R v Elkedra & Corbett [2010] NTSC 71

PARTIES:	THE QUEEN
	v
	GARY ELKEDRA
	AND
	DARRYL CORBETT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20819214 & 20819474
DELIVERED:	14 DECEMBER 2010
HEARING DATES:	7-8 DECEMBER 2010
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – offences on indictment – whether indictment should contain crimes – whether simple offences triable in Supreme Court – prisoners discharged – *Criminal Code* s 3 and s 298(1)

Criminal Code Act, s 3, s 3(4), s 8(1), s 112, s 112(1)(a), s 112(1)(b), s 112(2), s 112(2A), s 188(1), s 188(2), s 213(1), s 213(2), s 298(1), s 299, s 300, s 315(1), s 348, s 348A
Criminal Law and Procedure Ordinance 1978-1981, s 20, s 21
Interpretation Act, s 38E
Justices Act, s 4, s 49, s 52, s 101(a)
Police Administration Act, s 128(1), s 129, s 130(1)(a)

Sentencing Act, s 107(3)

Archbold, *Criminal Pleading, Evidence and Practice*, 42nd ed, Sweet & Maxwell, London

Birkeland-Corro v Tudor-Stack (2005) 15 NTLR 208; *Megson v The Queen* (2006) 17 NTLR 57; *R v Kurungaiyi* (2005) 15 NTLR 70; referred to

REPRESENTATION:

Counsel:

Plaintiff:	M McColm
Defendant:	E Sinoch

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	B
Number of pages:	9

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

R v Elkedra & Corbett [2010] NTSC 71
No 20819214 & 20819474

BETWEEN:

THE QUEEN

AND:

GARY ELKEDRA
First Defendant

and

DARRYL CORBETT
Second Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 14 December 2010)

[1] The accused in this matter are both charged with an offence against s 112(1)(b) of the *Criminal Code* of being a person lawfully detained as an intoxicated person, escaping from such detention.

[2] The accused were originally committed for trial on other charges. The original indictment against the accused, Gary Elkedra, contained a count of being a prisoner in lawful custody following arrest, escaped from such custody contrary to s 112(1)(a). The accused Darryl Corbett was not

charged with an escape offence. Following discussions as to plea, the current charges were included in a fresh indictment to which the accused had pleaded guilty. The facts alleged that each accused had been apprehended under s 128(1) of the *Police Administration Act*, which provides:

> Where a member has reasonable grounds for believing that a person is intoxicated with alcohol or a drug and that that person is in a public place or trespassing on private property the member may, without warrant, apprehend and take that person into custody.

[3] A person taken into custody under s 128(1) is not a person under arrest for an offence. The old summary offence of being drunk in a public place was repealed in the mid 1970s. The police are empowered to hold a person in custody under this Act only for so long as it appears that a person remains intoxicated[1] and whilst under apprehension cannot be charged with an offence.[2]

[4] During the course of the plea, it came to my attention that the maximum penalty for a breach of s 112(1)(b) of the *Criminal Code* was only imprisonment for 12 months and I raised with the parties whether the Court had jurisdiction to entertain those charges. I adjourned the hearing until the following day to enable counsel to consider the matter and make submissions.

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1 *Police Administration Act*, s 129.
2 *Police Administration Act*, s 130(1)(a).

[5] The following morning Mr McColm, counsel for the prosecution, conceded that the Court did not have jurisdiction to deal with those offences. I had reached the same conclusion having considered the matter overnight. Accordingly, I ruled that I did not have jurisdiction to deal with those charges and I discharged the accused from them.

[6] As the matter is of some importance to the administration of justice, I have decided to publish my reasons. These are my reasons.

[7] Prior to the introduction of the *Criminal Code*, the *Criminal Law and Procedure Ordinance 1978-1981* provided that offences against a law of the Territory which are punishable by imprisonment for a period exceeding six months are indictable offences.[3] Other offences were punishable only on summary conviction.[4]

[8] The expression "indictable offence" was mirrored in the provisions of Part V of the *Justices Ordinance* (now called the *Justices Act*). The *Justices Act* currently provides that an information may be laid before a Justice in any case where a person is suspected to have committed "any treason, felony, or indictable misdemeanour, or other indictable offence whatsoever, within the Territory".[5] The *Justices Act* does not contain a definition of what is an

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[3] See s 20.
[4] See s 21.
[5] *Justices Act*, s 101(a). The terms "felony" and "misdemeanour" are not used in the *Criminal Code 1983* (NT).

indictable offence, although there is a definition of minor indictable offence.[6]

[9] When the *Criminal Code* came into force in 1984, the expression "indictable offence" was not used.

[10] Section 3 of the *Criminal Code* provides:

> **3 Division of offences**
>
> (1) Offences are of 3 kinds, namely, crimes, simple offences and regulatory offences.
>
> (2) A person charged with a crime cannot, unless otherwise stated, be prosecuted or found guilty except upon indictment.
>
> (3) Unless otherwise stated, a person guilty of a simple offence or a regulatory offence may be found guilty summarily.
>
> (4) An offence not otherwise designated is a simple offence.

[11] Section 112 of the *Criminal Code* provides as follows:

> **112 Escape from lawful custody**
>
> (1) Any person who:
>
> (a) being a prisoner in lawful custody following his arrest or conviction for an offence; or
>
> (b) is lawfully confined or detained otherwise than as referred to in paragraph (a) and who,

[6] See s 4.

> escapes from such custody, confinement or detention, is guilty of an offence.

[12] Section 112(2) of the Code provides the circumstances in which the escape is a crime and is limited to crimes for which the person has been arrested or convicted. Section 112(2A) provides that a person who commits an offence against s 112(1)(b) is liable to imprisonment for 12 months.

[13] On the face of it therefore, a breach of s 112(1)(b) is a simple offence by virtue of s 3(4) of the Code and also by virtue of s 38E of the *Interpretation Act*, which generally provides that an offence is a crime if the penalty for the offence is imprisonment for a period of more than two years.

[14] Section 298(1) of the *Criminal Code* provides:

> (1) When a person charged with a crime has been committed for trial and it is intended to put him on his trial for the crime the charge is to be reduced to writing in a document that is called an indictment.

[15] Section 49 of the *Justices Act* provides that a complaint may be made to a Justice in any case where any person has committed, or is suspected to have committed any simple offence.

[16] As Martin (BR) CJ said in *Birkeland-Corro v Tudor-Stack*:[7]

> By this somewhat circuitous route involving the Act, the *Interpretation Act* and the *Criminal Code*, it may be concluded that where the Act speaks of an indictable offence it is referring to a

[7] (2005) 15 NTLR 208 at 67.

> crime which, unless otherwise stated in the Act, must be prosecuted upon indictment.[8]

[17] However, the Court did not in that case specifically find that the Court had no jurisdiction to deal with a simple offence.

[18] In *R v Kurungaiyi*,[9] Southwood J quashed an indictment pleading a charge of unlawful entry with intent to commit a crime because he was not satisfied that the Crown were entitled to rely upon an aggravated assault under s 188(1) and s 188(2) of the Code as constituting the crime. If his Honour were correct, the charge could only allege unlawful entry with intent to commit a simple offence for which the maximum penalty was imprisonment for two years. His Honour quashed the indictment and the Crown appealed. There was no specific discussion as to whether the Supreme Court had jurisdiction to deal with simple offences. It seems to have been assumed by all parties that the Court did not have such jurisdiction. The Court considered that Southwood J was right and dismissed the appeal.

[19] A similar problem arose in *Megson v The Queen*.[10] Once again, the Full Court in that case assumed without deciding specifically that only crimes were able to be the subject of a charge in an indictment.

[20] Were it not for two other sections in the Code, I would not have had any difficulty in concluding that the Supreme Court has no jurisdiction to deal with simple offences. Section 299 of the *Criminal Code* provides:

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[8] By "the Act", his Honour was referring to the *Justices Act*.
[9] (2005) 15 NTLR 70.
[10] (2006) 17 NTLR 57.

> When a person charged with a crime has been committed for trial and if, in the opinion of the person responsible for the presentation of the indictment, the evidence produced at the preliminary proceedings is such that he ought to be charged with some further or other offence he may present an indictment charging such further or other offence.

[21] Section 300 provides is as follows:

> **300 Ex officio information**
>
> A Crown Law Officer may sign an indictment against any person for any offence whether the accused person has been committed for trial or not.

[22] It is curious that both sections refer to offences generally rather than crimes. Prima facie, an "offence" would include a simple offence and a regulatory offence.

[23] It has never been the practice of the Prosecution to allege simple offences or regulatory offences in indictments presented in this Court and the general understanding has always been that simple offences can only be charged upon complaint in the Court of Summary Jurisdiction. The practice has been, for so long as I can remember, that where the Crown intends to charge a person with a simple offence whether as an alternative or "back-up charge" to a crime, or not, a complaint is laid under the *Justices Act* and the proceedings in the Court of Summary Jurisdiction are adjourned pending the outcome of the main charge in this Court. If the accused is found guilty,

this Court has no power to dispose of the lower Court matters, even by consent, and they must be dealt with by the Court of Summary Jurisdiction.[11]

[24] A general consideration of the provisions both of the *Justices Act* and of the Code however I think make it clear that an indictment can only charge a crime. Perhaps the clearest example relates to the provisions of Part IX Division 3 relating to alternative verdicts. It is very clear when one considers all of the sections in that Division that, with the exception of simple offences which fall within s 315(1) of the Code,[12] the Court could not leave as an alternative verdict to the jury a simple offence.

[25] These provisions reflect the common law that only indictable offences were available as alternatives.[13]

[26] There is also the consideration that summary offences must be charged within six months by virtue of s 52 of the *Justices Act*. It is unlikely in the extreme that the Legislative Assembly intended to provide by this roundabout route a means of avoiding the protection provided by that section.

[27] The only exception I can find of a power in the Supreme Court to deal summarily with an offence is for contempt of court.[14]

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[11] *Sentencing Act*, s 107(3).
[12] Such as common assault (s 188(1)) or unlawful entry (s 213(1) or s 213(2)).
[13] See Archbold, *Criminal Pleading, Evidence and Practice*, 42nd ed, par 4-84.
[14] See s 8(1) of the *Criminal Code Act*.

[28] Section 348 of the *Criminal Code* also provides that subject to s 348A, if an accused person pleads that he is not guilty he is by such plea deemed to have demanded that the issues raised by the plea be tried by jury. It seems incomprehensible to me that simple offences which are triable summarily could be tried by a jury.

[29] The conclusion that I reached therefore is that the words "some further or other offence" in s 299 are limited to crimes.

[30] Accordingly, as the offences charged were only simple offences, the Court has no jurisdiction to entertain them and the prisoners must be discharged.
