Kennedy v Cook [1999] NTSC 79

PARTIES:	ROBERT KENNEDY v KEVIN JAMES COOK AND SHEILA BATH v KEVIN JAMES COOK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA3 of 1999 (9819081) JA2 of 1999 (9819082)
DELIVERED:	10 August 1999
HEARING DATES:	9 and 14 July 1999
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	J. Lewis
Respondent:	In person

Solicitors:

Appellant:	Peter McQueen
Respondent:	In person

Judgment category classification:	C
Judgment ID Number:	ril99018
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Kennedy v Cook [1999] NTSC 79
JA3 of 1999 (9819081)
JA2 of 1999 (9819082)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an application seeking an extension of time within which to appeal a decision made in the Court of Summary Jurisdiction at Darwin

No. JA3 OF 1999 (9819081)

BETWEEN:

ROBERT KENNEDY
Applicant

AND:

KEVIN JAMES COOK
Respondent

JA2 of 1999 (9819082)

SHEILA BATH
Applicant

AND:

KEVIN JAMES COOK
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 10 August 1999)

[1] By virtue of s 171(2) an appeal from a Court of Summary Jurisdiction is required to be instituted within one month from the time of the conviction,

order or adjudication appealed against. The applicants sought an order of this Court dispensing with compliance with that condition. The power relied upon is contained in s 165 of the *Justices Act* and permits this Court to dispense with compliance if "in its opinion, the appellant has done whatever is reasonably practicable to comply with this Act."

[2] The circumstances giving rise to the applications commenced with an order of Mr Wallace SM made on 9 March 1998 when, at the request of the applicants, he ordered that the respondent enter into recognizances pursuant to s 99 of the *Justices Act* to keep the peace towards the applicants. The applicants then alleged that the respondent breached the terms of those recognizances and the matter came before Mr Gillies SM on 11 December 1998 in order to deal with the allegations. The applicants represented themselves before his Worship and the respondent was represented by counsel.

[3] Prior to any submissions being made and any evidence being introduced his Worship indicated to the parties that he was of the view "that there is no power to deal with a breach of a s 99 recognizance" and went on to rule as follows:

> "Very well, Ms Bath and Mr Kennedy have taken out complaints alleging that Mr Cook failed to comply with a recognizance, pursuant to s 99 of the *Justices Act*, to keep the peace and be of good behaviour towards each of them.
>
> I've been of the view that this Court has no power to consider a breach of a s 99 recognizance and there is no specific power under

> the *Justices Act* and, it would seem to me, that in the absence of a specific power, an implied power cannot be inferred.
>
> So the complaint of each of them is dismissed for want of prosecution."

[4] Why the complaints should be dismissed for "want of prosecution" was not made clear and it would appear that his Worship intended to dismiss them "for want of *jurisdiction*". The error may have been one of transcription, or simply a slip of the tongue.

[5] At the time of dealing with the matter his Worship was at pains to inform Mr Kennedy and Ms Bath that they had a right of appeal from his decision. He indicated that an appeal to the Supreme Court was available and he went on to say "but I invite you, if you're dissatisfied with my ruling, to appeal to the Supreme Court so that a superior court can consider the situation."

[6] Following that appearance Mr Kennedy and Ms Bath immediately approached the office of the Attorney-General for assistance. They were, it seems, referred to the Office of Courts Administration. On 14 December 1998 they wrote a letter to the Chief Executive Officer of the Office of Courts Administration setting out their complaints. In the course of that letter they said:

> "… we see no reason why the matter should simply [be] made to disappear or have to proceed to the Supreme Court in the form of an appeal for them to remain current. We therefore request that our matters be re-listed in the Magistrates' Court for hearing at the earliest possible date … however if there is a current administrative failing in the Courts and merit exists such as for an untainted

> environment, we are favourably agreeable to the matter (not an appeal) being heard before a Judge in the Supreme Court."

[7] They did not proceed to lodge an appeal notwithstanding the invitation made by his Worship. It seems from the correspondence that they expected the matter to be attended to administratively and were not interested in an appeal.

[8] There followed a response from the Chief Magistrate in which they were advised that "the only way the law provides for the decision to be reconsidered is by way of appeal to the Supreme Court". They were recommended to obtain "urgent legal advice to ascertain whether such an appeal should be brought".

[9] Following receipt of this letter the applicants on 18 December 1998 wrote a letter to the Office of Courts Administration in which they made the following observation:

> "Chief Magistrate Bradley in his concluding statement implied Magistrate Gillies may have been in error, certainly he seems so and under some circumstances excusable. However the "error" in this instance is related more to personal magisterial behaviour and administrative protocol for the Courts Administration to handle rather than about an evidence/legal/witness/etc/related "error", requiring an appeal of a higher legal interpretation in the Supreme Court jurisdiction. Hence our complaint is to the Courts Administration."

[10] The Office of Courts Administration promptly replied by letter dated 24 December 1998 and advised that the Northern Territory Attorneys-General Department was considering a draft letter which the office hoped

"will offer you a remedy to your dilemma". This was followed by a letter from the Solicitor for the Northern Territory dated 4 January 1998 in which it was pointed out that the applicants appeared to have "not fully understood the letter to you from the Chief Magistrate" and advised that the Solicitor for the Northern Territory had instructions to arrange to pay a solicitor of the applicant's choice "if necessary, to proceed with an application to the Supreme Court to obtain an order which will reinstate the proceedings in the Magistrate's Court". The applicants were asked to nominate a solicitor and they nominated their present solicitor Mr Peter McQueen. Mr McQueen was instructed to act on behalf of the applicants by letter dated 8 January 1999 from the Solicitor for the Northern Territory and, I am informed, that letter was received at Mr McQueen's office on 11 January 1999.

[11] Mr McQueen was absent on leave at the time that the letter was received and says he did not become aware of it until he returned to his office on 18 January 1999. Mr McQueen saw Mr Kennedy and Ms Bath on 29 January 1999 and on 4 February 1999 appeals were lodged, the recognizances to prosecute appeals were entered into and relevant documents were served.

The Law

[12] In order to obtain a dispensation from compliance with the requirements of s 171(2) it is necessary for the applicants to demonstrate that they have done "whatever is reasonably practicable to comply with this Act". The effect of that section was considered by Martin CJ in *Edrick v Nayda* (unreported,

Supreme Court of the Northern Territory, 22 December 1994) where his Honour observed:

> "What must be done if the Court is to give consideration to an application pursuant to s 165, is something which is reasonably practicable to comply with the Act, and in a matter like this, what must be sought to be complied with is the requirement that an appeal be instituted within one month from the date of the determination of the Court of Summary Jurisdiction."

[13] Martin CJ referred to the decision of Asche J in the *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8 at 10 and to the observations of Mayo J in *Potter v Neave* (1944) SASR 19 where the following was said (21):

> "It is for the person whose proceedings are defective, and who desires the benefit of s 165, to show by evidence or by admitted facts, that he, and his agent, that is the solicitor (if any) by whom he is represented, have done "whatever is reasonably practicable". If grounds, on which an affirmative opinion to that effect can properly be based, are not shown, the proceedings remain inchoate, they do not reach the stage of being an instituted appeal. Whether everything reasonably practicable has been essayed, must be tested by the circumstances of the intending appellant and his accessibility to means for completing and lodging the initial document. "Practicable" may possibly be paraphrased in the context of s 165, as "capable of being done or accomplished with the available resources whatever they may be …".
>
> Before an appeal is launched, that course must be decided on, and often further consideration of the questions involved will be first required. Thereafter a surety or sureties must be found and the necessary documents prepared, completed, served and lodged. These activities may take some time, and in usual circumstances peculiar difficulties may be present. But these difficulties can be described and explained as grounds why it has not been reasonably practicable to give notice and enter into a recognizance with the prescribed month. They are not to be assumed unless disclosed."

[14] In circumstances where an appellant, who is in custody, has reasonably left the matter in the hands of an apparently competent solicitor and where the instructions were given in ample time for the solicitors to comply with the provisions of the Act it has been held that the appellant has, within the meaning of s 165, done all that is reasonably practicable to comply with the provisions of the Act: *Nottle v Trenerry* (1993) 89 NTR 7.

[15] Although the applicants in this matter failed or neglected to heed the advice provided to them by both Mr Gillies SM and the Chief Magistrate, once they received the correspondence from the Office of Courts Administration indicating that something was occurring which was expected to "remedy" their "dilemma" and, further, when they received the letter from the Solicitor for the Northern Territory indicating that a solicitor would be engaged to "proceed with an application to the Supreme Court to obtain an order which will reinstate the proceedings in the Magistrates Court" and they nominated their solicitor, they were entitled to assume that the requirements of the legislation would be complied with. This did not turn out to be the case because of the absence of Mr McQueen from the jurisdiction. However, in the unusual circumstances of this matter, I am prepared to hold that the applicants ultimately did "whatever is reasonably practicable to comply with this Act". The matter had been left in the hands of a solicitor and there was no reason for them to be concerned that it would not be dealt with in the manner required by the legislation. It is not suggested that there is anything further they could or should have done.

[16] On 14 July 1999 I therefore dispensed with the need for compliance with the time limitations contained in s 171 of the *Justices Act.*

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