

Pache v Commissioner of Police [2009] NTSC 34

PARTIES: PACHE, TAMMY SUZZANE

v

COMMISSIONER OF POLICE

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: EXERCISING APPELLATE
JURISDICTION

FILE NO: LA7/2009

DELIVERED: 13 July 2009

HEARING DATES: 3 July 2009

JUDGMENT OF: OLSSON AJ

APPEAL FROM: LOCAL COURT AT DARWIN

CATCHWORDS:

Appeal against refusal to revoke drug premises order -- Original order made ex parte and in camera -- Order subsequently served on appellant -- Onus on appellant as tenant of premises to prove circumstances justifying revocation -- Appellant unrepresented before Local Court -- Magistrate not satisfied on merits that revocation justified -- Purported appeal on merits -- No question of law raised -- Right to appeal limited to questions of law -- appeal incompetent.

REPRESENTATION:

Counsel:

Appellant: In person
Respondent: C Frey

Solicitors:

Appellant:	In person
Respondent:	Office of the Director of Public Prosecutions

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

Pache v Commissioner of Police [2009] NTSC 34
No. LA7 of 2009

IN THE MATTER OF the *Local Court Act*

AND IN THE MATTER OF an appeal
against an Order of the Local Court at
Darwin

BETWEEN:

PACHE, TAMMY SUZZANE
Appellant

AND:

COMMISSIONER OF POLICE
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 13 July 2009)

Introduction

- [1] This is an appeal under s 19 of the Local Court Act against the decision of a stipendiary magistrate dated 3 June 2009, whereby the learned magistrate dismissed an application by the appellant under s 11P of the Misuse of Drugs Act (“the Act”) to revoke an earlier order of the Local Court made on 27 May 2009 pursuant to s 11K(1) of that statute declaring residential premises situated at 3 Applegum Drive, Karama (“the subject premises”) to

be drug premises. Relevantly, such an appeal under s19 of the Local Court Act only lies in relation to what is a final order. It is, by the statute, restricted to a question of law.

Relevant history

- [2] The proceedings commenced in the Local Court were initially misconceived.
- [3] Section 11D of the Act entitles the Commissioner of Police to apply to the Local Court for what is termed a “drug premises order” in relation to residential premises, in a variety of stipulated circumstances. That section falls to be considered in conjunction with ss 11K and 11L of the same statute, as appropriate.
- [4] Pursuant to the provisions of s 11H of the Act, an application for a drug premises order may be made and is to be considered by the Local Court on an *ex parte* basis.
- [5] On 18 May 2009 Detective Senior Constable Glenn Leafe (to whom I will simply refer as “DSC Leafe”) purported to file an *ex parte* application, expressed to be made pursuant to s 11D of the Act, in the Local Court at Darwin. The applicant was said, in it, to be “Northern Territory Police”.
- [6] The application sought a drug premises order in respect of the subject premises. It was prosecuted on the ground that the Commissioner of Police was said to have had a reasonable belief that, within the 12 month period

immediately before the application, there had been indications that a dangerous drug had been supplied at or from the premises.

- [7] The application was supported by an affidavit sworn by DSC Leafe, who deposed that he was a police officer assigned to the Drug Enforcement Section of the Northern Territory Police.
- [8] That affidavit, *inter alia*, deposed to a series of events on 10 June 2008, when detectives were said to have observed a blue Holden Commodore, bearing Queensland registration plates, leaving the subject premises. That vehicle was said to have been pursued by police.
- [9] The affidavit indicated that, although the occupants of the vehicle fled and escaped apprehension, a search of it indicated that it had been stolen. The search also revealed the presence, in the vehicle, of three clip seal bags containing 1.7 g of methamphetamine and one capsule containing an unknown substance.
- [10] Shortly afterwards, a search warrant was executed at the subject premises. Nine persons were found to be present, of whom only four were determined to be full-time residents. Police located small quantities of amphetamine and cannabis within the premises, as well as \$650 in cash, several clip seal bags of a white powder believed to be a cutting agent, scales and some items of stolen property.

[11] DSC Leafe deposed that indicators of supply, as specified in s 11C of the Act, were:

- (1) the presence, on the premises, of things used in the supply, manufacture or use of a dangerous drug i.e. the scales and the cutting agent;
- (2) the presence at the premises of a person who appeared to be under the influence of a dangerous drug;
- (3) an abnormally high volume of vehicular traffic to or from the premises, as noted by surveillance police officers;
- (4) the presence, on or in the vicinity of the premises, of two persons (including the appellant) known to police to be persons involved in the sale or distribution of a dangerous drug, one of those persons being a visitor to the premises;
- (5) the presence, on the premises, of property reasonably suspected of being stolen or of being exchanged in return for a dangerous drug; and
- (6) the finding of a dangerous drug on the premises on one or more occasions.

[12] The affidavit asserted that the situation that emerged on 10 June 2008 was the second occasion on which drugs had been located on the subject premises. Police had previously located drugs there on 6 July 2007.

[13] It was deposed that police again attended at the subject premises on 22 June 2008. It was said that, on that occasion:

- (1) a small quantity of methamphetamine and certain stolen goods had been found;
- (2) numerous needles, both used and clean, were located in the premises;
- (3) a male was present, heavily sleeping and under the influence of drugs and four persons, who were apprehended elsewhere, had admitted to being under the influence of drugs and to having just come from the subject premises;
- (4) excessive vehicular traffic had been noted at the subject premises;
- (5) a person known to be involved in the sale or distribution of a dangerous drug (namely the appellant) was a primary occupant of the premises;
and
- (6) items of property reasonably suspected of being stolen or exchanged in return for a dangerous drug were found on the premises.

[14] The affidavit further sought to make the point, for the purposes of s 11C(1k) of the Act, that this was therefore the third occasion on which a dangerous drug had been located at the residence, dangerous drugs having previously been located there on 6 July 2007 and 10 June 2008 respectively.

[15] DSC Leafe next deposed that, on 1 August 2008, police executed a further drug search warrant at the subject premises. He stated that eight persons were then found to be present, two of whom were persons known to be involved in the sale or distribution of dangerous drugs. One of those two persons was the appellant.

[16] He also deposed that, on that date, police located four clip seal bags of cannabis weighing 6.4 g in the possession of one occupant, one clip seal bag of cannabis weighing 1.3 g in the possession of another, numerous unused clip seal bags, a syringe containing 1.3 mL of amphetamine, scales, eight tablets of an unknown substance in a clip seal bags and a number of items of stolen property.

[17] This was, accordingly, said to be a fourth occasion on which dangerous drugs had been found on the subject premises.

[18] It was further deposed that yet another drug search warrant was executed by police at the subject premises on 16 April 2009.

[19] It was said that, as police approached the premises for that purpose, two female persons were observed attending them. A covert surveillance was thereupon conducted.

[20] It was deposed that, when the same two persons were seen leaving the premises a short time later, they were apprehended. A clip seal bag of cannabis was located on their person.

- [21] The affidavit indicates that, when the warrant was then executed, seven persons were found at the subject premises, two of whom were known to be involved in the sale or distribution of dangerous drugs. One of those two persons was the appellant.
- [22] During the search police officers located three clip seal bags of cannabis weighing 2.8 g in total and 1 g of amphetamine.
- [23] The affidavit indicated that, whilst the police were at or in the subject premises, a vehicle attended them, the occupants of it not providing any reason for that attendance. It was also observed that a further vehicle was about to pull up at the premises, but it quickly sped from the area -- pursued by police.
- [24] The occupants of this vehicle were later apprehended in Malak, but denied having been in the vicinity of the subject premises, despite the police observations of the vehicle.
- [25] This was asserted to be a fifth occasion on which drugs had been found at the subject premises.
- [26] The application came before a stipendiary magistrate on 20 May 2009. He pointed out to DCS Leafe, who appeared for the Commissioner, that it did not comply with the provisions of the Act, in that the statute only authorised the bringing of such application by and in the name of the "Commissioner of

Police” and that it was only the Commissioner's belief that was a relevant consideration.

[27] The hearing of the application was then adjourned to 27 May 2009.

[28] On that date the learned magistrate granted DSC Leafe leave to amend the name of the applicant to read “Commissioner of Police”, having noted that the affidavit of DSC Leafe had been “changed to reflect new applicant” and that:

- (1) an instrument of delegation by the Commissioner of his powers under ss 11D, 11P and 11W of the Misuse of Drugs Act to the Superintendent of the Drug and Organised Crime Division; and
- (2) an instrument by that officer that he believed, on the basis of the affidavit sworn by DSC Leafe, that there were reasonable grounds to believe that a dangerous drug had been supplied from the subject premises in the last 12 months,

had been filed.

[29] The reference to the changed affidavit appears to be a fresh version of the same affidavit as had originally been sworn which bore a heading indicating the Commissioner of Police as the applicant, re-sworn by DSC Leafe on 20 May 2009.

[30] Having done so the learned stipendiary magistrate then made a formal order in these terms:

“Pursuant to Section 11K(1) of the Misuse of Drugs Act I make a drug premises order declaring the premises at 3 Applegum Drive Karama to be drug premises.”

- [31] It appears to be common ground that the drug premises order and a prescribed notice in relation to it were duly served on the appellant on 27 May 2009, as a tenant of the subject premises, in compliance with s 11N of the Act.
- [32] I note that s 11Q of the Act mandates that, within that a stipulated time of the making of a drug premises order, a notice in a prescribed form must be affixed by a police officer as close to each entrance to the subject premises as is practicable. I take it from the appellant’s submissions to me that such notices have been so affixed, although it is not established when this may have been done.
- [33] The consequences of the foregoing situation are as set out in s 11R of the Act. Not only may any member of the police force search the subject premises and persons present at them without warrant in the circumstances postulated by the section, but other consequences may also follow, including the right of a landlord to evict tenants and residents from such premises.
- [34] I pause at this juncture to observe that certain of the content of the affidavits sworn by DSC Leafe appears to have been irrelevant to the application to which they purport to relate and was also prejudicial to the appellant.

[35] As I have recited, that application was specifically based on the provisions of s 11D(1) of the Act, which presupposes proof of the existence of a reasonable belief that, *within that the 12 months period prior to the application* (i.e. the 12 month period prior to 18 May 2009), there had been indications that a dangerous drug had been supplied at or from the subject premises.

[36] It follows that, *prima facie*, the alleged presence of drugs on the subject premises prior to 19 May 2008 was irrelevant as an indicator.

[37] Section 11K of the Act stipulates that, on receipt of an application under s 11D(1) in relation to residential premises, the Court has a discretion to make an order declaring the premises to be drug premises if it is satisfied that the “evidence of indications of supply” placed before it is sufficient to establish on the balance of probabilities that a dangerous drug has been supplied at or from the relevant premises. It is unnecessary to prove that some person has actually been convicted of possession or supply of drugs found on the premises (s 11J(7)).

[38] Section 11C(1) stipulates that indications that a dangerous drug has been supplied at or from residential premises include one or more of some 12 specific circumstances. Those circumstances are not exhaustive and exclusive.

[39] Of particular relevance for present purposes are the following indicators:

- (1) the presence on the premises of things used in the supply, manufacture or use of a dangerous drug;
- (2) the presence at the premises of a person or persons who are, or who appear to be, under the influence of a dangerous drug;
- (3) excessive, frequent or suspicious vehicular or pedestrian traffic to or from the premises;
- (4) the presence on the premises of persons known to be involved in the sale or distribution of a dangerous drug;
- (5) the presence on the premises of property reasonably suspected of being stolen or of being exchanged in return for a dangerous drug; and
- (6) the fact that a dangerous drug has been found on the premises on one or more occasions.

[40] It may be a moot point as to whether the presence of a dangerous drug on the person of someone who is (say) a visitor to the relevant premises or is other than the tenant or a resident of them without the knowledge of the tenant or a relevant resident falls within the ambit of the indications postulated by s 11C(1).

[41] This is an issue that was raised by the appellant and it may well be that there is force in her argument in that regard. However, at the end of the day, the volume of the indications properly disclosed by DSC Leafe in his affidavits was such that it is unsurprising that the learned magistrate ultimately

exercised his discretion in favour of making the drug premises order to which I have earlier referred.

[42] On or about 1 June 2009 the appellant filed an application in the Local Court pursuant to s 11P of the Act, seeking a revocation of the drug premises order. This asserted that the subject premises were premises from which it is unlikely that dangerous drugs are being supplied and that, in the circumstances, it was unjust to keep the order in place.

[43] This application was supported by an affidavit sworn by the appellant, couched in these terms:

“My home is not a drug premises. Last of six raids I was done for four sachets marijuana result \$300 fine. Everyone else was charged. I had no knowledge of what was on my guests and did not condone them to bring them to my house. I have made every effort to keep my home drug free and change my lifestyle and people I associate with as I have made an effort to make it safe and stable home for my children after separating from partner and guiding my children in the right way. Socialising with good people (nice to actually have people say how well we were doing) I am effort to keep on the right path and my home drug free.”

[44] On the hearing of her application the appellant appeared in person and the Commissioner was represented by counsel. A different stipendiary magistrate hearing that application afforded the appellant an opportunity of reading the affidavit of DSC Leafe, upon which the drug premises order had been founded. She was correctly told by the Court that, to sustain her application, she bore the onus of proving on the balance of probabilities that the premises were no longer premises at or from which dangerous drugs

were being or are likely to be supplied, or that, in the circumstances of the case, it would be unjust to keep the order in place (Misuse of Drugs Act, s 11P(4)).

[45] The appellant then addressed the learned magistrate in these terms:

“My son and I have made -- like arranged to -- made every effort to be drug free and make the effort in the last six months to try and socialise with the right kind of people and is very hard after living that lifestyle for 10 years. I’ve just been separated from my ex for 12 months and just had my 18-year-old rebel once he left and got into drugs but now he is drug-free.

We are doing family counselling. I have had FACS close my case. My two little ones have just started settling down now. I’m socialising with new people in my life. People are commenting on how well we’re doing and the praise is nice to have a new lifestyle. It's very hard to just socialise from that scene. I don’t encourage people to bring drugs into my home. I don't like them using them there.”

[46] Counsel for the Commissioner referred the learned magistrate to the content of the affidavit of DSC Leafe. He produced evidence that, following three of the searches referred to in the affidavit, the appellant had been charged with possession offences and convicted of them, in addition to which he indicated that one further charge was then currently before the Court.

[47] He further submitted that, having regard to the information that had been placed before the Court, it was quite clear that a drug premises order ought to have been made. He pointed out that drugs were found in the premises as recently as 16 April 2009 and argued that the appellant had failed to establish that the subject premises were now drug-free or identify any steps that had been taken to stop persons in possession of drugs coming to those

premises. He conceded that it was his understanding that it was the intention of the Northern Territory Housing Commission to serve a notice to quit on the appellant as soon as a notice had been affixed to the premises pursuant to s 11Q of the Act.

[48] The response of the appellant to the learned magistrate was to the effect that she had been to counselling at CentaCare and had been supporting her 18-year-old son who was no longer taking drugs, although he still had marijuana, a situation with which she was currently dealing. She asserted that her son had then just commenced a job at Subway full-time and had done a big turnaround. She stated that she was socialising with different people, putting more effort into her children and asking anyone that she suspected had drugs to leave the premises and not do drugs in her home.

[49] The learned magistrate did not express detailed reasons for her decision beyond saying that the appellant was responsible for who came into the subject premises and some of those persons were people with whom she had been socialising in earlier times and as to which she presumably had some knowledge of their habits. In essence, the learned magistrate said that she was not convinced that the circumstances had changed from those adverted to in the affidavit of DSC Leafe.

[50] Accordingly, the learned magistrate refused the application for revocation.

The basis of the appeal

[51] As I understood the stance of the respondent to this appeal, he accepts that the appeal is one that has been brought within time in respect of what is a final order disposing of the appellant's application to revoke the drug premises order, prosecuted pursuant to s 11P of the Act.

[52] However, as I understand what was put by Mr Frey of counsel for the Commissioner, he contends that neither the stated ground of appeal nor what was orally put by the appellant before me identify any question of law as envisaged by s 19 of the Local Court Act. It follows that the present purported appeal is incompetent.

[53] The sole ground expressed in the notice of appeal is "*That my premises is [sic] no longer Drug premises.*"

[54] It must be said that the oral submissions advanced by the appellant before me were essentially a passionate declamation to the effect that, following the recent cessation of her relationship with her former partner (who, I infer, was involved in the drug scene), she has made strenuous attempts to turn her life around and create a drug-free environment for her children. She asserts that her family is no longer the subject of attention by FACS and that her efforts have largely been successful.

[55] In essence, on the hearing of the present appeal, the appellant essentially sought to re-traverse the factual merits of the situation as canvassed in the Local Court. She suggested that the affidavit of DSC Leafe was incorrect

and inaccurate as to certain matters of detail. She did not seek to suggest that the learned magistrate had misconstrued the relevant statutory provisions or had erred in legal principle in arriving at a decision. Nor did she seek to identify any other error of law.

[56] It is to be regretted that the appellant was not able to secure legal representation in relation to her s 11P application. It is my understanding that she attempted to do so, but did not qualify for legal aid. Had she secured legal assistance, it may well have been the situation that significant additional factual material could have been put before the Local Court to found a more substantial basis for the application.

[57] As it was, the learned magistrate hearing that application had very little material before her upon which to assess what recent changes may have occurred in the circumstances of the appellant, so as to justify a revocation of the relevant drug premises order. The appellant was plainly at a serious disadvantage in prosecuting the application in person. With the benefit of hindsight it may have been preferable for the learned magistrate to have invited the appellant (as an unrepresented party) to enter the witness box and give detailed evidence on oath or affirmation in support of it.

[58] However, that said, the inescapable fact is that the appellant has been unable to identify any question of law arising in this matter that could properly enliven s 19 of the Local Court Act. Moreover, given the limited material placed for the Local Court, there is simply no basis for concluding that the

learned magistrate fell into error as to the factual merits of the case. It was fairly open to her to arrive at the conclusion that she expressed and, on well-settled principle, it is not to the point for this Court to consider whether some alternative approach might more appropriately have been adopted.

[59] In the circumstances, whilst I sympathise with the appellant and applaud any progress that she may have made towards the rehabilitation of both herself and her family, the inevitable conclusion to which I am bound to come is that the present appeal is incompetent. It must therefore be dismissed.
