CITATION:	*Police v Nitschke* [2009] NTMC 055
PARTIES:	SOPHIE WILLIAMS
	v
	MICHAEL NITSCHKE
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Criminal
FILE NO(s):	20831929
DELIVERED ON:	2 November 2009 (by mail)
DELIVERED AT:	Darwin
HEARING DATE(s):	14 October 2009
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW –Home Detention Order – Breach – Power to award costs

Justices Act ss 4, 9, 77; *Sentencing Act* s 48(2), Prisons (Correctional Services)(Home Detention Orders) Regulations *Reg* 4(2)(b)

REPRESENTATION:

Counsel:

Informant:	Ms McMaster
Defendant:	Mr Johnson

Solicitors:

Informant:	ODPP
Defendant:	Tony Crane

Judgment category classification:	A
Judgment ID number:	[2009] NTMC 055
Number of paragraphs:	27

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

No. 20831929

[2009] NTMC 055

BETWEEN:

SOPHIE WILLIAMS
Informant

AND:

MICHAEL NITSCHKE
Defendant

REASONS FOR DECISION

(Delivered 2 November 2009)

Ms Sue Oliver SM:

1. On 2 June 2009 an officer of Northern Territory Correctional Services laid an information pursuant to section 48(2) of the *Sentencing Act* alleging that Michael Allan Nitschke had breached a home detention order. On 7 April 2009 Mr Nitschke (the offender) had been sentenced by his Honour Mr Cavanagh SM to 2 months imprisonment on a charge of driving a motor vehicle while disqualified. That sentence was suspended on a home detention order of 2 months. The information laid correctly identified the sentence but incorrectly identified me, rather than Mr Cavanagh, as being the sentencing magistrate on that occasion. This defect was not in my view one that would cause the information to be a nullity in respect of the breach allegation.

2. The breach allegation was that the offender had consumed a drug (other than as prescribed by a medical practitioner) contrary to section 48(1)(g) of the *Sentencing Act* and Section 4(2)(b) (sic) of the Prisons (Correctional

Services)(Home Detention Orders) Regulations. The allegation arose from the offender returning a positive result for cannibinoids from a urinalysis test on 6 May 2009. The breach was denied by the offender and the matter came before me for hearing.

3. The parties agreed the following facts pursuant to s379 of the Criminal Code: The contents of the précis and attachments (being three pathology test results returned by the offender) together with an admission by the offender of cannibinoids in his system as evidenced by the test result on 6 May 2009. The tests on 7 April 2009 and 15 May 2009 were both negative for any illicit substances. The offender gave evidence and called his son, who had been staying with him at the time of the alleged breach, as a witness. They gave consistent evidence, supported by an analysis of the substance in question, of their belief that the positive result on urinalysis must have come from a cup of tea that included a small amount of the herb Mugwort, given to the offender by his son on the evening prior to the analysis.

4. The Mugwort had been purchased the year before by the offender's son from the Palmerston markets. When the offender became suspicious that this may have been the substance that had produced the positive result, he gave half of the remaining amount (which was still in a drawer in his son's bedroom) to his solicitor to arrange for analysis. The substance tested positive for cannibinoids. A letter from Western Diagnostic Pathology confirming that analysis was tendered by consent. The remaining Mugwort was tendered. It was in commercial style packaging labelled 'Magical Mystery Tour' 'Mugwort Herb' 'Dreaming Herb'. Its suggested use involves adding one teaspoon to a cup for 'relaxation, dreams, cramps'. The evidence of the offender and his son was that the son had made cups of Lipton's tea, adding some of the herbs together with milk and sugar and both had consumed it the night before the positive test.

5. The evidence of the defendant was that he had consumed the substance containing cannibinoids without knowledge that it contained that drug. I found on the evidence before me that the breach was not proved as in my view regulation 4(2)(b) of the Prisons (Correctional Services)(Home Detention Orders) Regulations requires in relation to the element that the offender has "consum[ed] alcohol or a drug" that he either intended or knew that what he had consumed was a non prescribed drug. I was not satisfied on the evidence that this was the case. I therefore dismissed the information.

6. The offender has applied for costs in relation to the contested hearing. I reserved my decision in relation to costs in order to give consideration to the question of whether the Court of Summary Jurisdiction has power to award costs following a contested hearing of a breach of a home detention order.

7. I now provide these reasons.

Home detention orders

8. Where a court sentences an offender to a term of imprisonment, that sentence may be suspended on the offender entering into a home detention order *Sentencing Act* s44. Section 48 of the Act provides that where a Justice is satisfied, on reasonable grounds by an information laid before him or her, that an offender has breached the order the Justice may either issue a summons directing the offender to appear at a court or may issue a warrant for the arrest of the offender where the information is on oath and the Justice is satisfied that proceedings against the offender by summons might not be effective. In this case the offender was summonsed to appear before the Court of Summary Jurisdiction.

9. The *Sentencing Act* is not consistent in its provision for the originating process for a breach of a sentencing order. Allegations of breach of a release on bond or of a suspended sentence order are to be made by way of application to the Court on the prescribed form (ss15(1) and 43(1)). An

allegation of breach of a community work order is commenced either by summons or warrant where a Justice is satisfied that an offender is in breach of a community work order. No mention is made as to how the Justice is to be so satisfied. By contrast, s48(2) provides as set out above for the breach allegations to be laid on information. I have not been able to discern any reason why a breach of a home detention order is required to be laid on information, which process is ordinarily used for the bringing of charges for indictable offences before the Court of Summary Jurisdiction s101 *Justices Act*.

10. Section 48(5) of the *Sentencing Act* provides that for the purposes of the application of sections 137 and 138 of the *Police Administration Act*, a breach of a home detention order shall be taken to be an offence. Those provisions deal with timeliness for the bringing of a person before a justice or a court after being taken into custody unless they have been granted bail under the *Bail Act* or otherwise released from custody. The same provision is applied to suspended sentences (s43(4AB) and to bonds (s15(3AB)) but not to persons taken into custody for an alleged breach of a community work order.

11. *The Justices Act* creates and provides for the jurisdiction of the Courts of Summary Jurisdiction to hear all charges laid on complaint and, in specified circumstances, charges for 'minor indictable offences' laid on information: Parts IV and V respectively of the *Justices Act*.

12. A distinction between charges of an offence laid on information and an allegation of a breach of a home detention order laid on information is that charges laid on information may proceed to a preliminary examination and committal for trial or sentence on indictment before the Supreme Court or in specified circumstances only may be determined by a Court of Summary jurisdiction either by trial or sentence *Ellis v Balchin* [2009] NTSC17 at [58]. By contrast, the resolution of an allegation of breach of a home

detention order, though laid on information, must necessarily be resolved by the Court of Summary Jurisdiction because it involves a sentencing disposition of that court. The fact of the allegation being laid on information does not enliven Part V of the Act.

The power to order costs

13. The power of a Court of Summary Jurisdiction to award costs is contained in section 77 of the *Justices Act*

> (1) Subject to subsection (2) and section 77A, where the Court finds a defendant not guilty of any offence on a complaint or a complaint is withdrawn, it may order the complainant to pay to the defendant such costs as it thinks fit.

Subsection (2) refers to circumstances which relate to the conduct of a defendant where the court shall not make a cost order. None are relevant for the purpose of this decision.

14. The prosecution contends that power to make a costs order does not exist because s77(1) is confined to circumstances "where the Court finds a defendant *not guilty of any offence on a complaint* or a complaint is withdrawn". It is said that because a breach of a home detention order is not an offence, and not laid on complaint, the power to award costs does not exist.

15. A "complaint" is defined in s4 of the Act to include "a charge of minor indictable offence (sic), if, and when, a Court of Summary Jurisdiction proceeds to dispose of the charge summarily". Clearly then, when a Court of Summary Jurisdiction proceeds to hear and determine a charge of an indictable offence, pursuant to the jurisdiction conferred in Part V, Division 2, it has power to make a costs order under section 77.

16. Section 9(2) of the Act provides

> "When in any other Ordinance or any Act the term ***information*** is used in relation to a simple offence or to any other matter determinable by a Justice or Justices in a summary way that term shall, for the purposes of this Act, be deemed to refer to and to mean a complaint under this Act".

An information laid with respect to a breach of a home detention order is therefore to be deemed to be a complaint under the *Justices Act*.

17. In *Ellis v Balchin* [2009] NTSC17 Martin (BR) CJ observed the statutory scheme for the charging of offences and their determination is primarily found in a combination of the *Justices Act* and the Criminal Code, the Code specifying that offences fall into three kinds "crimes, simple offences and regulatory offences." at [42] and [43]. Section 49(a) of the *Justices Act* permits a complaint to be laid where any person "has committed or is suspected to have committed any simple offence".

18. A "simple offence" is defined in section 4 to mean an

> "offence *or act for which a person is liable by law, upon a finding of guilt before a Justice or Justices, to be imprisoned or fined or both or to be otherwise punished*; but does not include an indictable offence which can only be heard and determined in a summary way as a minor indictable offence".

An information alleging a breach of a home detention order does not fall into the exclusion in that definition because it is not an "indictable offence".

19. Returning then to the costs order provision (s77) it follows that the reference to the court "find[ing] a defendant not guilty of any offence on a complaint" is a reference to the court determining either a 'simple offence" or a "minor indictable offence". Consequently, the reference in s77 to a

finding of not guilty of any offence includes an “act for which a person is liable by law, upon a finding of guilt before a Justice or Justices, to be imprisoned or fined or both or to be otherwise punished” which is part of the definition of a “simple offence”.

20. The *Sentencing Act* requires that an allegation of breach of a home detention order be laid on information. S9(2) of the *Justices Act* deems such an information to be a complaint. Where the court is satisfied that an offender has breached a home detention order the court may revoke the order and order that the offender serve the term of imprisonment that had been suspended on home detention.[1] A breach of a home detention order is in my view an “act for which a person is liable by law, upon a finding of guilt before a Justice or Justices, to be imprisoned or fined or both or to be otherwise punished” and therefore falls within the definition of “simple offence” under the *Justices Act*.

21. I note that the *Sentencing Act* does not refer to “a finding of guilt” with respect to a breach of a home detention order, rather it speaks of where the “court is satisfied that an offender has breached a home detention order”. In my view the expression “finding of guilt” should be given broad meaning to include findings (satisfaction) that an offender has breached a home detention order. Such finding requires the court to both determine the proof of particular facts together with the application of the relevant law to those facts. To use the words of McHugh J in *Eastman v DPP(ACT)* (2003) 198 ALR 1 at 7 “it is synonymous with the legal quality of the acts, omissions and state of mind that together constitute a particular criminal offence”.

22. It follows that in my view the power to award costs may be exercised in relation to a hearing of a breach of a home detention order.

---

[1] Where the breach is constituted by offending during the term of the order and the further offence is not a regulatory offence or is not punishable by imprisonment, the court has no discretion and is required to order the offender to serve the period of imprisonment previously suspended.

Should a costs order be made?

23. A costs order is discretionary although in ordinary circumstances an order for costs should made in favour of a defendant against whom a prosecution has failed *Latoudis v Casey* (1990) 170 CLR 534 *per* Mason CJ, and Toohey J. The exercise of the discretion is however subject to an examination of the circumstances, primarily in relation to a defendant's conduct that might cause a costs order to be declined. Some of these circumstances are set out in s77(2) and exclude the making of a costs order. As I have said those matters are not relevant in this case.

24. A costs order in criminal proceedings is not made to punish the unsuccessful party. The exercise of the discretion to award costs does not turn upon the question of whether the prosecution was properly brought or not. A costs order is made in order to compensate the successful party for the expense that he or she has incurred in contesting the charge or charges. Ordinarily then a defendant should be awarded costs unless there has been something in their conduct in relation to the proceedings that would make it unjust or unreasonable for costs to be awarded *Latoudis v Casey* (1990) 170 CLR 534.

25. There can be no criticism of the conduct of either party to these proceedings. The breach allegation was properly brought and it was appropriate for consideration to be given by a court as to the fault element required in order to constitute a breach of regulation 4(2)(b) of the Prisons (Correctional Services)(Home Detention Orders) Regulations. Both parties conducted the hearing in an expeditious manner by making admissions as to particular facts and to the chain of evidence with respect pathology tests.

26. The defendant has been put to the costs of defending the alleged breach of his home detention order and in my view is entitled in this case to an order to compensate him for that expense. Regulation 14 of the Justices Regulations however places a limit on the amount that can be awarded which is, for the first day of a hearing, including preparation of the case for

the hearing and counsel fee the sum of $710 unless the court is of the opinion that the circumstances of the case or the legal issues involved in the case are of an exceptional nature. Although a question of law was involved in the matter, there was nothing exceptional about it that, in my view, would require taking a costs order out of the ordinary monetary limit.

27. The informant is to pay the defendant costs in amount of $710.00.

Dated this 2nd day of November 2009.

____

Sue Oliver
STIPENDIARY MAGISTRATE