For the reasons set out above, I came to the conclusion that it was plain beyond argument that there was no evidence of the conduct element of the offence of attempt to possess a border controlled drug, the prosecution case was manifestly foredoomed to fail and I permanently stayed the prosecution.

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[11] *R v Smith* [1995] 1 VR 10 at 16.
[12] *Walton v Gardiner* (1993) 177 CLR 378 at 392-3.
[13] *R v Smith* [1995] 1 VR 10 at 28.