

CITATION: *Police v Hazelbane [2010] NTMC 009*

PARTIES: BRETT JUSTIN VERITY

v

SHANE GABRIEL HAZELBANE

TITLE OF COURT: Maningrida Court of Summary Jurisdiction

JURISDICTION: Criminal Code (NT); Justices Act (NT);  
Aboriginal Land Act (NT)

FILE NO(s): 20922486

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JUDGMENT OF: Jenny Blokland CM

**CATCHWORDS:**

CRIMINAL RESPONSIBILITY – OFFENCE OF ENTRY ONTO ABORIGINAL  
LAND WITHOUT A PERMIT

*ss1,31 Criminal Code (NT)*

*s4 Aboriginal Land Act (NT)*

*Pregelj v Manison (1987) FLR 346*

*He Kaw Teh v The Queen (1985) 157 CLR 523*

*Charlie v The Queen (1998) 7 NTLR 152*

*Marrday (1998) 7 NTLR 192*

*DPP (NT) v WJI (2004) 219 CLR 43*

**REPRESENTATION:**

*Counsel:*

Complainant: Mr Adams

Defendant: Mr Woodcock

*Solicitors:*

Complainant:

Summary Prosecutions

Defendant:

Woodcock Solicitors

Judgment category classification:

B

Judgment ID number:

[2010] NTMC 009

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15

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

No. 20922486

BETWEEN:

**BRETT JUSTIN VERITY**  
Complainant

AND:

**SHANE GABRIEL HAZELBANE**  
Defendant

REASONS FOR RULING

(Delivered 20 January 2010)

JENNY BLOKLAND CM:

**Introduction**

1. The Defendant pleaded guilty to one count on information that he possessed cannabis contrary to section 9(1) and (2)f and (ii) *Misuse of Drugs Act* (NT). He is yet to be sentenced on that matter. Arising at the same time as that offence was an allegation that on 6 July 2009 near Maningrida in the Northern Territory of Australia, he entered onto Aboriginal land without having been issued a permit to do so: (contrary to s 4 *Aboriginal Land Act* (NT)). Section 4 of the *Aboriginal Land Act* (NT) provides as follows:

**4. Entry onto, &c., Aboriginal land or road**

(1) Subject to this Part and to any provision to the contrary in a law of the Territory, a person shall not enter onto or remain on Aboriginal land or use a road unless he has been issued with a permit to do so in accordance with this Part.

Penalty: \$1,000.

(1A) Nothing in subsection (1) shall prevent a person who is entitled or permitted under this Part to enter onto or remain on Aboriginal land from using a road that is bordered by that Aboriginal land.

(2) An Aboriginal who is entitled by Aboriginal tradition to enter onto an area of Aboriginal land may enter onto that area of Aboriginal land.

(3) An Aboriginal who is entitled by Aboriginal tradition to remain on an area of Aboriginal land may remain on that area of Aboriginal land.

### **The Relevance of s31 *Criminal Code* (NT)**

2. It is alleged by the prosecution that when the Defendant travelled on 6 July 2009 to an area in West Arnhem he was not the holder of a permit as required by the section. A significant issue has arisen about whether the interaction between s 31 *Criminal Code* (NT) and s 4 of the *Aboriginal Land Act* (NT) means the prosecution must prove that the Defendant intentionally entered Aboriginal land without a permit, or foresaw he entered Aboriginal land without a permit in circumstances where he believed he did not need a permit by virtue of his own or his family's Aboriginal heritage. The Defendant did not argue a specific defence under s 4(2) and (3) *Aboriginal Land Act* (NT) but rather puts the case as so many s 31 cases have done in the past, in this instance, if he thought he was entitled to enter Aboriginal land then he thought he didn't need a permit; consequentially it is argued he could not have intended or foreseen the *act, omission* or *event* of entering or remaining on Aboriginal land without a permit.
3. As has been acknowledged in a number of the cases concerning s 31 *Criminal Code* (NT), "Act" is not limited to the "bodily movement" indeed, in s 1 *Criminal Code* (NT) it is defined as "in relation to an accused person, means the deed alleged to have been done by him; it is not limited to bodily movement and it includes the deed of another caused, induced or adopted by

him or done pursuant to a common intention”; “event” means the result of an act or omission.

4. Section 4 *Aboriginal Land Act* (NT) is not defined as a crime, nor as a regulatory offence but is rather a simple offence. It is not a matter that is excluded from the operation of s 31 *Criminal Code* (NT). I am not sure the Defendant’s actions can be said to be excused by s 31. So far as I can see, he is simply saying he didn’t need a permit based on his belief that as an Aboriginal person with links to other parts of Arnhemland it was not required. He fully intended to go onto Aboriginal land, although not necessarily consciously without a permit, he didn’t have a permit because he didn’t believe he needed one. I am not convinced that this is the same as *not intending or foreseeing* going onto Aboriginal land without a permit, it is rather expressing his reason for being on Aboriginal land without a permit.
5. Section 31 *Criminal Code* (NT) has thrown up some peculiar problems, particularly in the area of simple offences and sexual offences. As will be recalled, it arose at a fundamental level in *Pregelj v Manison* (1987) FLR 346 where s 31 was successfully argued as an *excuse* for offensive behaviour in circumstances where the alleged offending behaviour was not intended to be seen by others nor could it have been foreseen by the Defendants that they would be viewed. The reasoning of *He Kaw Teh* (1985) 157 CLR 523 was invoked to assimilate s 31 with *mens rea* as required in the common law. Generally s 31 does not apply to offences that have their own defined mental element: for example for the charge of murder as is evident in *Charlie v The Queen* (1998) 7 NTLR 152; neither is it required in the proof of aggravating factors relevant to aggravated assault: see eg. *Mardday* (1998) 7 NTLR 192. It was confirmed in *DPP (NT) v WJI* (2004) 219 CLR 43 by the High Court that s 31 applies to the element of consent in sexual assault cases in a similar manner to traditional common law cases although in contradistinction to other Australian Code jurisdictions.

6. The approach of those cases, that is, isolating the act, omission or event or all of them and considering whether the gravamen of the charge has been intended or foreseen, does not sit readily with the circumstances arising here. This will be discussed further.

### **Summary of the Evidence**

7. The evidence in this case was brief and was heard in the December 2009 Maningrida CSJ sittings. The prosecution called Ms Joanne Christopherson, the Northern Land Council's Regional Co-ordinator for West Arnhem Land. Her duties include looking after the permit records in the West Arnhem region. She was particularly concerned with the Jai-Bena outstation – it is common ground the Defendant was apprehended near Jai-Bena. Ms Christopherson said the Northern Land Council keeps a register of permits and other relevant material. She searched the records for Shane Hazelbane and saw that there was no application for a permit. She also searched for a permit that may have attached to the vehicle, she found no permit relevant to the vehicle. She said that to the best of her knowledge on 6 July 2009 there was nothing in her system relating to a permit for the Defendant to travel in West Arnhem Land, in particular to the area near the outstation.
8. Ms Christopherson agreed traditional owners have permission to be present on Aboriginal land and relatives of traditional owners are in a similar situation. She said traditional owners are of course allowed to travel on Aboriginal land as well as their relatives. She said it may depend on whether there is a relationship on the paternal or maternal line but generally people at outstations such as Jai-Bena would contact traditional owners to obtain permits. She said she did not look at genealogies in particular but she did contact the Bawanunga Association by phone and contacted two old men who spoke for the country concerned and asked them to check for Shane Hazelbane. She said her information was that Mr Hazelbane

shouldn't have been there; that the traditional owners were never asked; that they knew nothing about anyone going there. She advanced this information to the Court without objection by defence counsel. In her view Mr Hazelbane did not have a permit nor did he have permission by virtue of Aboriginal tradition.

9. Officer Ray Steadman gave evidence about arresting both the Defendant and a Mr Thompson after the cannabis was found in the vehicle driven by them. The Defendant agreed he had no permit. Officer Steadman agreed that Mr Thompson was a dark skinned Aboriginal person. He was asked about another person "Maverick" but said he was not present at the time of arrest.
10. The Defendant gave evidence that he too is an Aboriginal person living in Darwin at Unit 4/278 Casuarina Drive. His evidence was he is a traditional owner through his grandfather and father in the Darwin/Daly area and has traditional links in Arnhem Land through his great grandmother Rhota Russell. He said Rhota Russell is from the Roper area. His evidence was he was invited by Andrew Thompson and "Maverick" to the Jai-Bena area. He said Maverick was from Maningrida and the outstation they were visiting was not far from Jai-Bena. He said they invited him and he did not believe he needed a permit nor did he have a permit.
11. In cross-examination he said that Andrew Thompson and Maverick had told him they were traditional owners. He confirmed his rights to Arnhem Land through Rhota Russell. He confirmed he had permission and was unlike a journalist who the prosecutor put to him was in trouble for going onto Aboriginal land without a permit. He appeared to accept that Maverick was a teenager although he said that Andrew Thompson was older than he was. He confirmed that he believed he didn't need a permit. He said Mr Thompson and Maverick rang for permission, that they had said they had permission and had invited him to go hunting on country. He agreed he made no efforts to have Mr Thompson and Maverick called to give evidence.

## **Discussion of the Issues**

12. I am not convinced that the Defendant is exculpated by virtue of s 31 *Criminal Code* (NT). I am aware of and am prepared to interpret the section generously, given the breadth of s 31, however the fact the Defendant believed he didn't need a permit does not mean he did not act intentionally or with foresight. His belief that he didn't need a permit which I might say was strongly put by him during the course of the hearing does not mean in this instance that he did not act without intention or foresight. His belief is the reason he went onto the Aboriginal land without a permit. In itself it does not negate intent or foresight.
13. In my view it is unlikely that honest and reasonable mistake applies as this is most likely mistake of law. I will not rule finally on the point as Defence have not made submissions on honest and reasonable mistake, relying solely on s 31. Further, I request submissions from counsel on whether *claim of right* is available in these circumstances. This was not raised at the hearing in Maningrida.
14. The matter is listed before me for mention on 20 January 2010 (by videolink). I will ascertain from counsel whether further dates are required for argument.
15. After the final mention of this matter, the published ruling has been corrected and re-published.

Dated this 1<sup>st</sup> day of March 2010

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**Jenny Blokland**  
CHIEF MAGISTRATE