Harris v Sanderson [2016] NTSC 48

PARTIES:	**HARRIS, Stanley**
	v
	SANDERSON, Melissa
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 7 of 2016 (21547537)
DELIVERED:	22 September 2016
HEARING DATES:	29 August 2016
JUDGMENT OF:	HILEY J
APPEAL FROM:	LOCAL COURT

CATCHWORDS:

CRIMINAL LAW – *autrefois convict* and *autrefois acquit* – double jeopardy – "similar offence" – s 18 *Criminal Code* similar to common law – whether conduct impugned for breach of alcohol protection order is the same as or included within the elements for breach of bail.

Alcohol Protection Orders Act 2013 (NT) s 23(1)
Bail Act 1982 (NT) s 37B
Criminal Code (NT) s 17, s 18, s 20, s 21, Part II AA
Domestic and Family Violence Act 2007 (NT) s 120(1)

Connelly v DPP [1964] AC 1254; *Pearce v The Queen* [1998] HCA 57, (1998) 194 CLR 610; *R v Hofschuster* (1994) 4 NTLR 179, applied.
Ashley v Marinov [2007] NTCA 1, (2007) 20 NTLR 33, distinguished.
Li Wan Quai v Christie [1906] HCA, (1906) 3 CLR 1125, referred to.

REPRESENTATION:

Counsel:

Appellant:	D Bhutani
Respondent:	S Robson

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Hil1608
Number of pages:	9

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

Harris v Sanderson [2016] NTSC 48
No. LCA 7 of 2016 (21547537)

BETWEEN:

STANLEY HARRIS
Appellant

AND:

MELISSA SANDERSON
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 22 September 2016)

Introduction

[1] On 20 May 2016 the appellant was convicted of and sentenced for a number of offences arising out of his consumption of alcohol on 26 September 2015. These included:

(a) engaging in conduct that is said to have breached a condition of bail, contrary to s 37B of the *Bail Act 1982* (NT) (the **bail charge**);

(b) engaging in conduct that resulted in the contravention of an alcohol protection order, contrary to s 23(1) of the *Alcohol Protection Orders Act 2013* (NT) (the **APO charge**); and

(c) engaging in conduct that resulted in the contravention of a domestic violence order, contrary to s 120(1) of the *Domestic and Family Violence Act 2007* (NT) (the **DVO charge**).

[2] The appellant was sentenced to one month imprisonment in relation to the DVO charge, and an aggregate of 21 days imprisonment in relation to the other two charges. The latter sentence was to be served concurrently with the sentence on the DVO charge.

[3] Submissions had previously been made to and rejected by the Local Court, to the effect that because all three charges arose out of the same conduct the appellant could not be convicted of more than one of those three offences. The basis of those submissions was s 18 of the *Criminal Code* (NT), which codifies the common law principles of *autrefois acquit* and *autrefois convict*.

[4] This appeal relates only to the bail charge and the APO charge, the appellant accepting, correctly, that the DVO charge concerned conduct additional to his consumption of liquor.

[5] For the reasons that follow, I consider that the defence based upon s 18 of the *Criminal Code* did not apply, and that the appeal should be dismissed.

Grounds of appeal

[6] The appellant contended that the Local Court erred in two respects: first, holding that s 18 of the *Criminal Code* does not apply to the APO charge, apparently for the reason that the APO charge was an offence of strict liability; second, declining to conclude that s 18 operates to preclude convictions on both the APO charge and the bail charge.

[7] The respondent conceded that s 18 does apply, thus conceding the first ground. Although a relevant finding in relation to a regulatory offence is excluded from the operation of s 18 by force of s 20, there is no such exclusion in respect of offences of strict liability. Offences against the *Alcohol Protection Orders Act* are not regulatory offences. Accordingly this appeal focuses on the second ground, namely the contention that s 18 precludes the convictions on those two charges.

Consideration

[8] Section 18 of the *Criminal Code* provides as follows:

> Subject to sections 19 and 20 it is a defence to a charge of any offence to show that the accused person has already been found guilty or acquitted of:
>
> (a) the same offence;
>
> (b) a similar offence;
>
> (c) an offence of which he might be found guilty upon the trial of the offence charged; or

> (d) an offence upon the trial of which he could have been found guilty of the offence charged

[9] Section 17 defines similar offence to mean:

> an offence in which the conduct therein impugned is substantially the same as or includes the conduct impugned in the offence to which it is said to be similar.

[10] Mr Bhutani, counsel for the appellant, submitted that the APO charge is a "similar offence" to the bail charge because the "conduct therein impugned", namely the consumption of alcohol, is the same for both offences.

[11] On the other hand, Mr Robson, counsel for the respondent, contends that the "conduct therein impugned" is not confined to that particular conduct, but includes other matters that must be established in order to satisfy the necessary elements of each offence.

[12] In the case of the bail charge, the prosecution would need to establish the existence and conditions of the appellant's bail, that the appellant's consumption of alcohol amounted to a breach of such a condition, and that the appellant intended to breach, or foresaw the breach of, such bail condition. On the other hand, the APO charge would require proof of the existence and conditions attached to the alcohol protection order, and that the appellant's consumption of alcohol amounted to a breach of such a condition.

[13] It is accepted that the relevant provisions of the *Criminal Code* should be construed by reference to the principles regarding *autrefois acquit* and *autrefois convict* set out in *Pearce v The Queen*[1] (***Pearce***) in the judgment of McHugh, Hayne & Callinan JJ, particularly in the last sentence of [24]. Their Honours said:

> … there are sound reasons to confine the availability of a plea in bar to cases in which the *elements* of the offences charged are *identical or* in which all of the elements of one offence *are wholly included* in the other.
>
> (my emphasis)

[14] In *R v Hofschuster*,[2] Gray AJ, Kearney and Angel JJ agreeing, said, at 183-4:

> Section 18 and the definition of "similar offence" appear to me to substantially reproduce the common law doctrine as laid down in the judgment of Lord Morris of Borth-y-Gest in *Connolly v DPP* [1964] AC 1254 at 1305-1306. The fundamental principle is that a person is not to be prosecuted twice for the same criminal conduct.
>
> … I am of the opinion that "conduct therein impugned" means the facts alleged to constitute the legal ingredients of the offence and does not include facts which merely provide evidence tending to prove the presence of the essential ingredients.

[15] These passages were quoted and applied by the Court of Appeal in *Ashley v Marinov*.[3] In *Connelly v DPP*,[4] Lord Morris made it clear that

[1] [1998] HCA 57, (1998) 194 CLR 610.
[2] (1994) 4 NTLR 179.
[3] [2007] NTCA 1; (2007) 20 NTLR 33.
[4] [1964] AC 1254.

the test of *autrefois* was not generally directed to the sameness of facts or conduct, but the proof as would be necessary to convict for the respective offences:

> It matters not that incidents and occasions being examined on trial of the second indictment are precisely the same as those which were examined on the trial of the first. The court is concerned with charges of offences or crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could have been a conviction.

[16] In *Li Wan Quai v Christie*[5] Griffith CJ said:

> In order that a previous conviction or discharge can be a bar to subsequent proceedings, the charges must be substantially the same. The true test whether such a plea is a sufficient bar in any particular case is, whether the evidence necessary to support the second charge would have been sufficient to procure a legal conviction upon the first.

[17] McHugh, Hayne & Callinan JJ discussed this and a similar passage in *Pearce*. At [20] – [21]:

> 20 In each of *Chia Gee* v *Martin*[6] and *Li Wan Quai* v *Christie*,[7] Griffith CJ identified the test for whether a plea in bar would lie as being "whether the evidence necessary to support the second [charge or prosecution] would have been sufficient to procure a legal conviction upon the first".[8] At first sight this might suggest that it is appropriate to consider what witnesses would be called and what each of those witnesses *could* say about the events which gave rise to the charges.

[5] [1906] HCA; (1906) 3 CLR 1125.
[6] (1905) 3 CLR 649.
[7] (1906) 3 CLR 1125.
[8] *Chia Gee v Martin* (1905) 3 CLR 649 at 653; *Li Wan Quai* (1906) 3 CLR 1125 at 1131. See also *Ex parte Spencer* (1905) 2 CLR 250 at 251, per Griffith CJ; *Paley's Law and Practice of Summary Convictions*, 5th ed (1866), p 145; Broom, A *Selection of Legal Maxims*, 4th ed (1864), p 341.

> Closer examination reveals that the inquiry suggested is different; it is an inquiry about what evidence would be *sufficient* to procure a legal conviction. That invites attention to what must be proved to establish commission of each of the offences. That is, it invites attention to identifying the elements of the offences, not to identifying which witnesses might be called or what they could say. It is only if attention is directed to what evidence might be given, as opposed to what evidence was necessary, that the inquiry begins to slide away from its proper focus upon identity of offence to focus upon whether the charges arise out of the same transaction or course of events.
>
> 21 Further, when it is said that it is enough if the offences are "substantially" the same, this should not be understood as inviting departure from an analysis of, and comparison between, the elements of the two offences under consideration.

[18] In *Ashley v Marinov* the appellant had been acquitted of a charge of aggravated assault but later convicted of breaching a domestic violence order which was based upon the same facts. The Court of Appeal set aside the conviction by applying s 18. At [14]:

> In our opinion, the offence of breaching the domestic violence order was in the circumstances of this case a similar offence to the offence of aggravated assault because the conduct impugned is substantially the same or includes the conduct impugned in the offence of aggravated assault.

[19] At [17] the Court added that:

> The conclusion we have reached in this case does not necessarily mean that a person dealt with for an assault cannot be convicted also of an offence of breaching the terms of a domestic violence order. Much will depend on the precise terms of the order said to be breached, the facts relied upon to constitute the breach and whether or not, even if a defence under s 18 is not open, the court should nevertheless stay the prosecution as an abuse of process.

[20] An obvious example of a situation where the s 18 defence would not be available would be if the domestic violence order, in addition to prohibiting the offender from assaulting the protected person, also prohibited him from being in the presence of the protected person.

[21] Unlike the situation in *Ashley v Marinov* the elements constituting the bail charge are not the same as, or wholly included in, the APO charge, or vice versa. For example, the prosecution would have to prove the existence and terms of the APO in order to prove the APO charge, but not in order to prove the bail charge. In other words, the appellant could be convicted of the bail charge and acquitted of the APO charge, or vice versa, notwithstanding proof that he had consumed alcohol, an essential element for both charges.

[22] Like the example provided by way of footnote 12 in *Pearce*, if there was in the Northern Territory a simple offence of consuming alcohol, acquittal of that offence would necessarily result in acquittal on the APO charge and the bail charge. But that is not the case here.

[23] Whilst it might appear oppressive or unfair that a person could be prosecuted and convicted of two or more offences, each of which is based upon a particular fact or set of facts, a court has ample powers to prevent such unfairness, for example under s 21 of the *Criminal Code*

or under its inherent powers to stay proceedings and protect against double jeopardy when sentencing.[9]

[9] See for example *Pearce* at [29] – [49].