Curtis v Eaton [2010] NTSC 19

PARTIES:	ROBBIE CURTIS
	v
	DONALD JOHN EATON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE YOUTH JUSTICE COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 2/10 (20919852)
DELIVERED:	10 May 2010
HEARING DATE:	23 April 2010
JUDGMENT OF:	OLSSON AJ
APPEAL FROM:	Youth Justice Court

CATCHWORDS:

CRIMINAL LAW – APPEAL - JURISDICTION

Purported appeal from decision of magistrate constituting the Youth Justice Court whereby he declined to deal with charge of an indictable offence summarily and committed youth for trial - whether decision of magistrate an appealable "order" or "adjudication" within the meaning of s 144 of *Youth Justice Act* - proposed appeal untenable - issues as to proper construction of ss 52, 53, 54, and 55 of *Youth Justice Act* discussed.

REPRESENTATION:

Counsel:

Appellant:	Dr N Rogers SC
Respondent:	Mr M O'Reilly

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Curtis v Eaton [2010] NTSC 19
No. JA 2 of 2010 (20919852)

IN THE MATTER OF the *Youth Justice Act*

AND IN THE MATTER OF a purported appeal against an order of the Youth Justice Court

BETWEEN:

ROBBIE CURTIS
Appellant

AND:

DONALD JOHN EATON
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 10 May 2010)

Introduction

[1] On 9 February 2010 the appellant appeared before a Stipendiary Magistrate sitting in Alice Springs as the Youth Justice Court.

[2] That appearance was in relation to three separate files.

[3] On File 20919852 he was charged with three separate counts of sexual intercourse with a female child under the age of 16 years, contrary to the

provisions of s127(1)(a) of the *Criminal Code* (NT) ("Code"). That section prescribes a maximum penalty of imprisonment for 16 years in respect of each offence.

[4] On File 20921444, as amended, he was charged with having had sexual intercourse with the same female without her consent and knowing about or being reckless as to the lack of consent, contrary to the provisions of s192(3) of the Code. This section prescribes a maximum penalty of imprisonment for life for such an offence.

[5] On File 20920487, he was charged with aggravated assault and deprivation of liberty in relation to the same female.

[6] All offences allegedly occurred on 18 June 2009.

[7] When the matters were called on, the charges related to File 20920487 were adjourned for later summary hearing. No issue presently arises in relation to them.

[8] On the same occasion it became common ground that the charge on File 20921444 had to be dealt with by way of oral committal. It was so dealt with and the appellant was duly committed for trial in the Supreme Court.

[9] The appellant sought a summary hearing of the charges on File 20919852 in the Youth Justice Court. However, the learned Magistrate expressed the view that, because those charges each attracted a maximum penalty of imprisonment for a period in excess of 10 years, he had no jurisdiction to

deal with them summarily. He therefore proceeded by way of preliminary examination and, ultimately, also committed the appellant for trial in the Supreme Court, as to the three offences charged.

[10] The appellant seeks to appeal against the ruling of and his subsequent committal by the learned Magistrate in respect of the last mentioned File.

[11] In essence, he contends that the learned Magistrate misdirected himself in interpreting s 54 of the *Youth Justice Act* (NT) ("the Act"). He argues that the Youth Justice Court did have jurisdiction to dispose of the relevant three charges summarily and ought to have proceeded to do so.

[12] It is to be noted that, if an appeal properly lies in relation to that issue, the present purported appeal is out of time, having been filed on 10 March 2010. The appellant seeks an extension of time in which to appeal on the ground that senior counsel for CAALAS, who was to advise as to whether an appeal ought to be prosecuted, miscalculated the time within which a notice of appeal was required to be given.

Relevant statutory provisions

[13] The appellant seeks to prosecute the presently proposed appeal pursuant to the provisions of s 144 of the Act.

[14] That section provides as follows:

"144 Appeal to Supreme Court

(1) An appeal lies to the Supreme Court from a finding of guilt, conviction, order or adjudication made by the Youth Justice Court under -

(a) this Act; or

(b) any other Act in force in the Territory.

(2) An appeal under the section must be –

(a) made in accordance with the *Supreme Court Rules*; and

(b) heard by a single Judge.

(3) The provisions of the *Justices Act* relating to appeals from the Court of Summary Jurisdiction apply, with the necessary changes, to an appeal under subsection (1).

(4) Sections 61, 63 and 123 apply in relation to an appeal under the section as if a reference in those sections to the Court were a reference to the Supreme Court."

[15] The appellant in these proceedings seeks to appeal against what is described as "…… a certain order made on the 9th February 2010…… whereby an order was made that the…… [*Youth Justice Court*]…… did not have jurisdiction to deal summarily with three charges of Unlawful Sexual Intercourse with a Child…… [*with which the appellant had been charged*]…… in accordance with the provisions of section 54 of the *Youth Justice [Act]*, and…… that the aforesaid charges would have to be dealt with by way of preliminary examination."

[16] The jurisdiction of the Youth Justice Court and the application of the *Justices Act* to proceedings before it are spelt out in Division 1, Part 5 of the Act.

[17] Relevantly, s 52 of the Act generally stipulates that all charges of a summary or indictable nature against a youth who is alleged to have committed an offence must be dealt with "in accordance with this Act by the Youth Justice Court". By virtue of s 53, unless the Act makes specific provision in relation to proceedings, orders or convictions, the *Justices Act* (NT) is to apply as if the Youth Justice Court were the Court of Summary Jurisdiction established by the latter statute.

[18] This provision must, however, be read subject to s 54 of the Act. That section as expressed in these terms:

> **"54 Indictable offences to be tried summarily except in certain cases**
>
> (1) 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.
>
> (2) However, if –
>
> (a) the offence, if committed by an adult, would require the consent of the defendant to be heard summarily; and
>
> (b) the youth does not consent,
>
> the Court must proceed to deal with the matter by way of preliminary examination.

(3) The Youth Justice Court must also deal with a charge that, if committed by an adult, would be punishable by imprisonment for life by way of preliminary examination."

[19] I here pause to note that, subject to the qualifications expressed in s 122A of the *Justices Act* (NT), s 121A of that statute mandates which class of indictable offences may potentially be dealt with summarily by the Court of Summary Jurisdiction.

[20] Relevantly for present purposes, an indictable offence punishable by not more than 10 years imprisonment may be heard and determined by the Court of Summary Jurisdiction in a summary manner where –

"(1) (d) the defendant consents to it being so disposed of;

(e) the prosecutor consents to it being so disposed of; and

(f) the Court is of the opinion that the case can properly be disposed of summarily."

[21] At the risk of repetition, it is therefore to be observed that, generally speaking, four separate elements have to be satisfied if an adult charged with an indictable offence is to be tried summarily, namely, the relevant offence must not attract a maximum penalty of imprisonment for more than 10 years, both the defendant and the prosecutor must consent and the Court must be of the opinion that the case can properly be disposed of summarily.

[22] I return to the relevant provisions of the Act.

[23] Section 54 of that statute must be read in concert with the stipulations set out in s 55 of the Act. Subsection (1) of the latter section specifically directs that the provisions contained in it apply where a youth is charged with an indictable offence that, if committed by an adult, would require the consent of the defendant to be heard summarily.

[24] It is unnecessary to recite the content of s 55 *in extenso*. It will suffice to note that the Youth Justice Court is required to inform the youth and any adult in relation to the youth present in court of the former's right to consent or not to the matter being heard summarily. Subsection (5) stipulates that "If the youth consents and the Court is of the opinion that it is appropriate to deal with the matter of summarily, the Court must proceed to hear the matter summarily."

[25] The section further provides that, if the court is of the opinion that it is not appropriate to deal with the matter summarily, then, notwithstanding any consent by the youth, it must proceed to deal with the matter by way of preliminary examination.

Grounds of purported appeal and issues arising in relation to them

[26] No issue has been raised by the respondent as to the propriety of extending time, in the event that it be considered that the proposed appeal in this matter is competent.

[27] In essence, the appellant contends that the learned Magistrate erred in law in concluding that he had no jurisdiction to deal with the relevant charges

because each of them carried a maximum penalty of imprisonment for a period in excess of 10 years.

[28] The appellant's stance is that, on a proper construction of s 54 of the Act, the learned Magistrate was bound to hear and determine the charges summarily because the appellant specifically requested him to do so.

[29] Accordingly, it was inappropriate for the learned Magistrate to proceed by way of preliminary examination.

[30] The primary contention of the respondent is that the issue now sought to be raised by the appellant is not amenable to appeal. It is submitted that the appellant essentially seeks to raise a jurisdictional issue that can only be the subject of a remedy by way of judicial review in the nature of prerogative relief.

[31] The respondent argues that, if that view be not accepted, then, on a proper construction of all relevant provisions of the Act, the conclusion come to by the learned Magistrate was appropriate and correct in the circumstances because, despite an obvious shortcoming in the drafting of the Act, a right of trial by jury ought at least be implied in the instant case.

Discussion

[32] I first turn to the question of whether the principal issue sought to be raised by the appellant is amenable to appeal, by way of contrast with a remedy in the nature of prerogative relief.

[33] The respondent takes, as a commencement point, what fell from the High Court in its judgment in the well-known case of *Craig v State of South Australia*.[1]

[34] That case focussed on a situation in which a District Court Judge had made a *Dietrich* order, staying the trial of an accused person until further order.

[35] The Crown applied to the Supreme Court for an order in the nature of certiorari quashing the stay order, there being no statutory right of appeal in the circumstances.

[36] In the course of its judgment, the High Court stressed that a prerogative remedy such as certiorari is not an appellate procedure. It merely enables the quashing of an impugned order or decision upon grounds such as jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud or error of law on the face of the record.

[37] The point was made that, in the case of so-called inferior courts, their ordinary jurisdiction encompasses the authority to decide questions of law as well as of fact, involved in matters which they have jurisdiction to determine.

[38] The identification of relevant issues, the formulation of relevant questions and the determination of the relevance of evidence are all routine steps in the discharge of such a jurisdiction.

[1] (1995) 184 CLR 163 at 175-176.

[39] Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve an error of law which may found an order setting aside the order or decision of the inferior court.

[40] Such a mistake will not, however, normally constitute jurisdictional error. Nor will a failure to take into account some matter which it was, as a matter of law, required to take into account, or reliance by such a court upon an irrelevant matter on which it was not, as a matter of law, entitled to rely in determining a question within jurisdiction.

[41] The High Court pointed out that jurisdictional error arises where an inferior court mistakenly asserts or denies the existence of jurisdiction, or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognizes that jurisdiction does exist.

[42] Such an error can infect either a positive act or a refusal or failure to act. There will be relevant jurisdictional error when the inferior court makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based on a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.

[43] In the instant case, the learned Magistrate was, in practical terms, called upon to decide whether he did or did not have jurisdiction to hear the charges against the appellant summarily in the relevant circumstances.

[44] He held that he had no such jurisdiction and therefore embarked on the ministerial process of conducting a preliminary hearing in relation to those charges.

[45] If he was in error in so holding, this plainly amounted to a mistaken denial of jurisdiction, by way of contrast with an error within the exercise of jurisdiction.

[46] In such circumstances the ruling in contemplation is not a relevant "order" or "adjudication" within the meaning of those terms, as contemplated by s 144(1) of the Act, because no relevant valid order or adjudication would have been made.

[47] In the course of his submissions, Mr O'Reilly, of counsel for the appellant, sought to advance two alternative characterisations of the ruling of the learned Magistrate.

[48] First, he argued that the decision determining to proceed to a preliminary hearing on the footing that there was no jurisdiction to conduct a summary hearing of the charges constituted an "adjudication" within the meaning of that term, as employed in s 144(1) of the Act. Alternatively, he contended that the ultimate committal of the appellant for trial constituted an "order" for the purposes of the same section.

[49] In my opinion, neither contention can withstand serious scrutiny. According to its normal connotation the word "adjudication" means the determination

of the substantive rights and liabilities in dispute between relevant parties by the imposition of a decision or judgment of a court. It implies a final disposition of issues after a consideration of them on the merits.[2]

[50] *Brady* stands as authority for the proposition that the terms "order" and "adjudication" are essentially employed in a similar sense, in that the genus of order in contemplation is that of orders in the nature of directions of the Court that finally decide the substantive rights of parties and not orders that are merely incidental.

[51] What is here in question is not in the making of an order or adjudication in that sense. The pronouncement of the learned Magistrate that he lacked jurisdiction to deal with the matter by way of summary adjudication and his decision to embark upon the ministerial process of a committal hearing did not constitute a final disposal of the proceedings on the merits.

[52] Moreover, the ultimate order of committal not only did not constitute any substantive determination of rights, but it also followed a decision to embark upon the ministerial committal hearing – that decision constituting the primary matter complained of.

[53] In those circumstances I agree with Dr Rogers, of senior counsel for the respondent, that, if it be accepted that the fundamental conclusion arrived at by the learned Magistrate was erroneous, then this constituted a classic

[2] *Commissioner of Police v Brady* [1954] SASR 314 at 316-318 ("*Brady*").

example of jurisdictional error in the sense contemplated in *Craig*. It did not give rise to any relevant appealable order or adjudication.

[54] That being so, I conclude that the present appeal is incompetent.

[55] In the event that such conclusion be considered erroneous, it is desirable that I say something concerning the merits of the purported appeal.

[56] The key rationale of the approach of the learned Magistrate was that, because an adult could not consent to a summary disposal of an indictable offence which attracted a maximum sentence in excess of imprisonment for 10 years, then it was not open to a young offender to do so, because s 54(2) of the Act rendered the relevant provisions of s 121A(1)(b)(i) of the *Justices Act* (NT) applicable to the situation before him.

[57] He was of the opinion that the consequence of this situation was that subsection (2) of the former section effectively prohibited a young offender from consenting to summary disposal of an offence under s 127(1)(a) of the Code, by reason of the fact that it carried a maximum penalty of imprisonment for 16 years; and that the Youth Justice Court was accordingly bound to proceed by way of preliminary examination.

[58] As I have already indicated, the primary relevant mandate of the Act is to be found in s 52(1) of that statute. It stipulates, in general terms, that all charges of either a summary or an indictable nature against a youth who is

alleged to have committed an offence *must* be dealt with, in accordance with the Act, by the Youth Justice Court.

[59] I have made the point that this general mandate is to be read in conjunction with s 54(1) of the Act, which directs that 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, save that, in the case of an offence that, if committed by an adult, would require the consent of the defendant to be heard summarily and the alleged youth offender does not consent, the Youth Justice Court must embark on a committal hearing.

[60] Subsection (3) also directs that, in the case of a charge that, if committed by an adult, would be punishable by imprisonment for life, the Court *must* deal with it by way of preliminary examination.

[61] The general mandate is, *inter alia*, further qualified by the provisions of s 55(1) of the same statute. This provides, in effect, that a youth charged with an indictable offence that, if committed by an adult, would require the consent of the defendant to be heard summarily, is to be given the opportunity of consenting or not consenting to the matter being heard summarily by the Youth Justice Court.

[62] The section goes on to provide that, if such a youth does consent to that course, the Youth Justice Court is to deal with the matter summarily, unless that Court forms the view that it is not appropriate to do so.

[63] In the event that the youth does not consent, or the Youth Justice Court forms the view that it is inappropriate to deal with the matter summarily, then the Court is enjoined to embark upon a preliminary examination process.

[64] I accept that, at first glance, there appears to be an apparent lacuna in the legislative scheme erected by the Youth Justice Act. It does not direct *specific* attention to a situation in which, by reason of the fact that an offence charged attracts a maximum penalty in excess of imprisonment for 10 years but less than imprisonment for life, it would not have been open to an adult to consent to a summary disposal of the matter under s 121A of the *Justices Act* (NT).

[65] I observe that such a situation did not arise under ss 35 and 38 of the repealed *Juvenile Justice Ac* (NT). Leaving aside cases in which an offence attracted a potential penalty of imprisonment for life and which had to be the subject of committal proceedings in any event, the Juvenile Court was required to hear *all* indictable charges summarily.

[66] However, that Court, of its own motion or on the application of the informant, was empowered, in the exercise of its discretion, to decline to deal with such a charge in a summary manner and proceed in accordance with the provisions of the *Justices Act* (NT) applicable to indictable offences.

[67] If it may properly be said that there is, in fact, an unresolved lacuna of the nature to which I have referred, this would necessarily give rise to an outcome that was both illogical and anomalous.

[68] The net result would be that where, as in this case, the charge in question is one which, if committed by an adult, could not be heard summarily under the *Justices Act* (even by consent) but attracts a maximum penalty short of imprisonment for life, the committal provisions of the *Justices Act* are inapplicable and the general mandate of s 54(1) of the Act necessarily operates.

[69] The regrettable effect of such a situation would be that the youth in this case would necessarily be deprived of any right to elect for trial by jury.

[70] Quite apart from the fact that there was nothing in the second reading speech when the Act was introduced into the legislature to indicate that such a result was intended, I consider that Dr Rogers is correct when she argues that, on a fair reading of the statute as a whole, there is no lacuna.

[71] Infelicitous though the relevant drafting approach may be, I further agree with her that, in enacting the Act, the legislature must have intended to avoid the creation of any lacuna (and the consequential anomalous or incongruous consequences of it) by enacting s 53 of that statute.

[72] As already recited subsection (1) of that section stipulates that, unless the statute makes specific provision in relation to proceedings, orders or

convictions, the *Justices Act* applies as if the Youth Justice Court were the Court of Summary Jurisdiction established by such Act.

[73] Whilst the intended scope of that provision may not be entirely clear on the face of it, it is trite to say that, on well-settled principle, it should be interpreted in a manner that best achieves the obvious purposes and scheme of the statute and, at the same time avoids unintended, serious anomaly.

[74] This is especially so where one interpretation would necessarily have the effect of depriving a citizen of a fundamental right (such as a right to trial by jury) in circumstances in which there is no clear, expressed intention of the legislature to do so and in a fashion that is plainly out of step with the overall scheme of the statute.

[75] To adopt and adapt the language of Gibbs J (as he then was) in *Public Transport Commission of New South Wales v J Murray-More (NSW) Pty Ltd*,[3] where more than one construction of a statutory provision is open, it is proper to adopt that which will avoid consequences that appear irrational or unjust. Such an approach is consistent with the dictum of Stephen J in *PTC v Smorgon*,[4] when he made the point that a construction of a statute which interferes with the legal rights of a subject to a lesser extent and produces less hardship is to be preferred to another, having the opposite effect.

[3] (1975) 132 CLR 336 at 350.
[4] (1977) 16 ALR 721 at 729

[76] In my opinion, the obvious intention of s 53(1) of the Act is, *inter alia*, to provide for contingencies that have otherwise not specifically been addressed in other sections of the Act, albeit, perhaps, in a somewhat clumsy and obscure fashion.

[77] I consider that it ought properly to be construed as conveying that, in the instant case, where a youth is charged with an indictable offence attracting a maximum sentence in excess of 10 years, that charge may not be dealt with summarily, but is to be the subject of a preliminary examination and committal, if appropriate.

[78] In my view the action taken by the learned Magistrate was therefore in conformity with the provisions of the statute.

[79] Be that as it may, for the reasons that I have earlier expressed, an appeal in this matter is incompetent in any event and an extension of time ought not to be granted.
