Mununggurritj v Rue [2007] NTSC 2

PARTIES:	MUNUNGGURRITJ, Clinton Datjapu v RUE, Charles Joseph
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	RILEY J

CATCHWORDS:

CRIMINAL LAW – Particular offences – Summary Offences Act – Meaning of s 61(2) and s 61(3) – "has" possession of stolen property at time of arrest – Whether there must be a coincidence between possession of property and a reasonable suspicion that property was stolen or unlawfully obtained – Appeal allowed and conviction set aside.

Edwards v Trenerry NTSC JA 99 & JA 117 of 1997, 5 January 1998, considered
Eupene v Hales [2000] NTCA 9, considered
Kasprzyck v Chief of Army (2001) 124 A Crim R 217, followed
R v English (1989) 17 NSWLR 149, applied
Cleary v Wilcocks (1946) 63 WN (NSW) 101, referred to
Ferrell v Burrows (1973) 4 SASR 416, referred to
Grant v The Queen (1981) 147 CLR 503, considered

REPRESENTATION:

Counsel:

Appellant:	C McAlister
Respondent:	C Baohm

Solicitors:

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

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

Mununggurritj v Rue [2007] NTSC 2
No JA 31 of 2006 (20519545)

IN THE MATTER OF the *Summary Offences Act*

AND IN THE MATTER OF an appeal against conviction in the Court of Summary Jurisdiction at Nhulunbuy

BETWEEN:

MUNUNGGURRITJ, Clinton Datjapu
Appellant

AND:

RUE, Charles Joseph
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 16 January 2007)

[1] On 4 May 2006 the appellant was found guilty in the Court of Summary Jurisdiction of an offence under s 61 of the Summary Offences Act (NT). A "no case" submission had been made to the learned magistrate and rejected by her. The appellant appeals against the subsequent conviction.

[2] The appeal calls into question the meaning of s 61(2) of the Summary Offences Act which, along with s 61(3), is in the following terms:

> "(2) A person who –
>
> (a) has in that person's custody any personal property;
>
> (b) has in the custody of another person any personal property;
>
> (c) has in or on any premises any personal property; or
>
> (d) gives any personal property to a person who is not lawfully entitled to it,
>
> being personal property which, at any time before the making of a charge for an offence against this section in respect of the personal property, is reasonably suspected of having been stolen or otherwise unlawfully obtained, is guilty of an offence.
>
> Penalty: $2,000 or imprisonment for 12 months.
>
> (3) It is a defence to a charge for an offence against subsection (2) if the defendant gives to the court a satisfactory account –
>
> (a) as to how the defendant obtained the personal property referred to in the charge; and
>
> (b) of the custody of the personal property by the defendant after it was obtained by him or her for each period during which the defendant had custody of the personal property."

[3] The prosecution case, as noted by her Honour at the time of making her ruling, was that between 16 and 18 July 2005 a cell key and a Hoffman tool went missing from the Nhulunbuy police watchhouse. The brother of the appellant, Craig Mununggurritj, had been in the cells on Saturday 16 July

2005 and was the last person to be released from custody. The Crown alleged that the appellant was seen on 17 July 2005 at the Nhulunbuy High School oval showing various people items alleged to have been the key and the Hoffman tool. Those items were sufficiently distinctive to convince her Honour that they were the same items that went missing from the police watchhouse. The charge against the appellant related only to the cell key and not to the Hoffman key.

[4] On 4 May 2006, after a much delayed hearing, her Honour found that the key was in the possession of the appellant "at or around a session of drinking at the Nhulunbuy High School oval". Her Honour held that, in the circumstances, the key was reasonably suspected of having been stolen or otherwise unlawfully obtained. The appellant did not avail himself of the opportunity available pursuant to s 61(3) to provide the court with a satisfactory account of how he obtained the personal property. Her Honour went on to conclude:

> "I do find beyond reasonable doubt that Clinton Mununggurritj was in possession of the Nhulunbuy cell key. It was for a brief period. We can only say he was in possession of the key when (he) was with the other young people and the long-grass mob and that's really the extent of it, we don't know any more than that, but there was a reasonable suspicion, given he has chosen not to give an explanation about it. I can't really assess it any further, but to say that it's found beyond reasonable doubt."

[5] The submission on behalf of the appellant to her Honour and then again to this Court was that for a person to be guilty of an offence against s 61(2) of the Act the person must have custody of the goods in question at the time

the person is apprehended for the offence. In so arguing the appellant relied principally upon the decision of the Court of Criminal Appeal in New South Wales in *R v English* (1989) 17 NSWLR 149. In that case Gleeson CJ traced the history of similar legislation in New South Wales and noted that the history provided an important clue as to what was meant by the current version of the section. At the time s 527C of the New South Wales Crimes Act provided:

> "(1) Any person who –
>
> (a) has anything in his custody;
>
> (b) has anything in the custody of another person;
>
> (c) has anything in or on premises, whether belonging to or occupied by himself or not, or whether that thing is there for his own use or the use of another; or
>
> (d) gives custody of anything to a person who is not lawfully entitled to possession of the thing,
>
> which thing may be reasonably suspected of being stolen or otherwise unlawfully obtained shall be liable on conviction before a Stipendiary Magistrate to imprisonment for six months, or to a fine of $500."

[6] Gleeson CJ observed (156):

> "The puzzle is this. If s 527C(1)(a) covers the case of a person who once had the relevant goods in his custody, but later ceased to have custody of them, what is the need for a provision such as s 527C(1)(d)? To pick up the words of the Minister's speech in 1970, 'an intermediary possessor' would already have been caught by s 527C(1)(a). The presence in the present legislation of par (d) reflects, in my view, an assumption about the meaning of par (a)

which is that, at least in relation to the element of custody, the offence retains its historical connotation of being caught red-handed."

[7] The Court went on to rule that s 527C(1)(a) of the Crimes Act (NSW) required that at the time that a person is apprehended for an offence under that section the person must have custody of the goods in question. The same logic applies to the inclusion of s 61(2)(d) of the Summary Offences Act.

[8] A similar approach was adopted by the Defence Force Discipline Appeal Tribunal in *Kasprzyck v Chief of Army* (2001) 124 A Crim R 217. The Tribunal dealt with an alleged offence under s 46 of the Defence Force Discipline Act 1982 (Cth). Section 46 was in the following terms:

> "(1) A person, being a defence member or a defence civilian, who is in possession of property that may be reasonably suspected of having been unlawfully obtained is guilty of an offence for which the maximum punishment is imprisonment for six months.
>
> (2) It is a defence if a person charged with an offence under this section:
>
> (a) was not aware that he or she was in possession of the property to which the charge relates;
>
> (b) was not aware of the circumstances by reason of which that property may be reasonably suspected of having been unlawfully obtained; or
>
> (c) had a reasonable excuse for his or her possession of the property."

[9] It was contended before the Tribunal that the section does not apply where the defendant has parted with possession of the property prior to any reasonable suspicion being formed. The Tribunal made reference to the line of New South Wales authorities which included *English* (supra). Heerey J expressed the view that s 46 did not extend to possession of property which once was, but is not at the time it is in the defendant's possession, reasonably suspected of being unlawfully obtained. His Honour reached that conclusion by reference to the words of the section and also by reference to the history as recounted in *English* (supra). He concluded that the alternative construction would be "harsh". His Honour said:

> "Another consideration is that s 46 is somewhat Draconian. Unlike receiving (s47(2)), where the prosecution has to prove beyond reasonable doubt that the defendant knew the property was stolen, it is sufficient for the prosecution to prove objective circumstances giving rise to reasonable suspicion (not proof) of unlawful obtaining of the property, without establishing any state of mind (let alone a dishonest one) on the part of the defendant. The onus is then on the defendant, albeit on the balance of probabilities (s 12(2)), to make out if he or she can the defences under ss (2) or (3). It would be a harsh construction of s 46 to make it apply in circumstances where the defendant had departed with possession, perhaps years ago, and the prosecution says that there is now suspicion that the property was unlawfully obtained and it is up to the defendant to make out the defences if he can."

[10] Heerey J went on to say (220):

> "In my opinion, s 46 does not extend to possession of property which once was, but is not at the time it is in the defendant's possession, reasonably suspected of being unlawfully obtained. Conversely, neither does it extend to property previously possessed by the defendant which is only reasonably suspected of being unlawfully obtained at and from some time after the defendant's possession ceased."

[11] In the same case Mildren J stated that he did not regard the New South Wales authorities as being of assistance because the legislative provisions with which those authorities dealt were quite different from s 46(1) of the Defence Force Disciplinary Act. He preferred to construe the section by reference to the ordinary rules of statutory interpretation. In so doing he adopted the reasoning of Heerey J and concluded that "there is no offence against that provision where the defendant has parted with possession of the property before any investigation or charge".

[12] The provision found in the Summary Offences Act is different from that found in the New South Wales legislation and in the Defence Force Discipline Act. Of particular significance is the inclusion in s 61(2) of the qualification that the personal property had "at any time before the making of a charge for an offence against this section in respect of the personal property" been reasonably suspected of having been stolen or otherwise unlawfully obtained. The qualification clearly relates only to the time at which the property must be reasonably suspected of having been stolen or otherwise unlawfully obtained. It does not relate to the issue of whether or not the person has to have the property in his or her custody at the time of apprehension or arrest. As a consequence of the inclusion of the words in the section there is no requirement of a coincidence between possession of property by the defendant and the reasonable suspicion of that property being stolen or unlawfully obtained. Whilst the property must have been in

the possession of the defendant at the time of apprehension or arrest, the suspicion can have been held "at any time before" the making of the charge.

[13] A plain reading of the subsection indicates that the property must be in that person's custody at the time of arrest or apprehension. The expression "has in that person's custody" is to be contrasted with the alternatives of "had" or "has or had". It implies "a present or actual dominion over the goods, and not something which is at that time a past or antecedent state of affairs": *Cleary v Wilcocks* (1946) 63 WN (NSW) 101 at 102. The observations regarding the "draconian" nature of the legislation made by Heerey J in *Kasprzyck v Chief of Army* (supra at 221) would also apply.

[14] In the present case, as in the case of the legislation dealt with in *Kasprzyck v Chief of Army*, the introductory words of the section suggest that there must be proof of possession at the time of the charge being laid.

[15] The learned magistrate adopted a different view of the section. She said:

> "Ms Coroneo submitted that a natural reading of the section supports an interpretation that the goods must be in the custody of the defendant at the time of apprehension or charge. Naturally, I agree that if there is any ambiguity it should be resolved in favour of the defendant. The phrase 'at any time before the making of a charge' must, however have some work to do, beyond that the suspicion (which attaches to the goods, not the person), is what is being referred to by the words 'at any time before the making of a charge …'. What would be the point of the legislation providing for suspicion about the goods at any time and at the same time suggesting that anyone possessing those goods cannot be found guilty of the charge unless police catch them 'red-handed'. In short, the inclusion of that phrase in the Northern Territory legislation distinguishes it from the approach taken in other legislation in other jurisdictions."

[16] As I have indicated, a natural reading of the provision requires that the charged person have in that person's custody at the time of charge the personal property which is suspected of having been stolen or otherwise unlawfully obtained. The personal property must have the character of being reasonably suspected of having been stolen or otherwise unlawfully obtained "at any time before the making of a charge for an offence against this section". Whilst the property must be in the custody of the accused at the time of charging, the suspicion that it was stolen or unlawfully obtained can be at any time "before" that point in time.

[17] This interpretation is not inconsistent with that adopted by the Court of Criminal Appeal in *Eupene v Hales* [2000] NTCA 9. The issue in that case was the state of mind of the accused at the time he first obtained the personal property (some pearls), the subject of the charge. The appellant had given an innocent explanation for his possession of the pearls when they first came in to his possession. They were still in his possession when he was arrested. It was held that the appellant's state of mind at the time the appellant first obtained the pearls was the critical issue. Subsequent to that case s 61(3) of the Act was amended to require the defendant to not only provide a satisfactory account as to how he first obtained possession of the personal property but also as to his custody of the property after that time if he was to avail himself of the available defence. In the second reading speech accompanying the amendment reference was made to the South Australian case of *Ferrell v Burrows* (1973) 4 SASR 416 where an accused

hired a caravan for a period but kept it longer than the period of the hire and subsequently tried to sell it. The purpose of the amendment was to make it clear that if there is a suspicion that the property became stolen or unlawfully obtained after it first comes into possession of an accused person, the accused person must give a satisfactory account in relation thereto.

[18] The issue in those cases was not whether the accused had to have possession of the property at the time of arrest but, rather, the timing at which the suspicion must be held that it was stolen or unlawfully obtained. That suspicion of course attaches to the property and not the person having custody of it. It is the thing in the offender's custody which must bear "the taint of illegality": *Grant v The Queen* (1981) 147 CLR 503 at 507. The suspicion does not have to be entertained whilst the defendant has the property in his custody and it can arise at any time prior to the charge being made: *Edwards v Trenerry* (NTSC JA 99 and JA 117 of 1997, 5 January 1998).

[19] The issue in the present case is quite different from that in *Edwards v Trenerry*. It is whether the defendant must be in possession of the property at the time of arrest or apprehension. In my view that is the case.

[20] The interpretation I have adopted conforms with the plain meaning of the words of the section. It avoids the effect that the provisions of s 61(2)(d) of the Act are otiose. It also reflects the history of such provisions as

recounted by Gleeson CJ in *English*. In particular it is consistent with the historical requirement that the offender be caught "red-handed". If it had been the intention of the legislature to depart from that requirement it would have been easy to do so in clear terms. However the plain language adopted by the legislature is to the contrary.

[21] The appeal must be allowed. The conviction is set aside.

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