CITATION:	*BD v The Queen (No 2)* [2017] NTCCA 8
PARTIES:	BD v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA 4 of 2016 (21405513)
DELIVERED:	4 August 2017
HEARING DATES:	27 July 2017
JUDGMENT OF:	Grant CJ, Kelly and Barr JJ
APPEALED FROM:	Blokland J

CATCHWORDS:

CRIMINAL LAW – APPEAL AND NEW TRIAL

Convictions quashed – whether interests of justice require new trial – whether admissible evidence sufficiently cogent to warrant new trial – whether order for new trial the most adequate remedy – determination informed in large degree by constitutional and structural considerations – where there is evidence capable of supporting the charge appellate court should ordinarily order a new trial – matter for the prosecuting authority then to determine whether the prosecution should proceed – order for acquittal would in these circumstances usurp the functions of both jury and prosecuting authority – new trial ordered.

Criminal Code (NT) s 411, s 413

Dyers v The Queen (2002) 210 CLR 285, *King v The Queen* (1986) 161 CLR 423, *R v Stafford* [2009] QCA 407, *R v Thomas (No 3)* (2006) 14 VR 512, *Spies v The Queen* (2000) 201 CLR 603, *The Queen v Taufahema* (2007) 228 CLR 232, applied.

MacKenzie v The Queen (1996) 190 CLR 348, *Mallard v The Queen* (2005) 224 CLR 125, *Parker v The Queen* (1997) 186 CLR 494, referred to.

REPRESENTATION:

Counsel:

Appellant:	A Wyvill SC
Respondent	P Usher

Solicitors:

Appellant:	Halfpennys Lawyers
Respondent	Director of Public Prosecutions

Judgment category classification: B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

BD v The Queen (No 2) [2017] NTCCA 8
No. CA 4 of 2016 (21405513)

BETWEEN:

BD
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, KELLY and BARR JJ

REASONS FOR JUDGMENT

(Delivered 4 August 2017)

THE COURT:

[1] On 13 April 2017 this court allowed an appeal against conviction on two grounds and quashed the findings of guilt in respect of counts 1 and 2 on the indictment dated 12 May 2015. The court indicated that having allowed the appeal and quashed the findings of guilt it would hear the parties as to the appropriate disposition. The essential question is whether a new trial is the most adequate remedy.

[2] That question arises by operation of the court's dispositive powers on appeal conferred by Part X of the *Criminal Code* (NT). Section 411 of the *Criminal Code* provides relevantly:

411 Determination of appeal in ordinary cases

(1) The Court on any such appeal against a finding of guilt shall allow the appeal if it is of the opinion … that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal.

(2) ….

(3) Subject to the special provisions of this Division the Court shall, if it allows an appeal against a finding of guilt, quash the finding of guilt and direct a judgment and verdict of acquittal to be entered.

[3] The only special provision of the Division with any bearing on this matter may be found in s 413 of the *Criminal Code*, which provides relevantly:

413 Power to grant new trial

On an appeal against a finding of guilt on indictment the Court may, either of its own motion or on the application of the appellant, order a new trial in such manner as it thinks fit if the Court considers that a miscarriage of justice has occurred and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order that the Court is empowered to make.

[4] Provisions with the same or similar wording are in force in a number of other Australian jurisdictions.[1] Under provisions of this nature the onus rests on the Crown to satisfy the court that a new trial is the most appropriate remedy.[2] The considerations relevant to the determination include such matters as whether a significant part of the sentence has been served, the expense and length of a new trial, the length of time between the alleged offence and the new trial, and the impact of a new

1 See, for example, *Criminal Appeal Act 1912* (NSW), ss 6, 8; *Criminal Code 1899* (Qld), ss 669; *Criminal Code 1924* (Tas), ss 402, 404; *Criminal Appeals Act 2004* (WA), s 30.

2 *King v The Queen* (1986) 161 CLR 423 at 426.

trial on the accused, witnesses and others affected by the prosecution and the events giving rise to it.[3]

[5] Following the delivery of reasons allowing the appeal and quashing the findings of guilt, the parties made written submissions on the question of whether a new trial should be ordered. In addition to those submissions, the respondent was asked by the court to indicate whether the Director of Public Prosecutions would be precluded from filing a *nolle prosequi* and obliged to prosecute a new trial in the event an order was made under s 413 of the *Criminal Code*. Counsel for the respondent has advised that it would remain open to the Director to file a *nolle prosequi* notwithstanding an order in those terms. As will later become apparent, that is the correct position in law. The respondent advised further that the intention, presently at least, is to proceed to trial in the event an order is made under s 413 of the *Criminal Code*.

[6] Since the delivery of reasons allowing the appeal the appellant has also adduced evidence going to his material circumstances by affidavit made on 10 May 2017. In the reasons quashing the convictions, this court observed that it was "comfortably able to infer that the appellant has suffered a range of adverse consequences in the course of these proceedings, many of which will be irremediable regardless of the

3 See, for example, *The Queen v Taufahema* (2007) 228 CLR 232 at [55].

outcome of any retrial".[4] The appellant's affidavit material deals expressly with those consequences.

[7] The affidavit material discloses that the appellant has expended in excess of $130,000 in legal expenses in the defence of this and related criminal charges of which he was acquitted. As a result of the charges he has been suspended from employment without pay for more than three years now, and is unable to work as a teacher. He estimates his financial loss as a result of that suspension to be in the order of $350,000. His asset position is modest. The appellant deposes that the proceedings have had a severe impact on his health, including diagnoses of severe depression and anxiety. His time in gaol before the grant of appeal bail was particularly onerous. He has been on that bail for approximately 18 months now. Finally, the appellant apprehends that a new trial is likely to draw attention and a degree of ill-informed abuse and persecution, as was the case in the period leading up to the first trial.

[8] The evidence which would likely be led at any retrial of this matter would be capable of sustaining a guilty verdict, although it could not be said that the Crown case in any retrial would be a strong one. It might even be considered weak. While the offence of indecently dealing with a child under the age of 16 years is no doubt extremely

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4 *BD v The Queen* [2017] NTCCA 2 at [129].

serious, and while the allegations in this case involve an abuse of trust by the appellant in his role as a teacher, the nature of the transgression alleged is in relative terms at the low end of the scale of seriousness for this type of offending. The event in question took place approximately 5 years ago now, and the time which has elapsed since then is significant. As adverted to above, the appellant has already served two weeks in gaol of what was to be a term of two months imposed in respect of the offending.

[9] It was to those consequences and considerations which this court was referring when it observed that "it is not readily apparent that an order for a new trial would be the most adequate remedy in the circumstances or that the interests of justice militate in favour of an order in those terms".[5]

[10] Although the court acknowledges the effect an order for a new trial would have on the appellant's circumstances, and the adverse consequences that would potentially ensue, this is not a matter which turns exclusively on the balance of conveniences or prejudice. Rather, the court is required to determine the most adequate remedy. That determination is informed in large degree by constitutional and

5 *BD v The Queen* [2017] NTCCA 2 at [133].

structural considerations. As the plurality observed concerning the operation of a similar provision in *The Queen v Taufahema*:[6]

> One of the key 'circumstances' referred to in s 8(1), and one of the key factors in assessing whether a new trial is an adequate remedy, is 'the public interest in the due prosecution and conviction of offenders' [*R v Anderson* (1991) 53 A Crim R 421 at 453 per Gleeson CJ]. It is in 'the interest of the public ... that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury' [*Reid v The Queen* [1980] AC 343 at 349 per Lords Diplock, Hailsham of St Marylebone, Salmon, Edmund-Davies and Keith of Kinkel].

[11] Later in the same judgment, the plurality said:[7]

> An order for acquittal conflicts with 'the desirability, if possible, of having the guilt or innocence of the [accused] finally determined by a jury which, according to the constitutional arrangements applicable in [New South Wales], is the appropriate body to make such a decision' [*R v Anderson* (1991) 53 A Crim R 421 at 453 per Gleeson CJ].

[12] Similarly, in *Dyers v The Queen*,[8] Gaudron and Hayne JJ emphasised the undesirability of an order that would preclude a new trial where the evidence might conceivably sustain a conviction. Their Honours observed:[9]

> To make an order that would preclude a new trial would constitute a judicial determination of the proceedings against the appellant otherwise than on trial by jury and in circumstances where it is not held that the evidence adduced at trial required the jury to acquit the appellant. That

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6 (2007) 228 CLR 232 at [49].

7 *The Queen v Taufahema* (2007) 228 CLR 232 at [51].

8 (2002) 210 CLR 285.

9 *Dyers v The Queen* (2002) 210 CLR 285 per Gaudron and Hayne JJ at [23].

being so, there should be an order for a new trial despite it being probable that the prosecution will not proceed further.

[13] Those observations were adopted and applied by Keane JA (Fraser JA concurring) in *R v Stafford*, who concluded: [10]

> On the whole of the evidence before this Court, a jury could reasonably have been satisfied beyond reasonable doubt of [the accused's] guilt, but the question of his guilt was very much a jury question. That being so, in light of the opinion of the majority of the High Court in *Dyers v The Queen* and *The Queen v Taufahema*, I would order a new trial. It may be that the authorities will decide that the prosecution should not proceed further, but that is a matter for the prosecuting authorities. It may be that the effluxion of time has involved a loss of evidence which would make a fair trial now problematic. Whether that is so is first a question for the prosecuting authorities, and if it is to become a question for the courts, that will be a question for another day.

[14] The establishment of an independent Director of Public Prosecutions in this jurisdiction in 1991 also bears on the determination. As the Victorian Court of Appeal has observed: [11]

> An appellate court must be careful not to usurp the functions of the properly constituted prosecutorial authorities which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions …

[15] It was with reference to that arrangement that the plurality determined in *Spies v The Queen*: [12]

> Unless the interests of justice require the entry of an acquittal, an appellate court should ordinarily order a new trial of a charge where a conviction in respect of that charge has been set aside but there is evidence to support the charge. In the present case, given the competing considerations, it cannot

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10 [2009] QCA 407 at [170].

11 *R v Thomas (No 3)* (2006) 14 VR 512 at [27].

12 (2000) 201 CLR 603 at [27].

> be said that the interests of justice require that the appellant be acquitted of the s 229(4) charge. That being so, it is a matter for the prosecuting authority to determine whether in all the circumstances there should be a further trial of the s 229(4) charge.

[16] Similarly, Kirby J observed in *Dyers v The Queen*:[13]

> Where an appellate court has not accepted an argument that a verdict is unreasonable, but has found a material error of law, the proper order is normally to provide for a retrial. Where the prosecutor's discretion is exercised in favour of a retrial, such an order permits a verdict to be taken from a jury accepted as representing the community. This is why, normally, it is left to the Director of Public Prosecutions to evaluate the competing considerations for and against a retrial.

[17] An order for acquittal would in these circumstances usurp the functions of both jury and prosecuting authority. In the presence of evidence capable of sustaining a conviction, cases in which an order in those terms is properly made will be rare. Something more than adverse consequences for the accused will be required. By way of non-exhaustive example, a new trial might not be considered the most adequate remedy in circumstances where the effluxion of time precludes the conduct of a fair trial, where the penalty imposed will be of no practical effect having regard to time already served or time being served on the other matters, or where the Crown discloses an intention to run a different or supplementary case.[14]

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13 (2002) 210 CLR 285 at [88].

14 *King v The Queen* (1986) 161 CLR 423 at 433; *Parker v The Queen* (1997) 186 CLR 494 per Dawson, Toohey and McHugh JJ at 520; cf *The Queen v Taufahema* (2007) 228 CLR 232 at [38], [68], [181].

[18] For these reasons, the most adequate remedy in this case is an order for a new trial.[15] Even where an order is made in those terms, the authorities make it plain that it would be quite open to the Director of Public Prosecutions to determine not to proceed with a retrial having regard to the strength of the Crown case, the fact that the appellant has already served time in gaol,[16] and some of the other issues identified earlier in these reasons.

Disposition

[19] The findings of guilt in respect of counts 1 and 2 of the indictment dated 12 May 2015 are quashed, and a new trial is ordered.

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15 For the reasons given, in the circumstances of this case it is unnecessary to decide whether it would be open to this court to quash a conviction without ordering either a new trial or an acquittal: see *R v Henman* [2001] NSWCCA 4; *R v Newhouse* [2001] NSWCCA 294; *R v Giovannone* (2002) 140 A Crim R 1; *R v Campbell* [2004] NSWCCA 314; *R v Knorr* [2005] NSWCCA 70; *Skondin v R* [2005] NSWCCA 417; *R v Macleod* (2001) 52 NSWLR 389; *R v Narayanan* [2002] NSWCCA 200; *R v Lew* [2004] NSWCCA 320. It is also uncertain whether, in that event, it would be open to the Director of Public Prosecutions to proceed with a new trial or, in the alternative, to proceed by way of *ex officio* indictment. Those questions remain open.

16 See, for example, *Mallard v The Queen* (2005) 224 CLR 125 per Gummow, Hayne, Callinan and Heydon JJ at [43], Kirby J at [93]; *MacKenzie v The Queen* (1996) 190 CLR 348 per Gaudron, Gummow and Kirby JJ at 376.