CITATION: *Peter Mark Thomas v Gary William Meyerhoff* [2003] NTMC 009

PARTIES:	PETER MARK THOMAS Complainant v GARY WILLIAM MEYERHOFF Defendant
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20209679
DELIVERED ON:	7 March 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	21 January 2003, 27 February 2003
DECISION OF:	Jenny Blokland SM

CATCHWORDS:

Evidence – Identification Evidence - Surveillance Tape; *Kelleher v R* (1974) 131 CLR 534; *Powers v R* NTCCA 2; *R v Gorham* (1997) 68 SASR 505; *Smith v R* (2001) 181 ALR 354
Criminal Responsibility- Criminal Damage; ss 31 251*Criminal Code*; *Director of Public Prosecutions Reference No. 1 of 2002; Pregelj v Manison* (1987) 51 NTR1; *Samuels v Stubbs* [1972] 4 SASR 2003; *Hardman v Chief Constable Avon* [1986] Crim LR 330; "A" *(a juvenile) v the Queen* [1978] Crim LR 689; *Coughlin v Thomas* (1998) NT (SC); unreported; Kearney J; *Summary Offences Act.*

REPRESENTATION:

Counsel:

Complainant:	Ms Sanderson
Defendant:	Self Represented

Solicitors:

Plaintiff:	ODPP
Defendant:	Self Represented

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 009
Number of paragraphs:	23

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20209679

BETWEEN:

PETER MARK THOMAS
Complainant

AND:

GARY WILLIAM MEYERHOFF
Defendant

REASONS FOR DECISION

(Delivered 7th March 2003)

Jenny Blokland SM:

1. Two primary issues that require determination in this matter, are first, whether the defendant has been identified to the criminal standard as the perpetrator and second, whether sticking up posters in the circumstances of this case amounts to unlawful criminal damage contrary to s 251 of the *Criminal Code*.

BACKGROUND FACTS

2. Evidence has been given that on 30 May 2002, relevant employees of the Darwin Bus Company attended work and pulled down 18 posters out of around 60 or so that had been placed on partitions at the Palmerston bus exchange. The remaining posters needed to be cleaned off by professional cleaners who were engaged at a cost of $ 68.20 (being the amount of the damage alleged in the complaint).

3. There was some evidence that when cleaned, there were small scratches left behind, but in essence it is the cleaning costs that are alleged to be the

damage. The scratches do not constitute the damage alleged. There was also evidence from the investigating police officer that he viewed a surveillance tape showing two persons placing some posters up in the area; that he made enquiries with other officers who directed him to separate television news footage of the defendant; that those officers identified the defendant and that as a result of this material, the investigating officer formed the view that that the defendant was one of two persons in the video tape.

IDENTIFICATION EVIDENCE

4. For the prosecution case to succeed, it must be proven beyond reasonable doubt that the defendant was one of two persons in the video surveillance tape. The surveillance tape was played in the proceedings, and, as I indicated to the parties, I have separately viewed the tape again in attempting to resolve this issue. While I have taken into account the evidence of the investigating officer and his opinion that the person in the tape is the defendant, the nature of this case has required me to satisfy myself beyond reasonable doubt that the defendant is in fact the person on the surveillance tape.

5. In my view the identification evidence of the officer was honestly given. But I do have to direct myself in accordance with *Kelleher R* (1974) 131 CLR 534 and many other cases decided since that honest and well meaning witnesses can be mistaken and this can lead to miscarriages of justice. The circumstances of this case do require me to form my own opinion.

6. The court in these proceedings has not had the benefit of the news footage, nor the evidence of the views of the officers that formed the basis of the identification made by the officer in charge of this case. I consider the type of identification asserted here to be analogous to the circumstances referred to by the Court of Criminal Appeal (NT) in *Powers v R,* [2000] NTCCCA 2.

7. In *Powers v R* the Court of Criminal Appeal adopted *R v Gorham* (1997) 68 SASR 505 noting -

> "...it is important for the prosecution to lead evidence of all the relevant circumstances ....". It is also important to know the details of any conversation which might have taken place at the time of identification between the witnesses and police officers or other persons associated with the prosecution"

8. Although *Powers v R* involved an identification in the precincts of the court, there are important analogies with this case. It was important for the prosecution to play the film footage used by the investigator that assisted him in coming to the conclusion that he did. Without it, I am essentially left to comparing the surveillance tape myself with the defendant. Although impressionistically there are similarities with the defendant, I am not prepared, bearing in mind all of the dangers associated with identification to find, beyond reasonable doubt that the defendant is the person in the surveillance tape. Ms Sanderson referred the court to *Smith v R* (2001) 181 ALR 354. If anything, that authority bolsters my opinion. *In Smith v R* a majority of the High Court and in the context of the NSW Evidence Act ruled that evidence from police that they recognised the appellant from security photos could not rationally affect the jury's assessment of the fact in issue and should not have been received.

CRIMINAL DAMAGE

9. If I am wrong in the conclusions concerning identification, then in any event, I am of the view that putting up posters is not necessarily prima facie criminal damage. In legal theory it could be criminal damage, but it may not be.

10. Criminal damage is a crime under the *Criminal Code*. To prove criminal damage requires proof of the act or event coupled with proof of the requisite mental element, here governed by s 31(1) and (2) *Criminal Code* (NT).

11. The application of s 31 has recently been considered by the Court of Criminal Appeal in *Director of Public Prosecutions Reference No. 1 of 2002*. Although that *reference* concerned the application of ss 31 and 32 of the *Criminal Code* (NT) to s 192(3) sexual assault, it represents the most recent jurisprudence on issues of intent and foresight under the *Criminal Code* (NT). That decision confirms my long held suspicion that the threshold for proving criminal responsibility in the Northern Territory is high compared to other jurisdictions, both common law based and Code based. In other words, in practical terms the very structure of criminal responsibility in the Northern Territory is that in many instances, it will be more difficult for the prosecution to prove the mental element than in comparable jurisdictions.

12. At par [68] Bailey J states:

> "Accordingly, the Criminal Code (NT) stands alone in excusing a person for criminal responsibility for an unintended and unforeseen event."

13. This follows a line of authority commencing with *Pregelj v Manison* (1987) 51 NTR 1 and applied in a variety of circumstances since then.

14. To prove criminal damage, the prosecution must prove beyond reasonable doubt that the accused intended or foresaw, (as a possible consequence), the damage. It stretches my legal imagination to say that proof of putting up posters that can fairly easily be removed proves beyond reasonable doubt that a defendant intended or foresaw damage. As mentioned to the parties at the prima facie case stage, I am aware of authorities in common law jurisdictions concerning the meaning of damage.

15. As I mentioned at the prima facie case level, I do recall when a number of protestors were prosecuted for chaining or handcuffing themselves to mining equipment machinery at Jabiluka, there was some debate in legal circles on

whether the removal of the protestors by police cutting the chains or handcuffs was appropriately dealt with as criminal damage of the machinery.

16. My researches indicated that on the face of it, criminal damage may and I stress may be proven if there is a "temporary functional derangement" of the particular article of property – so held in *Samuels v Stubbs* [1972] 4 SASR 2003 involving the crushing of a police officers cap; graffiti that could be washed away by rain in *Hardman v Chief Constable of Avon* [1986] Crim LR 330 was held to be criminal damage; however in *"A" (a Juvenile) v the Queen* [1978] Crim LR 689 concerning spitting on an officer's jacket, it was said:

> "…that when interpreting the word "damage," the court must consider the use of an ordinary English word. Spitting at a garment could be an act capable of causing damage. However, one must consider the specific garment which has been allegedly damaged. If someone spat upon a satin wedding dress for example, any attempt to remove the spittle might in itself leave a mark or stain. The court would find no difficulty in saying that an article bad been rendered "imperfect" if, after a bold course but, reasonable attempt at cleaning it, a stain remained. An article might also have been rendered "inoperative" if, as a result of what happened, it had been taken to dry cleaners. However, in the present case, no attempt had been made, even with soap and water, to clean the raincoat, which was a service raincoat designed to resist the elements. Consequently, there was no likelihood that if wiped with a damp cloth, the first obvious remedy, there would be any trace or mark remaining on the raincoat requiring further cleaning. Furthermore, the rain coat was not rendered "inoperative" at the time; if it was "inoperative," it was solely on account of being kept as an exhibit:"

17. In my view, I would be hard pressed to find that there was intent or foresight to produce a "temporary functional derangement" of the partition. There is no evidence before the court on the functions of the partitions. In submissions Mr Meyerhoff suggested they were wind breaks. The fact that a number of posters were so easily removed makes it hard to accept beyond reasonable doubt proof of intent or foresight.

18. It may be a different matter if the prosecution had charged simply "bill posting" under the *Summary Offences Act* in this type of situation. All that would need to be proved is the intent to post the bills. On a finding of guilt, appropriate orders of restitution or compensation could be made that compensates for the very real nuisance this behaviour brings on the public. This conclusion is a simple consequence of the rules of criminal responsibility as expressed in the *Criminal Code* (NT). Nothing in *Coughlin v Thomas* (1998) unreported (NT) (SC) Kearney J deters me from this view. In any event *Coughlin* represents a view of criminal responsibility not informed by the most recent decision being *DPP Reference No. 1 of 2002* and further in *Coughlin* evidence of foresight of damage was inferred.

19. I consequently dismiss this charge.

20. I make one observation in dismissing this charge. The defendant has essentially alleged bad faith on the part of the police and the prosecutor.

21. I reject that

22. The investigation and prosecution proceeded in good faith. The test prosecutors must use is necessarily different to that of the courts. The prosecution use the test of reasonable prospect of conviction, however this Court's function is one of proof beyond reasonable doubt. I dismiss the charge but my ruling should not be taken as an indication that the court considers the prosecution to be brought in bad faith.

23. A copy of the formatted Judgement will be forwarded to the parties.

Dated this 7th day of March 2003.

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JENNY BLOKLAND
STIPENDIARY MAGISTRATE