PARTIES:	STEWART BARRY DUREAU and ANDREW EDWARD DUREAU v ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	Justices' Appeal
FILE NO:	JA 17 and 18 of 1998
DELIVERED:	23 October 1998
HEARING DATES:	8 September 1998
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Justices appeal – incorrect application s46A *Summary Offences Act* – trite law to apply definition section of one Act to another without express adoption – meaning of "lawful".

Legislation

Justices Act s163
Criminal Code s210; Pt. V1
Sentencing Act s3(1) 78A(1) 3(1); 1(a)(b)(c)
Summary Offences Act 46A
Trespass Act s5; s6; s8(4)
Interpretation Act s62A

Cases

1) *Prideaux v Director of Public Prosections* (Victoria) (1987) 163 CLR 483 applied

2) *Barker v The Queen* (1983) 153CLR 338, referred.

3) *Crafter v Kelly* (1941) SASR 237, referred.

4) *Taikato v The Queen* (1996) 186 CLR 454, referred

REPRESENTATION:

Counsel:

Appellants:	Ms S Cox
Respondents:	Mr M Carey

Solicitors:

Appellants:	NTLAC
Respondents:	DPP

Judgment category classification:	B
Judgment ID Number:	MIL98176
Number of pages:	8

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

No. JA 17 & 18 of 1998
(9716711 & 9716713)

BETWEEN:

STEWART BARRY DUREAU and ANDREW EDWARD DUREAU
Appellants

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 23 October 1998)

MILDREN J:

These appeals, which were heard together, are from the Court of Summary Jurisdiction, and brought pursuant to s163 of the *Justices Act*.

The appellants were both charged with stealing contrary to s210 of the *Criminal Code*. They pleaded guilty. Complaints alleging that they each trespassed on enclosed premises were withdrawn. Neither appellant had any

relevant prior convictions. The question which came to be agitated before the learned Magistrate was whether or not the offences to which they had pleaded guilty were "property offences" as defined by s3(1) of the *Sentencing Act*. If they were, the appellants each faced a mandatory minimum sentence of 14 days' imprisonment pursuant to s78A(1) of that Act. If they were not, the Court had a complete sentencing discretion. The learned Magistrate held that the offences were property offences. Accordingly, he convicted both the appellants and sentenced them both to 14 days' imprisonment.

The appellants have appealed against these findings.

The Facts

The facts as alleged by the prosecutor are as follows. At approximately 2.30 pm on Friday 25 July 1997 the defendants entered the rear of the property of City Wreckers, Winnellie, which was unfenced, and without any signs. They removed various items from vehicles within the yard, which they placed in the rear of their vehicle, which was parked on the property. They were discovered by the owner, who happened to be driving past at the time, and after some heated discussions, the property, valued at $100, was replaced. On the day in question it was a public holiday and the premises were not open for business. There were no other relevant factual findings by the learned Magistrate, but it was put by counsel for the appellants that they were interested in doing up vintage cars, and whilst fishing at the wharfs, had been told that there were some car bodies at the premises which were to be crushed for scrap, and so they decided to go and have a look. After entering the

premises through the unfenced rear boundary, they found amongst stripped car wrecks, rubble and litter, four double tyre rims, two old tyres which they wanted to use as a boat rest, and a small table frame made from angle iron which they pulled out from some mud and weeds.

"Property Offences"

S3(1) defines "property offence" to mean an offence specified in Schedule 1 of the Act. The Schedule provided (at the relevant time)

> 1. An offence against section 210 of the *Criminal Code*, except where –
>
> (a) the offence occurred at premises, or a place, where goods are sold;
>
> (b) the offence was not part of a single criminal enterprise during which the offender committed an offence against Part VI of the *Criminal Code*; and
>
> (c) the offender was lawfully in the premises or at the place at the time of the offence.

The findings of the learned Magistrate

His Worship held that the onus was on the Crown to prove beyond reasonable doubt that at least one of the elements of clause 1(a) to (c) of the Schedule was negatived. It was conceded that subclause (b) could not be negatived, and the only question was whether the Crown had negatived either subclause (a) or (c).

After some discussion of clause 1(a), (as to which his Worship made no finding one way or the other), his Worship turned to consider 1(c). His

Worship held that "lawfully" had its general and ordinary meaning, as something that was according to law or permitted by and therefore not contrary to law. His Worship concluded that, on the facts, there was no offence committed in violation of the *Trespass Act*, and he said that no other offence had been suggested to him by counsel. Nevertheless he considered that the appellants had breached s46A of the *Summary Offences Act*, *viz*:

> A person who in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace enters whether or not he is so entitled to enter land which is in the actual and peaceful possession of another is guilty of an offence. Penalty: imprisonment for 12 months.

Accordingly, his Worship held that the Crown had proven that on the facts, as the appellants had entered the land with intent to steal some items thereon and this was likely to cause (and did in fact cause) a breach of the peace, the appellants were unlawfully in the premises at the time. He was therefore obliged to record convictions and impose the mandatory minimum sentences of 14 days.

Submissions and Conclusions

It was submitted by Ms Cox on behalf of the appellants that in so deciding the case this way, his Worship had fallen into error as s46A applied only to those who went upon land with the intention of occupying and taking possession of it: *Prideaux v Director of Public Prosecutions (Victoria)* (1987) 163 CLR 483. Counsel for the Crown, Mr Carey, conceded this point – rightly in my opinion.

Mr Carey, however, tried to support the learned Magistrate's decision on another basis. First, he submitted that "lawfully" in the Schedule must have the same meaning as the opposite to "unlawfully" as that term is defined in the *Criminal Code, viz,* something which is not "without authorisation, justification or excuse". I reject this submission. It is trite law that it is not permissible to apply a definition section to be found in one Act to another Act unless the latter Act expressly adopts the definition in the former Act. Mr Carey's submission goes further – it involves not merely translating the definition but also applying the negative of it. I know of no authority for such a proposition which in my opinion is without substance.

Alternatively, Mr Carey submitted that the appellants were not lawfully in the premises as they had committed an offence against the *Trespass Act,* but he eventually was forced to concede, and rightly so, that no offence was committed against that Act, because the land was not "enclosed premises" (s5) as it was partly unfenced, the land was not prohibited land (s6), and no warning off had been given (s8(4)).

Mr Carey next submitted that the appellants were unlawfully in the premises as they were trespassers under the civil law. In support of his submission, Mr Carey relied on *Barker v The Queen* (1983) 153 CLR 338, but that case is distinguishable as it dealt with the meaning of the words "enters…as a trespasser" in s76(1) of the *Crimes Act 1958 (viz)* and is not relevant to the meaning of the word "unlawfully".

Some guidance is available from other authorities. In *Crafter v Kelly* (1941) SASR 237 at 243 Napier J (as he then was) said:

> …. I think that the natural meaning of "lawful" depends on the context in which the word is used. It may mean, simply, "permitted". In this sense an act is lawful, when it can be done without any infraction of the law…. Another use is in the sense of supported by the law, e.g. lawful authority, excuse or impediment; but it seems to me that, in some connections, the word implies the quality of being "legally enforceable".

Kirby J, in *Taikato v The Queen* (1996) 186 CLR 454 at 488 referred to this passage, observing that:

> In many cases it is easier to see what the word does *not* mean than to define with precision what it does.

S62A of the *Interpretation Act* now requires the Courts to prefer a construction that promotes the purpose or object underlying the Act. It seems to me that the purpose of clauses 1(a) to (c) of the Schedule was to exclude shoplifting-type offences from the type of stealing which was to be subject to the exception: see also *Hansard*, 21 November 1996, p10097. If this is so, and the word "lawfully" was interpreted to exclude trespassers, the intention of the exception would not be defeated, even though persons who enter premises as licensees for a particular purpose are nevertheless trespassers if they enter for a purpose which is outside the scope of the licence or invitation to enter: see *Barker v The Queen, supra*, at p346. However, as Mason J, (at p348) and Brennan & Deane JJ (at 361-2) point out, shoplifters are generally

not trespassers, although if they enter the premises solely for the purpose of stealing the position may be otherwise (see Dawson J at p373).

Against that consideration is the fact that the word appears in a statute dealing with mandatory minimum penalties, the word "lawful" is capable of bearing the meaning "not against the criminal law", or "not forbidden by law" (see *Taikato v The Queen, supra*, at 460-461) which I take to mean the same thing and the liberty of the subject is at stake. However, the principle that an ambiguity in a penal statute should be resolved in favour of the accused – if it applies to this type of statutory provision – is "an ambiguity which persists after the application of ordinary rules of statutory construction": *Barker v The Queen, supra*, at 355 per Brennan & Deane JJ. If the construction contended for by the appellants were to be adopted, it is clear that the exception would be broadened to encompass persons who were not shoplifters and who had, say, entered shop premises at a time when they were not open to the public. I do not think this would promote the purposes of the exception, and therefore I consider that, applying s62A of the *Interpretation Act*, I should prefer the construction that "lawfully in the premises" does not encompass a trespasser.

The learned Magistrate made no finding as to whether or not the appellants were trespassers according to the civil law. I do not consider that I should make findings on an issue which has not been debated before the learned Magistrate and in respect of which the parties had not had an opportunity to call evidence or make submissions. There is also the consideration that the learned Magistrate did not deal with paragraph 1(a) of

the Schedule. If S78A(1) does not apply, the learned Magistrate has an unfettered sentencing discretion including a discretion not to impose a conviction. Accordingly, the appeals must be allowed, the convictions and sentences are set aside and the matters are remitted to the learned Magistrate to be dealt with according to law.