Bentley v Carey & Bentley v Verity [2010] NTSC 60

PARTIES:	KAYNE BENTLEY v MICHAEL CAREY (in his capacity as a Stipendiary Magistrate sitting in the Youth Justice Court) and BRETT JUSTIN VERITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No 76 of 2010 (21023588)
AND:	IN THE MATTER of an appeal under the Justice Act
PARTIES:	KAYNE BENTLEY v BRETT JUSTIN VERITY
FILE NO:	JA 10 of 2010 (20906236)
DELIVERED:	21 July 2010
HEARING DATES:	21 July 2010
JUDGMENT OF:	MILDREN J

APPEAL FROM: Michael Carey SM

Supreme Court Rules, O 56.02(3)

Howie v Youth Justice Court (2010) 161 NTR 1; (2010) 240 FLR 103; S*omerville Retail Services Pty Ltd v Vi* [2008] VSC 196; followed

Curtis v Eaton (2010) 239 FLR 84; *R v Deland & Ors; ex parte Willie* (1996) 6 NTLR 72; *Lednar v The Magistrates Court* (2000) 117 A Crim R 396; [2000] VSC 549; referred to

REPRESENTATION:

Counsel:

Appellant:	J Franz
First Respondent:	R Jobson
Second Respondent:	M Nathan

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
First Respondent:	Solicitor for the Northern Territory
Second Respondent:	Office of the Director of Public Prosecutions

Judgment category classification: C
Number of pages: 8

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

Bentley v Carey & Bentley v Verity [2010] NTSC 61
No 76 of 2010 (21023588) & JA 10 of 2010 (20906236)

BETWEEN:

KAYNE BENTLEY
Plaintiff

AND:

MICHAEL CAREY (in his capacity as a Stipendiary Magistrate sitting in the Youth Justice Court)
First defendant

BRETT JUSTIN VERITY
Second defendant

AND IN THE MATTER of an appeal under the Justices Act

BETWEEN:

KAYNE BENTLEY
Appellant

AND:

BRETT JUSTIN VERITY
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 21 July 2010)

Ex Tempore

[1] This is an application for an extension of time under O 56.02(3) of the *Supreme Court Rules* for an application to grant relief in the nature of *certiorari*.

[2] The facts of the matter are that the plaintiff was charged with a serious crime involving alleged sexual intercourse with a child under 16 which proceeded summarily.

[3] The learned Magistrate offered to the defendant the opportunity for the matter to proceed by way of a committal hearing, but the defendant, who was legally represented, consented to the matter being dealt with summarily. He was convicted on 26 February 2010 and then lodged a notice of appeal from his conviction. He has not been sentenced.

[4] The 60 day period expired on this matter on or about 26 April 2010.

[5] On 10 May 2010, after the time limit had ran out, Olsson AJ, in the matter of *Curtis v Eaton*,[1] raised a question as to whether or not the Youth Justice Court had jurisdiction to deal with matters of this kind.

[6] At the time when that was first raised, the 60 day time limit had already expired. The issue came up again in the case of *Howie v Youth Justice Court*,[2] which was referred to the Full Court.

[1] (2010) 239 FLR 84.
[2] (2010) 161 NTR 1; (2010) 240 FLR 103.

[7] The Full Court delivered its judgment on 25 June 2010 and it held that the Youth Justice Court had no jurisdiction to hear a matter of the same kind as was dealt with in respect of the plaintiff.

[8] The child in this case, I am told, is now aged 14 and is available, so far as the defendant knows, to give evidence again. I was told also that his evidence was not recorded at the time of the summary trial, as would be the case in this Court, simply because of the lack of court facilities available at the time to do so. There was however a soft interview which could be relied upon as the complainant's evidence-in-chief.

[9] Under the rule, an extension of time is only able to be given if there are special circumstances. What are special circumstances has been considered in a number of authorities to which I have been referred, most of which are well known. The core concept is that there must be something unusual or different to take the matter out of the ordinary course.

[10] In *R v Deland & Ors; ex parte Willie*,[3] Kearney J was of the view that special circumstances must include events which render the time specified by the legislature unfair or inappropriate.

[11] In Victoria, the most recent case which I have been able to find dealing with special circumstances under the Victorian equivalent of the same rule, is *Somerville Retail Services Pty Ltd v Vi*,[4] where Kyrou J reviewed the

[3] (1996) 6 NTLR 72.
[4] [2008] VSC 196 .

relevant authorities and followed the judgment of Gillard J in the case of *Lednar v The Magistrates Court*.[5]

[12] At paragraph 43 of his Honour's judgment, Kyrou J quoted from *Lednar* where Gillard J said this at paragraphs 140-143:

> "Rule 56.02(3) does not confine the special circumstances to the failure to institute the appeal within time and reading order 56 as a whole there is nothing in its provisions which limit the special circumstances for failure to institute the proceeding. In my opinion it was not the intention of the framers of the rule to so confine the paragraph in rule 56.02 and in my opinion one has to consider all the circumstances which include not only the reasons for failing to bring the proceeding within time but also whether the plaintiffs have an arguable case and whether the defendants would be prejudiced by an extension of time. In determining what are special circumstances it is necessary for the court to weigh up the interests of both the plaintiff and the defendant. The rules have prescribed a 60 day period during which a proceeding should be commenced and the rules should be complied with. Further, in the area of public law it is not only the interests of the parties that may be affected but also the public interest. A party that has the benefit of an order in its favour should be able to proceed and enforce or rely upon the order or decision once the period of judicial review has expired. Indeed it is a matter of some weight if a late attack is made upon an order where a party has relied upon it and would suffer detriment and prejudice if time was extended. The court does have a discretion which it may exercise where special circumstances were established and what constitutes special circumstances in any particular case will depend upon the circumstances of the case. It is not appropriate to attempt to fetter the jurisdiction by seeking to define what are 'special circumstances'. In my opinion the chances of the plaintiff being successful in the application, the injustice to a plaintiff if the decision or order is allowed to stand, prejudice to the other party and difficulties concerning legal aid, in my view, are relevant factors to whether or not there are special circumstances. They have to be weighed and the court has to determine whether in totality they constitute special circumstances."

[5] (2000) 117 A Crim R 396; [2000] VSC 549.

[13] I think the following matters must be considered. First, the conviction was recorded on 26 February 2010 and it has been appealed on its merits.

[14] I think that it is important to note that the appellant, who was legally represented, accepted the jurisdiction of the Court at the time. However, the matter is still outstanding in the sense that the appellant has not been sentenced and if the Court were now to refuse an extension of time it would mean that the Court would, in effect, be allowing a magistrate to proceed to sentence where the magistrate would have no jurisdiction at all at the present time.

[15] Secondly, it seems to me that in view of the decision of the Full Court in the case of *Howie v Youth Justice Court*, to which I have previously referred, the plaintiff has not just an arguable case that the decision relied on below was without jurisdiction, but really an unassailable case.

[16] So far as prejudice is concerned, the main prejudice, as far as I can see, is that the child victim will, if the matter is set aside, inevitably have to give evidence again. It was most unfortunate that the child's evidence was not recorded, but that is not a matter of any fault of the plaintiff's. I note that there was a soft interview but it would still mean even if that were to be relied upon, that the child would have to be cross-examined, which is most undesirable. It seems to me that that is a factor that the Court needs to consider.

[17] The present application is now some three months out of time. It is obvious that neither the plaintiff's solicitors nor the plaintiff himself was aware that the Court had no jurisdiction to try him. Indeed in the matter which was dealt with before Olsson AJ, the argument put to the Court about jurisdiction in that case was an argument put by the Director of Public Prosecutions and indeed the Full Court decision was instigated on the question of jurisdiction by the Director of Public Prosecutions.

[18] Mr Nathan has made the point that there must be something to take the case out of the ordinary and his submission was that the Full Court judgment raises a class of potential applicants all of which fall into the category of having been found guilty of offences when the Court had no jurisdiction to do so. That may be a class which goes back to the beginning of the Youth Justice Court.

[19] I do not think the same can necessarily be said about the Juvenile Justice Court. I say nothing about that. But certainly it can be said about all of those cases that have been dealt with summarily in the Youth Justice Court whether by consent or otherwise.

[20] However, what I think places this case in a special position are two factors. First, the applicant has not been sentenced and therefore the proceedings have not been completed. That, it seems to me, is a very compelling factor in this case together with the fact that the Youth Justice Court simply had no jurisdiction to deal with it.

[21] The second factor which I think is in favour of granting the extension is that I do not think that there are very many cases likely to be in the same position as this plaintiff, namely, still having a proceeding part heard to be dealt with after conviction. Perhaps there may be other cases, perhaps not, but the vast majority, I would expect, are cases which are over and done with.

[22] The third matter is that although there is some prejudice to the Crown it is not a prejudice which I think outweighs the factors which I have mentioned. In my opinion, special circumstances have been established and I will grant an extension of time.

[23] As to the application for an adjournment, I refuse that application. I have indicated why but I will make it clear. The application for an adjournment was made by Mr Nathan on the basis that the Parliament intends to take up the observations of the Full Court and introduce urgent legislation at the next sittings. At that time, what the Parliament will do I am not able to say, but one of things that Mr Nathan expects the Parliament to do is to legislate retrospectively to validate decisions of the Youth Justice Court. That may be so and I expect it will.

[24] By the same token, I do not expect the Parliament to retrospectively validate decisions which have been subject of appeal or decisions of this Court. That I do not think will happen.

[25] The plaintiff has exercised his rights. He is entitled to have his case determined. I think an adjournment to enable the matter to be decided by the Parliament would be an abdication of my judicial responsibility.

[26] There will be a declaration that the first defendant was without jurisdiction to try the plaintiff in the Youth Justice Court and cannot proceed to sentence the plaintiff. I make an order in the nature of certiorari pursuant to O 56 of the *Supreme Court Rules* and quash the conviction of the first defendant made on 26 February 2010. The appeal is dismissed.