Blackley v Rigby [2013] NTSC 12

PARTIES:	BLACKLEY, Tracey
	v
	RIGBY, Kerry
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 81 of 2012 (21224755)
DELIVERED:	12 March 2013
HEARING DATES:	18 February 2013
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS:

Criminal Law and Procedure – defence appeal – *Ex parte* decision – application to set aside – relevant factors – nature of exercise of discretion to set aside – "reasonable excuse" – lateness not misadventure – narrow approach – discretion miscarried – *Justices Act* s 63A

Criminal Law and Procedure – Costs – informal agreement between parties – court retains jurisdiction

Justices Act (NT) s 63A, s 177,
Summary Procedure Act (SA) s 76,
Summary Offences Act (NT) s 75,

Bonsell v Development Consent Authority [2003] NTSC 3; *Maider v Dancis* (1985) 39 SASR 136; applied

Boulghourigian v Ryde City Council (2008) DCLR (NSW) 314; discussed

Peach v Bird (2006) 17 NTLR 230; referred to

Bashir v Malagorski [2012] NTSC 64; *Cranssen v The King* (1936) 55 CLR 509; *Hird v Keech* (1979) 21 SASR 237; *House v The King* (1936) 55 CLR 499; *Rough v Rix* (1982) 30 SASR 301; *Van Ryswyck v Hicks* (1974) 8 SASR 376; *Yunipingu v Goodsell* (unreported), JA 15 of 1998; cited

REPRESENTATION:

Counsel:

Appellant:	Mr Pyne
Respondent:	Ms McMahon

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	BLO 1306
Number of pages:	15

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

Blackley v Rigby [2013] NTSC 12
No. JA 81 of 2013 (21224755)

BETWEEN:

TRACEY BLACKLEY
Appellant

AND:

KERRY RIGBY
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 12 March 2013)

Introduction

[1] This is an appeal against a magistrate's decision refusing an application to set aside a finding of guilt, conviction and penalty imposed *ex parte* against the appellant on 22 October 2012.

[2] Some history is required to understand why the appellant was convicted and sentenced in her absence and why the refusal to set aside those orders is the subject of appeal.[1] On 30 July 2012 the appellant was charged with one count on complaint. The complaint alleged that on 12 June 2012, the appellant owned a dog that attacked a person, contrary to s 75A(2)(a) of the

[1] I am grateful to counsel for the respondent who provided a chronology of all relevant dates. Minor corrections made by agreement between counsel at the hearing of appeal have also been helpful.

Summary Offences Act. The appellant appeared at the Court of Summary Jurisdiction before a magistrate in answer to a Notice to Appear on 31 July 2012 at 10:00am. The case was listed for a "contest mention"[2] on 11 October 2012. The appellant appeared with counsel at the contest mention. The case was adjourned for a contested hearing to take place on 22 October 2012 at 9:30am.

[3] The appellant failed to appear at 9:30am on 22 October 2012. The learned acting magistrate stood the case down until 10:10am. As there was still no appearance of the appellant, the learned acting magistrate proceeded *ex parte*. A finding of guilt was made, the appellant was convicted and fined $550.00, and a victim's levy of $40.00 was imposed. It appears to be common ground, (or at least not disputed before the learned magistrate who heard the application to set the orders aside), that the appellant appeared at court on 22 October 2012 at about 11:00am.[3] It is also common ground that the prosecution had six witnesses ready to be called and one ready by video link for the hearing scheduled for 22 October 2012. The prosecutor initially told the learned acting magistrate that the witness who was the person bitten by the dog was unwell and that an application to be part heard was anticipated.[4] After the case was stood down the prosecutor indicated he

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2 The case management process for contested criminal cases in the Court of Summary Jurisdiction.
3 T 14 November 2012 at 4.
4 T 22 October 2012 at 2.

would not rely on that witness and asked the learned acting magistrate to deal with the matter *ex parte*.[5]

[4] An application to set aside the *ex parte* orders was filed by the appellant on 7 November 2012. The application stated the appellant "had vehicle problems attending court on the hearing date and came to court late (11:00am)" and, that she "has an arguable legal defence". The application to set aside was heard and dismissed on 14 November 2012.

[5] The grounds of appeal are directed to the decision made by the learned magistrate on 14 November 2012 refusing to set aside the *ex parte* conviction and fine. Although not specifically directed to the decision to impose the *ex parte* orders of 22 October 2012, if this appeal is successful, this court may substitute or make any order which ought to have been made at first instance.[6] It follows that if the grounds exist to justify such a course, this court may order the *ex parte* orders of 22 October 2012 be set aside if it is concluded that such a decision ought to have been made on 14 November 2012. This course may be taken notwithstanding the learned acting magistrate was entitled to make the *ex parte* finding of guilt and associated orders.[7]

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5 T 22 October 2012 at 5.
6 Section 177(2)(c) *Justices Act*.
7 Section 62(b); s 62AB(1)(b) and (4) *Justices Act*; Transcript 22 October 2012 at 6-7; *Bashir v Malagorski* [2012] NTSC 64 at [16].

[6] For the following reasons, in my opinion the appeal should be allowed and orders made setting aside both the orders of 22 October 2012 and 14 November 2012.

Ground One: That the learned Stipendiary Magistrate erred by resolving the application on the basis that the appellant needed to establish that she had a reasonable excuse for failing to attend at court before the application to set aside the finding of guilt and conviction would be granted.

[7] It is common ground that the learned magistrate made her decision on the basis that she was not satisfied that the appellant had given a reasonable excuse as to her non-attendance on 22 October 2012.[8] It was the sole reason given for the decision. The respondent argues the learned magistrate must be taken to have considered all other relevant factors and the decision was open to her.

[8] Section 63A *Justices Act* sets out the procedure for bringing and hearing an application to set aside an *ex parte* order. The power to determine the application is couched in broad terms.[9] If the court proceeds to set aside the order it may do so on such terms and conditions as it sees fit.[10] The court may make an order for costs.[11]

[9] Section 63A does not prescribe any criteria or list any factors that must or may be taken into account. The power conferred on the court to determine the application is a broad discretionary power. It does not involve the

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8 T 14 November 2012 at 15. Appellant's submissions, para 6; respondent's submissions para 4.
9 Section 63A(7) *Justices Act*.
10 Section 63A(7) *Justices Act*.
11 Section 63A(8) *Justices Act*.

application of any particular inflexible standard; it must of course be exercised judicially.

[10] In *Bonsell v Development Consent Authority*[12] Martin (BF) CJ reviewed the interstate decisions that considered the nature of the exercise of the power under similar legislation. His Honour made the following observations:

> "It seems to have been the case that the greater the degree of culpability of the accused in his or her failure to attend at court, then the more substantial must be a defence made out to the charge. On the other hand, if the failure to attend was due to misadventure and not down to the accused at all, then the substance or otherwise of the proposed defence did not assume much significance. However, on my reading of the cases there is no established pattern and no suggestion that such tests as may have emerged are inflexible. Whether relief is to be granted or not depends upon the exercise of a judicial discretion in the circumstances of each case."[13]

[11] His Honour expressly agreed with the approach taken by his Honour Cox J in *Maider v Dancis*.[14] In relation to the exercise of the discretionary power Cox J said: "there cannot be any hard and fast rules in this area,"[15] and, that a review of the cases did not establish "inflexible categories that will determine the success or failure of these applications".[16] His Honour also made the point that the rights and interests of respondents are to be considered. It was acknowledged that at times the substantial merits of a proposed defence will need to be regarded and at other times not. The conclusion his Honour came to was:

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12 [2003] NTSC 3.
13 [2003] NTSC 3 at [24].
14 (1985) 39 SASR 136.
15 (1985) 39 SASR 136 at 142.
16 *Ibid.*

> "[I]n the end, as it seems to me, it will be a matter of doing what the justice of the case in hand requires. The relief given by s 76(a) is discretionary, and any review of a special magistrate's decision on appeal will be dealt with in the manner appropriate to discretionary orders. As long as he applied the correct principles, and took all relevant matters and only such matters into account, his decision will not ordinarily be assailable."[17]

[12] With respect I agree with and adopt the approach taken in *Bonsell* and *Maider v Dancis*. In my opinion, determining the application by reference to a standard of "reasonable excuse" takes an approach which is narrower than that anticipated by the conferral of the discretion and as discussed in the authorities. It is not at all clear that the other relevant factors were weighed in the decision to refuse relief.

[13] As noted, the authorities indicate a broad approach should be taken, and acknowledge that at times different factors will assume significance as between different cases.

[14] Particularly in a case such as this, where the defendant says they are not guilty, where there is a history of appearance at court and an attempt has been made to attend court, (although as here the appellant was late), application of the standard "reasonable excuse" does not correspond with the approach as accepted in *Bonsell* and other authorities because it fails to enable consideration of all of the relevant circumstances of the case. No specific case of prejudice was put on behalf of the prosecution aside, (and I

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[17] *Ibid* at 142. In South Australia the jurisdiction to set aside a conviction or orders made by the court of summary jurisdiction is provided by s 76(a) *Summary Procedure Act* (SA). Before that provision was enacted in 1982, to set aside an *ex parte* order was required to be dealt with in the Supreme Court: *Van Ryswyck v Hicks* (1974) 8 SASR 376*; Hird v Keech* (1979) 21 SASR 237*; Rough v Rix* (1982) 30 SASR 301.

accept this is inevitably and most unfortunately the case), the inconvenience to witnesses and associated costs.

[15] The appellant gave evidence before the learned magistrate on 14 November 2012. None of her brief evidence was challenged. She said she was not in court on 22 October 2012 when her matter was called as she got up late; she caught the connecting bus to Woodruff and Gray; by the time the bus arrived at the bus depot in Palmerston she missed the bus that she needed to catch. She told the court that when she missed the bus she rang NAAJA and told them she was running late; that NAAJA told her to come in and that she would be dealt with when she arrived. She said she arrived at court at about 11:00am. She went to the office at the court and was told she had been dealt with.

[16] In cross examination she was asked about the advice she was given and the associated paperwork. She said she was told to fill in the form and that she had seen her lawyer. Her evidence was not challenged in any way.

[17] A number of subjects were traversed during the hearing of the application to set aside. Her Honour pointed out that the application to set aside had noted "vehicle problems" whereas the appellant's evidence was about missing the bus. Brief submissions on this point attempted to show the two versions were not necessarily at odds. I agree with counsel for the respondent that the learned magistrate was well entitled to scrutinize the appellant's stated reasons for non-attendance or late attendance. The statement on the

application was not used to challenge the appellant's evidence; but neither did the appellant's counsel attempt to clarify the apparent disparity during the appellant's evidence in chief. Her Honour made no specific finding on the apparent disparity. It is reasonable however to infer that her Honour's ultimate conclusion that she was not satisfied the appellant had a reasonable excuse for her non-attendance was based on that material.

[18] Counsel also raised two potential defences to the charge. The first was said to be a defence under s 75(3) of the *Summary Offences Act* that provides a specific defence to a charge in circumstances where the attack took place on the owner's premises or the person attacked was on the premises for an illegal purpose. Counsel submitted there was arguably a lack of evidence that specific permission was given to enter the premises.[18] He said questions would be raised as to whether a sign had been properly affixed to the premises and that this may be relevant to the question of permission. Her Honour said the argument was "a little tenuous". She indicated, however that she was *not* saying that the defence may not have merit.[19]

[19] The second potential defence raised was whether it could be proved the appellant was the owner of the dog. Her Honour was told there was another person who claimed ownership of the dog; that there were a lot of other people who lived at the relevant address and that the dog was registered to a person who lived at a different address. Her Honour pointed out that the

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18 T 14 November 2012 at 10 - 11.
19 T 14 November 2012 at 11.

précis said the appellant had said to police "don't taser my dog". It is not clear that her Honour came to a concluded view on whether the defences were open, arguable or not.[20] The reasons do not disclose if any conclusion was drawn on that issue.

[20] On appeal the respondent's counsel argued that the learned magistrate had taken the following into account: the appellant's reasons given about why she did not attend court; consideration of whether there were exceptional circumstances; whether there was carelessness on the part of the appellant; the strength of the Crown case; the availability of defences and the witnesses being put to inconvenience. Although these subjects were touched on in argument, the apparent inconsistency between the evidence and the reason for non attendance given on the written application appears to be the only consideration that could form the basis of the sole finding that the appellant did not have a "reasonable excuse" for her non-attendance. It is reasonable to infer that her Honour also had regard to the inconvenience of witnesses, given her Honour noted that consideration simultaneously with her reasons.

[21] In concluding that her Honour based her decision on whether the appellant had a "reasonable excuse", I am mindful that extempore reasons should not be dismembered or subject to hypercritical analysis.[21] It is necessary to take a broad view and ascertain the essential thrust of the reasoning process

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20 See exchange at T 14 November 2012 at 12.
21 *Peach v Bird* (2006) 17 NTLR 230 at 232.

applied without being unduly critical of the modes of expression used or according them a degree of definitiveness which was not intended. As a discretionary decision, the principles that guide appeals from such decisions must be adhered to.[22] It is not enough that the appellate court consider that it would have taken a different course from the primary judge. It must appear that some error has been made in exercising the discretion.

[22] The learned magistrate introduced the standard of "reasonable excuse" in an early exchange with counsel during argument:[23]

> Her Honour: " ... – submissions should be made on the law as to what should be taken into account.
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> > Now in the civil jurisdiction there is a reasonable excuse for not turning up and that there is an arguable defence to the action. And you have told me there might be an arguable defence, I'm not sure about that, whether or not there is reasonable excuse. But this is not the civil jurisdiction, this is the criminal jurisdiction.
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> Mr Pyne: ... and your Honour's talking about a default judgment.
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> Her Honour: Yes".

[23] After the conclusion of the argument, as noted, the sole reason expressed was lack of a reasonable excuse. In my opinion the reasonableness of the excuse is a significant consideration but cannot, on the authorities that I have read, subsume all other factors material to the particular case. The

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22 *House v The King* (1936) 55 CLR 499; *Cranssen v The King* (1936) 55 CLR 509.
23 T 14 November 2012 at 6.

approach on this occasion was too narrow in the circumstances and has in my respectful opinion led to error.

[24] Other relevant considerations were the history of appearances by the appellant and that the appellant had appeared previously at mentions and a contest mention with her counsel clearly indicating on each occasion she intended to defend the charge. Despite the appellant not attending properly to her transport from Palmerston to court on time on the day of the hearing, her history of attendance was not in question. Her position was nothing like the defendant/appellant in *Bashir v Malagorski*[24] who displayed an entrenched history of non-appearance and lateness.

[25] Counsel also openly and frankly disclosed two defences that would be argued. They could not be considered to be frivolous. It may be that the first defence sought to be argued appeared tenuous, but as her Honour acknowledged, it was not necessarily devoid of merit. Without in any way suggesting they would be likely to succeed, the proposed defences appear to be arguable. Much would of course depend on the strength of the evidence adduced.

[26] The prosecutor did not seek to argue that the prosecution would be prejudiced if the matter were again set for hearing. Plainly, the inconvenience and costs associated with witnesses and their attendance was relevant. On appeal, counsel for the respondent submitted that an order for

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[24] [2012] NTSC 64.

costs favouring the prosecution could not have been made to remedy the situation given the long standing arrangement between the prosecution and NAAJA in that neither organisation seek costs against the other. I simply point out that as useful as such an agreement is to both organisations and may well be conducive to the administration of justice, in itself this agreement cannot divest the court of its jurisdiction to order costs in a particular case.[25] It may be a matter that is relevant to the discretion to award costs but the agreement is no bar to an application in a particular case if that were considered appropriate by either party.

[27] I agree with counsel for the respondent that it is a serious matter to put the prosecution to further cost and the witnesses to inconvenience. It was also pointed out that six hours of court time was allocated on the day of the hearing.[26] There will be more costs associated with re-listing the matter for hearing, but that must be balanced against the appellant seeking to agitate defences to the charge. That is not a minor consideration. It is central to ensuring there is not an unjust outcome. As indicated, there was some prevarication in relation to the readiness of the prosecution case, at least when first called on before the learned acting magistrate. Initially there was an indication of an application to be part-heard because a witness was unwell. That application was later not proceeded with. Another witness to be called had not provided a statement to the prosecution and the learned acting magistrate directed the witness' phone number be given to defence

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25 *Yunupingu v Goodsell* 24 December 1998 (unreported), JA 15 of 1998, Martin (BF) CJ.
26 Respondent's submissions, para 33.

counsel so that she could talk to the witness before the hearing.[27] It appears all witnesses, (perhaps save one who was to be heard via video link), were local; some were police officers and some were public servants.[28]

[28] The appellant's lateness and therefore non-appearance caused disruption to witnesses and to the court. I would not put her reasons for lateness in the category of 'misadventure'. Counsel for the respondent provided a number of illuminating examples of accepted "misadventure". [29] In those cases the "misadventure" may readily point to a favourable exercise of the jurisdiction. The appellant's explanation was, however, required to be weighed with other factors, particularly as it was clear the appellant believed she had reasons which could not be considered frivolous to defend the charge. Although the conviction was for a summary offence, in my view it is the type of conviction that could attract a deal of odium and from that point of view is a more significant matter, than for example, a simple speeding conviction.[30] The appellant also took steps to remedy the situation by phoning NAAJA. That evidence did not appear to be challenged. It does not appear to have been explained why her phone message was not communicated to the court in a timely manner on the morning of the hearing.

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27 T 22 October 2012 at 2-3.

28 Respondent's submissions, para 37.

29 Car breaking down in a remote area with no facilities: *Hird v Keech* (1979) 21 SASR 237; an accident or mishap on the way to court: *Aston v Hincks, Vice Fitzgerald* (1950) SASR 182; difficulty in attending due to a documented medical condition or illness (*Bonsell* (cited above)); genuine misunderstanding as to the date and time of the hearing *Rough v Rix* (1982) 30 SASR 301.

30 cf *Bashir v Malagorski* [2012] NTSC 64 at [16].

[29] In this particular case the application of the standard of whether the appellant's excuse was reasonable to the exclusion of other considerations was in my opinion too narrow and the discretion miscarried.

Ground Two: That the decision miscarried because the learned Magistrate failed to give adequate weight to the fact that the appellant was late to court because of misadventure and not because of manoeuvring or deliberate dilatoriness or inaction and gave insufficient weight to the desirability of allowing the appellant to put the complainant to proof.

[30] This ground was argued in the alternative. As already indicated, I disagree this was a case of 'misadventure', however it was not argued the appellant's lateness was deliberate on her part. She was, it appears, careless about her arrangements to attend court. This is highly undesirable but must be weighed against all other relevant factors. Aside from the assertion that the appellant's case is one of misadventure, I would allow the appeal on this basis also, for reasons similar to those already given in relation to ground one. All relevant factors must be weighed in the exercise of the discretion.

[31] In the vast majority of cases, *ex parte* hearings are of great merit. They permit the expeditious hearing of many matters in the Court of Summary Jurisdiction when defendants do not appear. As noted in *Boulghourigian v Ryde City Council:*[31]

> "Their implementation saves the cost and inconvenience that would otherwise be incurred by requiring the use of resources and the presence of witnesses to present evidence to prove offences, in respect of which an accused person may properly submit to a finding of guilt without the formalities that might otherwise be required.

[31] (2008) DCLR (NSW) 314.

> However, as the Court of Appeal has made abundantly clear, the legislation was not intended to produce injustice. Those accused wish to defend the charges brought against them must be permitted to do so."

[32] I would add that an *ex parte* hearing is often a preferable course than the issue of a warrant in the case of non-appearance of a defendant, particularly if the likely penalty is no more than a fine. *Ex parte* hearings also save the cost of repeat court appearances and police resources. Where however the case is to be defended, the relevant authorities indicate a broad approach is necessary so that injustice is not produced.

Orders:

[33] 1. The appeal is allowed.

2. The order of 14 November 2012 refusing to set aside the finding of guilt, conviction and sentence imposed on 22 October 2012 is quashed.

3. The finding of guilt, conviction and penalty imposed on 22 October 2012 is set aside.

4. The complaint is remitted to the Court of Summary Jurisdiction to be determined according to law.

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