Chin-v- Teague [2014] NTCA 05

PARTIES:	NICHOLAS CHIN
	-v-
	ALAN JAMES TEAGUE
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 11 OF 2013 (21300964)
DELIVERED:	21 AUGUST 2014
HEARING DATES:	17 APRIL 2014
JUDGMENT OF:	BLOKLAND J, BARR AND HILEY JJ
APPEAL FROM:	KELLY J

CATCHWORDS:

ADMINISTRATIVE LAW – Natural justice – Procedural fairness –Judicial review by Supreme Court – Court of Summary Jurisdiction at first instance – Driving motor vehicle whilst under influence of prohibited drugs – Driving motor vehicle without having proper control – Analysis of blood sample sent to interstate laboratory – Preliminary results of drug screen – Application for adjournment refused – Magistrate did not provide reasons for decision – Supreme Court granted order in the nature of certiorari – Decision to refuse adjournment quashed – Consequential order – Dismissal of criminal charges for failure to call evidence set aside – Representations made regarding adjournment of one week – Mistake of fact – Length of adjournment sought – Length of adjournment required to prosecute criminal charges – Leave granted to amend notice of appeal – Appeal allowed – Order in the nature of certiorari and consequential order set aside.

Traffic Act 1987 (NT).
Traffic Regulations 1999 (NT).

Blaveski v Judges of the District court of New South Wales (1992) 29 ALD 197; *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd and Anor* (1991) 22 NSWLR 389; *Cranssen v The King* (1936) 55 CLR 509; *House v The King* (1936) 55 CLR 499; *Jones v Dunkel* (1959) 101 CLR 298; *Teague v Chin* & *Teague v Chin and Anor* [2013] NTSC 72; *Un v Schroter and Ors* (2003) NTCA 2, applied.

REPRESENTATION:

Counsel:

Appellant:	M Thomas
Respondent:	D Morters

Solicitors:

Appellant:	Louise Bennett
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	BLO 1409
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Chin-v- Teague [2014] NTCA 05
No. 21300964

BETWEEN:

NICHOLAS CHIN
Appellant

AND:

ALAN JAMES TEAGUE
Respondent

CORAM: BLOKLAND J, BARR AND HILEY JJ:

REASONS FOR JUDGMENT

(Delivered 21 August 2014)

The Court

Introduction

[1] The appellant appeals from the judgment of a single judge granting (1) an order in the nature of certiorari to quash a magistrate's decision refusing the respondent's application to adjourn the hearing of criminal charges against the appellant in the Court of Summary Jurisdiction, and (2) a consequent order setting aside the magistrate's dismissal of those charges after the respondent called no evidence.

[2] On 30 January 2013 the appellant was charged on complaint with four offences alleged to have been committed on 7 January 2013, namely: driving a motor vehicle whilst having the prohibited drugs cannabis, methylamphetamine and methadone in his blood (count one); driving a motor vehicle whilst under the influence of drugs to such an extent as to not have proper control of the vehicle (count two); driving a motor vehicle in a manner dangerous to the public (count three), and driving a motor vehicle without due care (count four).

Proceedings in the Court of Summary Jurisdiction

[3] At a contest mention in the Court of Summary Jurisdiction on 7 May 2013, a police sergeant appeared for the respondent and Mr Thomas of counsel appeared for the appellant. On the basis that all charges were contested, a hearing date was set for 11 June 2013.

[4] On 6 June 2013, counsel for the respondent unsuccessfully applied to Mr Neil SM to vacate the hearing date set for 11 June and to adjourn the hearing (to a date to be fixed). The reason advanced for the adjournment was that the results of "blood work" had not been received.[1] Counsel for the respondent informed the court that the appellant's blood sample needed to be analysed by a forensic chemist in Western Australia, that a request had been made for the analysis to be expedited, that a "tentative timeframe" was one week, and that an expert would then be required to analyse the results. Counsel for the

[1] AB 6

respondent said, "That would be two weeks, your Honour".[2] It was unclear whether counsel meant that a total of two weeks would be required for the analysis and the expert interpretation, or whether one week was required for the analysis and a further two weeks for the expert interpretation.

[5] On 11 June 2013 the charges came on for hearing in the Court of Summary Jurisdiction, before Ms Morris SM. Counsel for the respondent made a further adjournment application. The transcript of the application is extracted below:[3]

> Ms Swindley: My learned friend and Mr Thomas and I were just having a chat outside. Your Honour, today the application I'll be making on this file will be to seek an adjournment ---
>
> Her Honour: And you've already made this application once or is it a different reason you're making the application.
>
> Ms Swindley: Your Honour there is a slightly different basis for it. And that is that we have, since the previous application, we have received some preliminary results from the drug screen which do indicate the presence of drugs in the blood of the defendant. And that is the slightly different circumstances under which we bring this application today.
>
> Her Honour: So if you've got those, what's the reason ---
>
> Ms Swindley: They are preliminary results, your Honour, at that stage we don't have the certificate and we would be seeking more time to obtain that.
>
> Her Honour: So what form are the preliminary results in?
>
> Ms Swindley: Your Honour, they appear in a, I guess a simple print from the, not really sure a form is the right way to describe it, your Honour. It's in a letter format from the company who have been engaged to do the

[2] AB 7.3
[3] AB 12.2 to 14.5.

screening for us. So it's certainly not in a certificate form that would be required for evidentiary purposes.

Her Honour: So what's the date of that test and the date of the letter?

Ms Swindley: The date of the letter, your Honour is Malnutrition (sic) 24.[4] And I understand that – I'm not sure when we received this, your Honour, I do apologise, I've just come back from several weeks leave. But that information was disclosed to my learned friend I believe on Friday. So I understand that it's only very recently acquired by us.

Her Honour: So why hasn't the certificate been made between the preliminary results and today if that was May 24?

Ms Swindley: Your Honour, the only advice I can give you about that is that this is the cost of the drug screening is very expensive, it's somewhere in the vicinity of $3,500. In order to obtain approval for that kind of testing there's, in order for police to approve that funding, there is a process that needs to be engaged and that process was engaged. And I understand the turnaround time for that process was approximately 12 days.

And I think, your Honour, if we're to add that to 24 May, that would bring us to – quite close to when we were advised, which was 5 June that those tests would be performed and we obviously sort to bring this matter on, on Friday, which was the day immediately after that. Those results were received by prosecutions in the meantime.

Her Honour: Sorry, I'm just looking at the calendar and I've lost you there a minute. So you got a letter dated 24 May saying preliminary tests results. Does that mean more testing needs to be done or just a certificate needs to be formed after the preliminary results?

Ms Swindley: I'm sorry, your Honour I'm not in a position to advise that. But I do believe that they are able to provide that certificate within a week.

Her Honour: But they haven't done the test. Have they done the test now?

Ms Swindley: Your Honour, I'm not sure what the nature of the test is.

[4] Although "Malnutrition" was transcribed, it appears from the context that the prosecutor probably said "May".

Her Honour: What evidence did you have to charge him with this offence in the first place?

Ms Swindley: Your Honour, the testing results that we have are from a testing centre in WA, which is where those results are sent to because the capacity for the Northern Territory forensic unit to test for these kinds of drugs – essentially they don't have that capacity, your Honour, so ----

Her Honour: Yes, but how did you lay the complaint? Your complaint was laid on 30 January that he drove a motor vehicle with cannabis, methyl amphetamine and methadone. How did they know to lay that complaint if they didn't have any preliminary results ---

Ms Swindley: I understand that the forensic centre in the Northern Territory does have capacity to do preliminary screening.

Her Honour: So you had a preliminary screen done some time before 30 January.

Ms Swindley: Your Honour, I don't have that information, but yes, I believe that was the basis for the charge.

Her Honour: So why wouldn't – so you then did another preliminary screening?

Ms Swindley: Your Honour, those tests are then sent to Western Australia for those tests to be taken out. And I believe their initial process is to do a similar preliminary screen. Your Honour, I understand their testing facilities are quite different from ours. Ours are certainly not at the stage where they could be used for evidentiary purposes and that's why they must be sent to the WA. Ordinarily we use South Australia but they've been sent to WA in this instance.

Her Honour: But like in the Smart Court we get tests back in the time within a short period of time from the local provider in relation to whether people have got ----

Ms Swindley: Your Honour I understand that there are numerous other prescription drugs that are being tested for, we don't have preliminary screens back on those. But they are being screened on the basis that those are the nature of the items that were found in the vehicle with the defendant at that time.

[6] It can be inferred from the statements then made by the respondent's counsel that the appellant had been charged with count one (and possibly also count two) on the basis of preliminary screening of the appellant's blood sample carried out by the Northern Territory Forensic Section, prior to 30 January 2013. Subsequently, a sample of the appellant's blood had been sent to a laboratory in Western Australia for testing. Another lot of preliminary screening results were provided, on a date which counsel did not identify, by a document dated 24 May 2013. Then, at some time around 24 May, a "process was engaged" for full testing of the sample, which, counsel suggested, was a process with a 12-day turnaround. As a result, it was expected that testing would be performed on 5 June 2013.

[7] The use of the word 'turnaround' suggested that testing would take place and results returned within the 'turnaround' period. That would mean that results would have been received by about 6 June if the "process was engaged" on 24 May. However, as at 11 June 2013, it appeared that testing had not been carried out and certainly the suggested 'turnaround' had not occurred.

[8] It is apparent from the transcript that the magistrate was somewhat confused (justifiably so, in our opinion) by the information provided, at the point when her Honour said:

> "So you got a letter dated 24 May saying [*stating*] preliminary test results. Does that mean more testing needs to be done or just a certificate needs to be formed [*completed*] after the preliminary results?"

> To which the reply was "... I'm not in a position to advise that. But I do believe that they are able to provide that certificate within a week."
>
> To which her Honour responded "but they haven't done the test. Have they done the test now?
>
> To which counsel replied "Your Honour, I'm not sure what the nature [*status*] of the test is".[5]

[9] The basis for the respondent's counsel's belief that "they are able to provide that certificate within a week" was unclear. Counsel was not able to say whether the interstate laboratory had done the required testing of the appellant's blood sample, as distinct from a repeat preliminary screening. If the interstate laboratory had done the required testing, and had obtained results, it was unclear whether the results had been referred to some other person for interpretation. Moreover, if the situation was either that the required testing had not been done or that testing had been done but the interpretation of the test results had not been done, counsel did not give any indication as to when the things required to be done would be done, nor as to how long an adjournment was sought.

[10] After hearing from the appellant's counsel, the magistrate refused the adjournment application and refused to grant leave for the prosecution to withdraw the charges. The magistrate did not provide reasons. The magistrate was not asked to provide reasons. Counsel for the respondent then read each of the four charges in turn to the appellant, who entered pleas

[5] The italicised words in square brackets represent our understanding of what was sought to be conveyed, that is, the intended meaning, irrespective of what may have been said or what was transcribed.

of not guilty. Counsel for the respondent then informed the magistrate that the respondent offered no evidence. No witnesses were called or evidence tendered in relation to any of the charges. The magistrate then dismissed all charges and discharged the appellant.

Proceedings in the Supreme Court

[11] Proceedings were commenced by the respondent in the Supreme Court challenging the decision of Ms Morris SM not to grant an adjournment of the hearing. The result in the Supreme Court was that Kelly J made an order in the nature of certiorari quashing the decision of the magistrate refusing the adjournment and remitting the matter to the Court of Summary Jurisdiction to be heard and determined according to law.[6]

[12] In her written judgement Kelly J noted that Morris SM had not accorded procedural fairness to the respondent in that she had not given reasons for her decision not to grant the adjournment.[7] However, before then quashing the magistrate's decision, bearing in mind that an order in the nature of certiorari is discretionary, Kelly J determined for herself whether the adjournment should have been granted.

[13] Kelly J determined that an adjournment should have been allowed for reasons stated at [38] of her decision.[8] Those reasons included that (1) the prosecutor had sought an adjournment of only one week, which was not

[6] *Teague v Chin* & *Teague v Chin and Anor* [2013] NTSC 72.
[7] *Teague v Chin* & *Teague v Chin and Anor* [2013] NTSC 72 at [19], [25]-[26].
[8] AB 151

excessive;[9] and that (2) the refusal of the adjournment, coupled with the refusal of leave to withdraw the charges so they could be laid again, made it inevitable that the charges would be dismissed without the complainant having the opportunity to present his case.[10]

[14] We are satisfied that Kelly J erred in her factual finding[11] that the prosecutor sought an adjournment of only one week. Her Honour may well have relied upon counsel's contention that the requested adjournment was for only one week.[12] In fact, the prosecutor did not specify the length of the adjournment sought, and appeared unable to answer the magistrate's questions in circumstances where the answers to the questions would have shed some light on the length of the adjournment required.[13]

[15] The respondent's counsel written submissions to Kelly J included the following:[14]

> The transcript of the proceedings before the second defendant records that the prosecutor made the second defendant aware that there was a preliminary report in existence that demonstrated the presence of dangerous drugs in the blood sample taken from the first defendant at the relevant time. The prosecutor advised the second defendant that on her instructions the results could be available in admissible form within about a week.

[16] This submission considerably over-stated the situation. As explained in [9] above, the basis for the prosecutor's belief as to the provision of a

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[9] *Teague v Chin* & *Teague v Chin and Anor* [2013] NTSC 72 [38] (b)
[10] *Teague v Chin* & *Teague v Chin and Anor* [2013] NTSC 72 [38] (e)
[11] *Teague v Chin* & *Teague v Chin and Anor* [2013] NTSC 72 [16], [38](b).
[12] *Teague v Chin & Teague v Chin and Anor* [2013] NTSC at [31].
[13] See the transcript extracted above at [5] and [8].
[14] 'Plaintiff's Submissions on Appeal and Application for Prerogative Relief', paragraph 18, AB 51. The reference to the second defendant was to Ms Morris SM.

certificate in a week was not explained to the magistrate. In light of subsequent events, there was no basis. Even at the time there probably was no basis for the belief, given that the prosecutor did not even know whether the testing itself had been carried out.

[17] The affidavit material[15] tendered by the respondent (plaintiff) before Kelly J provided background information as to discussions within the Office of the Director of Public Prosecutions including the process for referral of the appellant's blood sample to the interstate laboratory for testing and funding decisions in relation to that process. None of that precise information had been placed before the magistrate. Of possible significance was that approval for expenditure to carry out the testing interstate was not granted until 5 June and the preliminary screen results were made available only on 7 June 2013.

[18] In our opinion the further information provided to the Supreme Court indicated that the magistrate was not fully informed as to the stage interstate testing had reached and confirmed that there was even more uncertainty, ie, even more than magistrate Morris had been led to understand at the time she refused the adjournment application.

[19] The affidavit material tendered to Kelly J established that the test results were not received until on or about 29 July 2013.[16]

[15] Affidavit of ACS made 2 August 2013, AB 26-31.
[16] AB 30.

[20] The affidavit material established the preliminary screen test confirming the presence of methylamphetamine and amphetamine, in unknown quantities, was received by the prosecution by way of letter on 7 June 2013.[17] A "Supplementary Report" dated 21 June 2013 was received by the prosecution on or about 29 July 2013 which confirmed the presence of nine different prohibited or regulated drugs in varying quantities.[18] The "Supplementary Report" from Chem Centre is signed by Francois Oosthuizen, in his capacity as "Chemist and Research Officer, Forensic Science Laboratory". If Francois Oosthuizen was an authorised analyst within the meaning of the *Traffic Act*, it could be assumed that a Certificate in the prescribed form[19] would be prepared soon after receipt of the "Supplementary Report" of 29 July 2013. Hence, count one could have proceeded shortly after 29 July, but not count two, which required expert evidence as to the effect on a driver's capacity to control a vehicle given the level of drugs indicated in the "Supplementary Report" received by the prosecution on 29 July 2013.

[21] With the benefit of such hindsight as was available to Kelly J, it can be seen that an adjournment of at least 7 weeks from 11 June 2013 would have been required before the crucial evidence was available in admissible form.

[22] Mr Morters asked this Court to infer that the matter would have been pursued with greater vigour by the respondent if the hearing had been

[17] Affidavit, ACS, made 2 August 2013; para 16, annexure C.
[18] Affidavit, ACS, made 2 August 2013, para 16, annexure E.
[19] Form 6, Traffic Regulations.

adjourned by the magistrate to a specific date, and that the test results would have been obtained earlier. However, there are good reasons why we should not draw the inference. No attempt was made to establish those matters before Kelly J. There was no indication in the affidavit material tendered by the respondent that the interstate laboratory was aware that the matter had been adjourned and had put the analysis of the appellant's blood sample in some lower priority waitlist. There was no suggestion that the respondent had not diligently pursued the test results. There was no evidence as to any procedure for expedited testing and reporting. Moreover, the respondent re-laid two of the charges on 12 June 2013, and those charges proceeded to a mention on 5 July 2013. The re-laid charges were pending for an additional period of three weeks. That might suggest that the respondent had a continuing incentive (from 11 June to 5 July) to pursue the test results. The respondent bore the onus on this issue before Kelly J; it was up to the respondent to prove those matters on the balance of probabilities. It did not attempt to do so. It is equally open to us to conclude that obtaining the evidence on 29 July 2013 was the best the respondent could achieve.[20] As a result, there is no proper basis to infer that the test results would have been available earlier than 29 July 2013.

[23] In our opinion, in exercising her discretion as to the grant of an order in the nature of certiorari, Kelly J mistook a significant and relevant fact, namely the length of adjournment sought. In our view also, her Honour failed to

[20] See *Jones v Dunkel* (1959) 101 CLR 298; *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd and Anor* (1991) 22 NSWLR 389 at 418-419; *Un v Schroter and Ors* (2003) NTCA 2 at [8]-[13].

take into account the length of adjournment required to enable the prosecution to properly prosecute the charges, in particular counts one and two. In our opinion the Magistrate's exercise of her discretion to refuse the adjournment should not have been interfered with.

[24] We are mindful of the fact that, although intervention will be justified if a serious injustice has been occasioned by a refusal of an adjournment, it is nonetheless unusual for superior courts in judicial review proceedings to interfere with decisions of summary courts to grant or refuse adjournments. We respectfully adopt the explanation of the competing principles set out in the judgment of Kirby J in *Blaveski v Judges of the District Court of New South Wales*:[21]

> Appellate courts, both in appeals and in proceedings by way of judicial review, will rarely disturb the decisions of judicial officers or tribunals to grant or refuse adjournments. See for example *Sydney City Council v Ke-Su Investments Pty Ltd* (1965) 1 NSWLR 246 (CA), 252, 257 (CA); *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710 (CA); *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR (CA) at 77, 80. This rule applies with added force in respect of criminal proceedings. It is important to avoid undermining the orderly and efficient conduct of criminal process. See for example *R v Cox* [1960] VR 665 (FC) at 667; *R v McDermott* (1990) 49 A Crim R 105 (FFC) at 108; *Bates v McDonald* (1985) 2 NSWLR 89 (CA) at 97; 60 ALR 245 at 252 and *Murphy v R* (1989) 167 CLR 94, 99; 86 ALR 35 at 38. In criminal proceedings, judges are entitled to take into account considerations such as the accused's right to a hearing of charges brought by the State, without undue delay. Such judges are also entitled to take into account proper and efficient case management, case flow and the demands of other litigation. See for example *State Pollution Control Commission v Australian Iron & Steel Pty Ltd*, (1992) 75 LGRA 327.

[21] (1992) 29 ALD 197 at 200.

> Nevertheless, the foregoing principles do not go so far as to hold that adjournments are effectively unreviewable, that an injustice occasioned by their refusal is irrelevant and that challenges by way of appeal or to the prerogative writs are hollow gestures to be met always by the incanted *mantra* upholding the primary decision-maker, whatever he or she has done. Each application to this court invokes its jurisdiction which is then to be exercised judicially. If a serious injustice has been occasioned by a refusal of an adjournment, and particularly one which can and should be readily corrected, this court may provide relief and in the appropriate case should do so.

[25] We acknowledge the inherent public interest in the prosecution of offences against the *Traffic Act*. However, as acknowledged by Kelly J, all offences came before the court on complaint and could not be categorised as very serious offences[22], in the context of the wide range of offences available. In light of the matters before the magistrate supportive of the decision to refuse the adjournment, we do not consider a serious injustice has been occasioned in the sense discussed in *Blaveski*.

[26] In light of our decision it is not strictly necessary to consider her Honour's finding that the refusal of the adjournment, coupled with the refusal of leave to withdraw the charges so they could be laid again, made it inevitable that the charges would be dismissed without the Crown having the opportunity to present its case.

[27] The magistrate's decision not to permit an adjournment would have been without effect if the prosecution were permitted to withdraw the charges and

[22] *Teague v Chin & Teague v Chin and Anor* [2013] NTSC [38](f)).

relay them. It was logically consistent with her decision to refuse the adjournment that she would not permit the charges to be withdrawn. To preserve the integrity of the order refusing the adjournment, Morris SM was entitled to refuse the application to withdraw the charges. As mentioned earlier, another magistrate had already refused to vacate the hearing date. We note finally that Morris SM was informed that the appellant had been suspended from driving since the charge was laid, some five months earlier.

[28] In any event, there is nothing in the material that indicates counts three and four could not have proceeded to a hearing on the available evidence. There is no indication that proof of those charges was reliant on an evidential certificate or expert evidence relying on the blood analysis.

The Grounds of Appeal

[29] Numerous grounds of appeal were argued before us. Many of the arguments raised in support of the original grounds effectively sought that this Court review, in a general way, the exercise of the discretion of Kelly J. In the absence of error such an approach would be impermissible in respect of an appeal against a discretionary judgment.[23]

[30] We have concluded that the finding by the Supreme Court that "The prosecutor sought an adjournment of only one week which was not excessive"[24] constituted error of a kind that vitiated the decision to grant an

[23] *House v The King* (1936) 55 CLR 499 at 504-505; *Cranssen v The King* (1936) 55 CLR 509 at 519-520.
[24] Para [38](b), AB 151.

order in the nature of certiorari. Although oral argument before this Court canvassed associated subject matter, we were not satisfied the original grounds of appeal sufficiently dealt with this error. After the appeal hearing, we invited counsel to provide further written submissions on this point and on the question of whether leave should be granted to file a further relevant ground of appeal.[25]

[31] In our opinion leave should be granted to the appellant to add the following ground of appeal set out in the appellant's further written submissions:

> "Her Honour erred in relation to the question of whether there had been a denial of natural justice sufficient to found prerogative relief, by finding, erroneously, that the prosecutor on 11 June 2013 had sought an adjournment of only one week, a period of time which her Honour found not to be excessive".

[32] We are not persuaded by the respondent's arguments to the contrary that the time period of seven days was not a significant factor. Clearly it was.

[33] While we accept that Morris SM did not give reasons, we would allow the orders made by Morris SM to stand on the basis that she was justified in refusing to grant an adjournment and in refusing to grant leave to withdraw the charges.

Orders

[34] Leave is granted to the appellant to amend the notice of appeal by adding the ground of appeal referred to in para [31] above. We uphold the appeal

[25] Submissions received on behalf of the appellant on 5 June 2014 and on behalf of the respondent on 10 June 2014.

and set aside the order in the nature of certiorari made by the Supreme Court and consequential orders.

[35] We grant liberty to apply with respect to final orders and costs.

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