CITATION:	*Rue v Mununggurritj* [2006] NTMC 041
PARTIES:	CHARLES JOSEPH RUE v CLINTON DATJAPU MUNUNGGURRITJ
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act; Summary Offences Act
FILE NO(s):	20519545
DELIVERED ON:	03rd May 2006
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JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

SUMMARY OFFENCES – GOODS SUSPECTED OF BEING STOLEN
Summary Offences Act (NT) s61
Crimes Act (NSW) s527c
Police and Police Offences Ordinance (1923-1960)
Police Act (SA)
Summary Offences Act (SA) s41

Janelle English (1989) 44 A Crim R 273
Kasprzyck v Chief of Army (2001) 124 A Crim R 217

Eupene v Hales [2002] NTCA 167
Ferrell v Burrows [1973] 4 SASR 416
Edwards v Trennerry NT(SC), 17 November 1997

REPRESENTATION:

Counsel:

Complainant:	Ms Bohem / Mr Fisher
Defendant:	Ms McAdam / Ms Coroneo

Solicitors:

Complainant:	Office of the Director of Public Prosecutions
Defendant:	Miwatj / Naaja

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

No. 20519545

BETWEEN:

CHARLES JOSEPH RUE
Complainant

AND:

CLINTON DETJAPU MUNUNGGURRITJ
Defendant

RULINGS ON THE NO CASE
SUBMISSION AND ADMISSIONS

(Delivered 03rd May 2006)

JENNY BLOKLAND SM:

Introduction

1. At the March 2006 Nhulunbuy sittings, counsel for the defendant made a no case submission at the end of the prosecution case during a summary hearing for a charge against *s 61 Summary Offences Act.* The matter was unable to be heard during the April sittings for various reasons, however, I held that there was a case to answer. These are the reasons for my ruling that there was a case to answer and my ruling on certain evidentiary issues.

2. The charge against the defendant reads as follows:

> Between the 16 July 2005 and 18 July 2005 at Nhulunbuy in the Northern Territory of Australia
>
> 1. Did have in your custody, personal property, namely police cell key, which at the time before making the charge was

reasonably suspected of having been stolen or otherwise unlawfully obtained.

3. Essentially the prosecution allegation is that between 16 July and 18 July 2005 a cell key and a Hoffman tool went missing from the Nhulunbuy watchhouse. The defendant's brother (Craig Mununggurritj) had been in the cells on Saturday 16 July and was the last person in custody to be released from protective custody (evidence of Constable Sheppard). The allegation is that the defendant was seen on 17 July 2005 at the Nhulunbuy High School oval and showed various people an item described by some of the lay witnesses as a "bottle opener" or "stubby opener" and a key.

Police Evidence and Ruling on Admissions

4. Constable Sheppard gave evidence of speaking to Aboriginal Community Police Officer ("ACPO") Mununggurritj to ask him to assist in locating Craig Mununggurritj, who in turn gave him certain information leading him to believe that the defendant, Clinton Mununggurritj should be spoken to in relation to the key. Officer Sheppard readily agreed Craig Mununggurritj had not been charged with stealing as there was no information suggesting that he had stolen the key. That information was in turn passed on to Officer Kowalewycz. Constable Sheppard told the Court he was aware Officer Kowalewycz spoke to the defendant the day before he spoke to him. Constable Sheppard said that as a result of the investigation, the Hoffman tool was located near the rear of the police station, in the public area near the police compound. He said the key was not at any time located.

5. Constable Sheppard gave evidence concerning conversations with the defendant that were objected to. I received the evidence on a voir dire basis and gave a ruling on its admissibility at the same time as the prima facie case ruling. I won't go into the full text of these conversations and the search of the scene with the defendant present but it is clear that no caution was given to the defendant; the conversations were not taped; the defendant

is someone who would have the protection of the *Anungu Rules* (he is obviously from one of the traditional families in North East Arnhemland; police officers and other witnesses acknowledge the defendant has mental health problems. In evidence in chief Senior Constable Kowalewycz said he asked the defendant about the key directly "due to his limited intellectual capacity". He agrees the defendant exhibits signs of having mental health issues. Given the background to the investigation that is in evidence, I find the defendant was either a suspect at the time of being spoken to by police or became a suspect during the conversations. Officer Kowalewycz told the court he commenced his conversation with the defendant asking something like "What did you do with the key you took?" As I said in the brief oral reasons I gave on 4 April 2006, police obviously needed to make inquiries with the defendant on the basis of material in their possession but that of itself does not mean the resulting conversations will be admissible in evidence. I am not satisfied that the partial or implied admissions received were voluntary in the sense of an exercise of free choice to speak or remain silent or if I am wrong on that conclusion, I would exercise the fairness discretion or the public policy discretion not to admit them into evidence given the following factors: the Defendant is clearly someone to whom *Anungu Rules* apply; he is a traditionally oriented Aboriginal person who has all the signs of suffering mental illness; there is a real risk his explanations will not be reliable. It is clear police needed to speak to the Defendant in these circumstances but I would be in error to admit these conversations into evidence.

6. Officer Sheppard described the missing key as chrome, six or seven inches long, *quite a large key*. He said the Hoffman tool was similar to a folding pocket knife with a blade on one side, used by police stations throughout the Northern Territory to safely cut material a person might have used for self harm without injuring the person; he said the Hoffman tool and the cell key are always kept together with the Hoffman tool being kept in a black bag

with a velcro lock; he said the key and the black bag were joined with a key ring, or loop of wire. Senior Constable Kowalewycz located the Hoffman tool after a search amongst the grass and shrubs around the police station.

Craig Mununggurritj

7. Craig Mununggurritj told the court he was the defendant's brother; he had been in the cells on the Saturday night before the events that gave rise to the charge; he said he was "full-drunk"; in the morning he left and went home to Yirrkala. The next day he returned to town with Danny Marrawili and Quincey Gumbala; they went to the "Walkabout" and to the oval drinking. He said he saw "Long-grass mob and Clinton went there with the keys". He said he thought Clinton said "it might have been for the safe" and that he (Craig) replied "From the cell." "and the station". He told the court: "He said he must have stole it from the cell" and "He thought it was the cell key". When asked for a description, Craig Mununggurritj said "same key like the cells. Like from cell key". Craig Mununggurritj said he had seen the key before, on the Saturday. He was shown Exhibit P2 (tendered as a photo of the cell key) and Craig Mununggurritj said "This is another key". He said it was "different" to the one that Clinton had; he said the key Clinton had was longer. He said Clinton showed him "just a key and stubby opener"; he said the "stubby opener" was like the one in the photo in evidence. He said after Clinton showed him the key he went towards the school. He said he told his uncle (ACPO Donga Mununggurritj) that Clinton stole it. He said he did not take the key from the watchhouse on the Saturday night.

8. In cross-examination Craig Mununnggurritj agreed he had been "locked up" three times in that year for being drunk; that when he is locked up police take the key out and take it back with them; he said the key looked like the one in P2; then he said the key "looked different" (to the key depicted in P2); he agreed his evidence was that Clinton told him "I've got a new safe at

the bank" and that was all Clinton told him about the key. He agreed that he (Craig) wasn't at the scene and could not have seen Clinton steal the key. He agreed he was very drunk when he saw Clinton at the oval; he agreed Clinton has mental health problems and sometimes says "strange things which are not true"; he agreed Clinton gets mixed up and imagines things in his head. In re-examination he said the key "looked different".

Danny Marrawili

9. Danny Marrawili gave evidence he was drinking with Clinton and that Clinton "showed [him] the key", he described the key as "thin and long", indicating about five to six inches; he said Clinton said "I stole it from the cell"; he was shown exhibit P2 and said it was a "bottle opener and the key" and it was the key Clinton showed him. He said he was really drunk. In cross-examination Mr Marrawili agreed that his statement said that Clinton said "I stole the key from the bank"; he agreed Clinton said "the bank" not "the cells"; he said he thought Clinton was lying; playing a game. He agreed his memory was not very clear as he was really drunk; he agreed it was possibly a different key that he was shown.

The No Case to Answer Submission

10. Ms Coroneo made a lengthy and strong *no case to answer submission* based on the reasoning of the New South Wales CCA in *Janelle English* (1989) 44 A Crim R 273, namely that proof of the New South Wales equivalent charge ("*goods in custody*") and consequently the Northern Territory version requires proof that at the moment of apprehension there must be custody of the goods. The Appellant in that case had found bank notes in a hand bag. The bank notes were no longer in her possession when she was spoken to and charged by police. Ultimately the CCA (NSW) held that she could not be found guilty as the notes were not in her custody at the time of being charged. The CCA dealt with the history of the "goods in custody" section holding that the purpose of the charge was to deal with persons caught in

flagrante delicto and it was necessary that the suspicion should exist at the time when the person is in custody of the property. It was held that the wording of the NSW legislation (*s527c* Crimes Act 1900 NSW), preserved the historical connotation of being caught *red handed*. The relevant parts of Section 527c reads:

(1) Any person who-

(a) has anything in his custody;

(b) ……..

(c) ……..

(d) …….. which thing may be reasonably suspected of being stolen or otherwise unlawfully obtained, shall be liable on conviction before a stipendiary magistrate………..

11. Ms Coroneo also referred to *Kasprzyck v Chief of Army* (2001) 124 A Crim R 217 where the Defence Force Discipline Appeal Tribunal came to a similar conclusion under an analogous section of the *Defence Force Discipline Act 1982* (CW). Justice Heerey (at 221) stated: "It would be a harsh construction of s46 to make it apply in circumstances where the defendant had departed with possession, perhaps years ago, and the prosecution says that there is now suspicion that the property was unlawfully obtained at it is up to the defendant to make out the defences if he can". Justice Underwood (at 227) referred to an earlier version of the offence in the *Police Offences 1901 (NSW) Act* that commenced "whosoever being in his custody;……". His Honour commented "The introductory words of the section were influential in the decision that there must be proof of possession at the time of the charge being laid." Ms Coroneo referred me to other jurisdictions where the interpretation is the same.

12. Ms Bohem submitted the Northern Territory legislation differed because of the inclusion of the words “at any time before the making of a charge” at the end of s61(2). Section 61 Summary Offences Act (NT) reads as follows:

> “(1) In this section –
>
> "personal property" includes money in cash or cheque form, or deposited in an ADI account or other account;
>
> "premises" includes a structure, building, vehicle, vessel, aircraft, hovercraft, land or place.
>
> (2) A person who –
>
> (a) has in that person's custody any personal property;
>
> (b) has in the custody of another person any personal property;
>
> (c) has in or on any premises any personal property; or
>
> (d) gives any personal property to a person who is not lawfully entitled to it,
>
> being personal property which, at any time before the making of a charge for an offence against this section in respect of the personal property, is reasonably suspected of having been stolen or otherwise unlawfully obtained, is guilty of an offence.
>
> Penalty: $2,000 or imprisonment for 12 months.
>
> (3) It is a defence to a charge for an offence against subsection (2) if the defendant gives to the court a satisfactory account –
>
> (a) as to how the defendant obtained the personal property referred to in the charge; and
>
> (b) of the custody of the personal property by the defendant after it was obtained by him or her for each period during which the defendant had custody of the personal property.

13. In regard to the words “at any time before the making of a charge”, the Northern Territory section, (possibly along with the comparable South Australian section) appears to be unique. I have been unable to find precisely when those words were first included in the Northern Territory legislation but under the *Summary Offences Act*, they were obviously part of the section when the Court of Appeal (NT) dealt with a different aspect of

"goods reasonably suspected of being stolen" in *Eupene v Hales* [2002] NTCA 167, (14 December 2000). They appear to have been part of the *Summary Offence Act (NT)* throughout its history and were included in its legislative predecessor the *Police and Police Offences Ordinance* (1923-1960), at least at the time of the 1960 reprint when the section was in quite a different format to its present form. I note those words also appear in the 1932 (No. 19 of 1932) version of the offence as…… "Any person having in his possession or conveying in any manner any personal property whatsoever which, in the opinion of the Special Magistrate or the Justices before whom he is charged, *was at any time prior to the making of that charge* reasonably suspected of having been stolen……." The phrase appears in a slightly different format in the *1923 Police and Police Offences Ordinance* (No. 20 of 1923), that provides it is: "proved to be or *to have been* in the possession of the person charged, whether in a building or otherwise, and whether the possession *had been parted with by him before being brought before the Special Magistrate or Justices or not".* The South Australian legislation (that prior to 1911 applied in the Northern Territory) appears to have a similar, but not identical theme: (see s71 *Police Act* 1916 (SA) and s41 *Summary Offences Act* (SA)). Section 41(1) of the current *Summary Offences Act* (SA) reads :

> "A person who has possession of personal property which, *either at the time of possession or at any subsequent time before the making of a complaint* under this section in respect of the possession, is reasonably suspected of having been stolen……" (emphasis added).

14. Although initially attracted to the argument advanced by Ms Coroneo, for all the reasons that make good legal sense, namely that "possession" itself connotes an immediacy in the circumstances; that this is a provision that must be construed strictly as it is capable of being open to abuse (as is evident in the various historical accounts of its use given in the reported judgements) and finally, it reverses the onus of proof, requiring proof on the balance of probabilities of a "satisfactory account" being given. This last

point is potentially a problem in the circumstances mentioned by Heerey J in *Kasprzyck* (cited above). Ms Coroneo submitted that a natural reading of the section supports an interpretation that the goods must be in the custody of the defendant at the time of apprehension or charge. Naturally, I agree that if there is any ambiguity it should be resolved in favour of the defendant. The phrase "at anytime before the making of a charge" must, however *have some work to do*, beyond that the suspicion, (which attaches to the goods, not the person), is what is being referred to by the words "at any time before the making of a charge….". What would be the point of the legislation providing for suspicion about the goods at any time and at the same time suggest that anyone possessing those goods cannot be found guilty of the charge unless police catch them "red handed". In short, the inclusion of that phrase in the Northern Territory legislation distinguishes it from the approach taken in other legislation in other jurisdictions.

15. Although the Court of Appeal in *Eupene v Hales* (cited above) was not dealing with this point, by implication, the Court of Appeal must have, with respect, approached that particular issue from the point of view that custody of the goods can occur, as a matter of law to satisfy the section, prior to the apprehension. In *Eupene v Hales* the Appellant was found with the suspect pearls in his possession in his house. He gave police an explanation that the pearls were found by him on the beach. His Honour Justice Angel took the view that the Appellant may have had a defence in that it was the Appellant's state of mind at the time he came into possession of the pearls that was crucial, not his subsequent decision to keep them. His Honour said that the innocent account given by the Appellant may have afforded him a defence: (para [17]). His Honour relied on the South Australian case of *Ferrell v Burrows* [1973] 4 SASR 416 for that proposition. The relevance of the reasoning in both *Eupene* and *Ferrell v Burrows* to the argument advanced before the Court in this matter is that if the Defendant's interpretation was correct, then the Court in *Eupene*, with respect, would

never have had to examine the mind of the Appellant at the time of coming into possession of the goods – it would have been irrelevant. That was not the point in time he was found "in custody". On the defendant's argument, it is the coincidence of the custody and apprehension or charge that is crucial, not the earlier possession. (It should be noted that s61 *Summary Offences Act* was amended after *Eupene* to add subsection (3): See *Legislative Assembly, Hansard*, 6 June 2001).

16. Although Ms Bohem mentioned *Edwards v Trenerry*, NT(SC), 17 November 1997, Martin CJ (unreported) during argument, the Court had no access to the decision while sitting in Nhulunbuy. Now that I have read that decision I note Martin CJ, was dealing with an appeal against conviction for an offence of possession of goods suspected of being stolen. Although the same point is not expressly argued in that case, the facts indicate the goods in question (a firearm) were in the possession of the appellant well before he was charged. He handed the firearm into police on 9 October 1996 as part of the firearms buyback scheme but was not spoken to by police until 11 October 1996 and again on 17 February 1997 and was presumably charged some time after that. In His Honour's discussion of what had be proved, he states (at 2327): "It is not necessary under Territory law for the suspicion to be entertained whilst the defendant has the property in his custody. It can arise at any time prior to the charge being made." Although this does not completely answer the question, it tends to indicate a different approach. Despite authorities in other jurisdictions, this approach is obviously binding on me.

17. Ms Coroneo also raised the point that as the cell key was government property, it could not be described as "personal property" within the meaning of the *Summary Offences Act*. I reject that argument. In my view the term "personal property" is used to distinguish it from other forms of property that may not be capable of being stolen, or at least traditionally were not capable of being the subject of a "larceny" charge at common law.

The use of “personal property” does not signify an acceptance of the “private/public” dichotomy, but rather, if anything, distinguishes it from “real” property and represents a traditional distinction between “personal” and “real” property.

18. I have found there is a case to answer. Prima facie there is a reasonable suspicion concerning the key. Prima facie although there are varying descriptions of the key the Defendant had in his possession, the fact that he possessed it with the Hoffman Tool, (notwithstanding it was described, rather ingeniously, I thought as a “bottle opener” or “stubby opener”), leads me to conclude there is a case to answer.

Dated this day of 2006.

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STIPENDIARY MAGISTRATE