

CITATION: *Police v KS* [2010] NTMC 020

PARTIES: JUSTENE DWYER

v

KS

TITLE OF COURT: Youth Justice Court

JURISDICTION: Criminal

FILE NO(s): 20940911

DELIVERED ON: 19 March 2010

DELIVERED AT: Darwin

HEARING DATE(s): 12 February 2010

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – Trespass – warning to stay off a place – averments
Trespass Act ss 4, 5, 8 and 12
Public Transport (Passenger Safety) Act 2008 ss 22, 26
Interpretation Act s 24
R v Hush ex parte Devaney [1932] 48 CLR 487
Gallacher v Cendak [1988] VR 731
Treviranus v Police [2005] NZHC 85

REPRESENTATION:

Counsel:

Complainant: Ms Ozolins
Defendant: Ms Harland

Solicitors:

Complainant: ODP
Defendant: NAAJA

Judgment category classification: A
Judgment ID number: [2010] NTMC 020
Number of paragraphs: 37

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20940911

[2010] NTMC 020

BETWEEN:

POLICE
Complainant

AND:

KS
Defendant

REASONS FOR DECISION

(Delivered 19 March 2010)

Ms Sue Oliver SM:

1. I have been asked to rule that there is no case to answer with respect to a charge against KS that on 8 November 2009, being a person who was warned on the 6th November 2009 under s 8 of the *Trespass Act* to stay off a place, namely Darwin Bus Interchange did trespass on the said place within one year after giving of that warning contrary to s 8(4) of the *Trespass Act*.
2. The charge contains averments in the following terms, that on 6 November 2009:
 - (i) Wayne Cottle acting under authority of a person in charge was an occupier of Darwin Bus Interchange in accordance with section 4, and
 - (ii) A warning to stay off was given to [KS] by Wayne Cottle acting under the authority of a person in charge in accordance with section 9.

3. Evidence has been given by Wayne Cottle, Maisie Newport and James Enguell, all of whom identified themselves as Transit Officers under the *Public Transport (Passenger Safety) Act 2008*.
4. Section 8 of the *Trespass Act* is in these terms:
 8. Trespass after warning to stay off
 - (1) Where a person is trespassing or has trespassed on any place, an occupier of that place may, at the time of the trespass or within a reasonable time afterwards, warn that person to stay off that place.
 - (2) Where an occupier of any place has reasonable cause to suspect that a person is likely to trespass on that place, the occupier may warn that person to stay off that place.
 - (3) Where a person is found guilty of an offence against this Act committed on or in respect of any place, the Court may warn that person to stay off that place.
 - (4) A person who, being a person who has been warned under this section to stay off any place, trespasses on that place within one year after the giving of the warning, commits an offence.
5. An offence against s 8 requires proof that a warning in accordance with s 9 was given by the occupier of the place. The warning may be given at the time of the trespass or within a reasonable time afterwards. Second, that at the time the warning was given, the person was trespassing, had trespassed or there was reasonable cause to suspect that the person was likely to trespass on that place. On the evidence the requirement of the form for a warning to stay off pursuant to s 9 has been satisfied as a written warning was handed to the youth.
6. It is submitted that the prosecution has both failed to establish that at the time of the giving of the warning that the youth was trespassing or had trespassed on the place and failed to establish the identity of the occupier, and therefore the authority of Mr Cottle to give KS a warning to stay off.

The Prosecution Evidence

7. Mr Cottle's evidence was that on 6 November while on duty he received information from a bus driver of juveniles marking a bus seat with graffiti. He went to the Casuarina Bus Interchange where he found "two kids" sitting on a step and asked them whether they were the ones who had put graffiti on seats on the bus. KS said "we did". He then issued KS with a written 12 month notice. KS refused to sign it but took the notice.

8. The notice is a warning to stay off the following places:

The Darwin Bus Interchange, The Casuarina Bus Interchange, The Palmerston Bus Interchange and all buses operated by Darwin Bus Service (ABN 21 870 613 078) or Buslink P/L (ABN 63 094 672 799) identified with the "DarwinBus" logo or the "Buslink" logo.

9. On 8 November 2009, Mr Enguell and Mr Newport were Transit Officers on duty. At around 4.30pm they pulled into the Darwin Bus Interchange where they saw KS and two others sitting on a bench. I observe that the evidence of both witnesses is that one of the young people (not KS), whom he knew by name, was inhaling deodorant spray. Although this appears to me to be an incident requiring mandatory reporting to police or the CEO under the *Care and Protection of Children Act*, it is not evident that either Officer took this action.

10. KS was told that she was trespassing and that they would proceed against her.

Was the warning to stay off given by the occupier of that place?

11. The prosecution, in written submissions, asserts that "The Casuarina Bus Interchange, the Darwin Bus Interchange and the Palmerston Bus Interchange are premises occupied by the Northern Territory Government." That is not a matter for submission but one that calls for proof by evidence. The defence are prepared to concede, although there is no direct evidence of

this, that the Department of Lands and Planning is responsible for all bus infrastructure such as bus interchanges, bus stops and shelters. The defence does not however concede that these are premises occupied by the Northern Territory Government.

12. The *Trespass Act* contains four separate trespass offences. Trespass on premises (s 5), Trespass on prohibited land (s 6), Trespass after direction to leave a place (s 7) and Trespass after a warning to stay off a place. Section 5 makes it an offence to trespass on **premises** whereas s 7 and 8 create offence of trespassing on a **place** after either a direction to leave or a warning to stay off that place. Although “place” is defined in s 4 to include premises (which in turn is defined) and land, the fact that the offences deal respectively with premises and a place would suggest that there is intended to be some differentiation between them.
13. The issue here is occupation of the place that the youth has been warned to “stay off”. Section 4 defines "occupier", in relation to a place, to mean:
 - (a) where the place is Crown land or land occupied by the Territory or the Commonwealth or a statutory corporation – a person in charge of the land; and
 - (b) where the place is other than Crown land or land occupied by the Territory or the Commonwealth or a statutory corporation – a person in lawful occupation of the place,and includes an employee or other person acting under the authority of a person in charge under paragraph (a) or in lawful occupation under paragraph (b);
14. Proof of the identity of the occupier, and therefore “an employee or other person” who has authority to issue warnings to stay off is facilitated by s 12 of the Act. Section 12 allows for an averment in a complaint that a person is or was at the relevant time an occupier within the meaning of s 4. An averment of this matter is evidence of that fact. Dixon J (as he then was) in *R v Hush; ex parte Devaney* (1932) 48 CLR 487 at 507 observed that the

effect of such a provision does not place upon the defendant the onus of disproving the facts upon which his guilt depends but “while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus.”

15. In *Gallagher v Cendak* [1988] VR 731 at 740 Vincent J noted that the convenience for the prosecution in being able to aver a factual element of an offence rather than being required to call oral evidence, and thereby establishing *prima facie* proof of that element, needed to be balanced against the possibility of unfairness to a defendant that may arise out of that use. Otherwise, his Honour said, the potential arises for a *de facto* reversal of the onus of proof. In order to prevent that effect, it has been stated many times by numerous courts that averments must be drafted with care and precision otherwise they will not have any evidentiary effect.¹
16. In this matter, the complaint contains an averment that “Wayne Cottle acting under authority of a person in charge was an occupier of Darwin Bus Interchange (sic) in accordance with s 4”. In my view, that averment is not sufficiently clear and precise for the purpose of establishing *prima facie* evidence of the identity of the occupier so that the court might be satisfied that there is sufficient evidence to establish that the warning to stay off was given by the occupier of the premises as is required. The averment does not contain any statement of fact that the place in question is land occupied by the Territory. The averment is silent as to who is the “person in charge” and it is not possible then to ascertain whether Mr Cottle has been given authority by the person in charge. In my view, even if it is possible to aver that a person is acting under authority of a person in charge², unless the

¹ *Gallagher v Cendak* above at 738-739 and the authorities referred to therein.

² In *Cahill v M* [2010] NTMC 011 I expressed the view that such authority should be proved in the usual way.

identity of the person in charge is provided in the averment, it will not be sufficiently clear and precise so as to have the necessary evidentiary effect. A defendant is left without the ability to question proof of occupation of land or premises and consequent authority in relation to them when an averment does not contain either of those facts.

17. In any event the evidence of Mr Cottle is entirely inconsistent with the statement in the averment. He did not give evidence that he was authorised by the person in charge of the land (whoever or whatever entity that might be) but rather that he was authorised as a Transit Officer by the *Public Transport (Passenger Safety) Act 2008* to issue trespass notices. He referred to powers conferred by Part 2. If that is so then his authority would exist as a matter of law and therefore could not be the subject of an averment but also would not be in contest once evidence of his appointment as a Transit Officer was accepted.
18. However, no specific power to issue trespass notices could be identified by the prosecution as existing in the *Public Transport (Passenger Safety) Act 2008*. Rather it is submitted that I should consider the second reading speech of the Minister for Infrastructure and Transport on the debate of the Bill for that Act in which she stated in relation to powers to be given to “Transport (sic) Safety Officers”:

“What also became apparent was that the officers needed further powers to enable them to be more effective in dealing with problem passengers and other persons on the bus network. To that end, the Transport Safety Officers were given training and powers to be inspectors under the *Commercial Passenger (Road) Transport Act* along with the power to issue trespass notices under the *Trespass Act*.”

19. The *Interpretation Act* allows for the use of extrinsic material to interpret a provision of an Act in order to confirm the meaning conveyed by the text, or

to determine the meaning when there is ambiguity or obscurity in a provision or where taking the ordinary meaning of the words would be manifestly absurd or unreasonable when the object or purpose of the Act is considered. Here, there is no provision that is under consideration. In effect, I am being asked to determine that the Legislature intended to provide a power that does not appear in the Act. It is not even clear from the passage quoted that the Minister was referring to power being given by the proposed Bill or whether some other form of authorisation was believed to have been given. The second reading speech is not material that can be considered in determining Mr Cottle's authority.

20. The averment is not sufficiently precise and clear to establish the authority of Mr Cottle to issue a warning to stay off nor do I accept his evidence that he has legal authority as a Transit Officer to issue a notice of that kind. It does not appear in the legislation that creates the office of Transit Officer nor has he given any evidence of authorisation by any person in charge of the Darwin Bus Interchange.
21. The averment is not admissible and there being no other evidence of authority, I find that there is no case to answer. The charge is dismissed and KS discharged.

Other Issues

22. Although it is not necessary, given the finding I have made to consider the other issues that were raised in argument regarding the construction of s 8 of the *Trespass Act*, given that they raise issues of law that may be ongoing in relation to charges of this nature, I make the following observations.
23. A further element of the s 8 offence that requires proof is whether at the time of being handed the warning to stay off, the youth was trespassing, had trespassed or there was reasonable cause to suspect that she was likely to trespass on the place she was warned to stay off.

24. The warning given to KS was not directed at warning her to stay off **a place**. She was warned to stay off multiple places and multiple vehicles. At the time she was given the notice she was at the Casuarina Bus Interchange. Mr Cottle's evidence was that at that time she was "permitted to be at the bus stop". In view of that express evidence, she could not therefore be said to be trespassing on at the Casuarina Bus Interchange at that time.
25. However, the warning to stay off was also directed at her staying off "all buses operated by Darwin Bus Service (ABN 21 870 613 078) or Buslink P/L (ABN 63 094 672 799) identified with the "DarwinBus" logo or the "Buslink" logo." She had been travelling on a bus on the public transport network. She had come to the attention of the Transit Officer Mr Cottle because she had marked a seat on the bus with graffiti. The question is whether by that action she had become a trespasser on the bus (or perhaps buses of the public transport network).
26. The preamble to the *Public Transport (Passenger Safety) Act 2008* provides that it is "An Act to provide for the safety of passengers on public transport". Although no application of the Act is provided, it is clear from its terms that it is intended to apply to public buses and the conduct of persons using those buses. Part 3 sets rules of behaviour for passengers on buses or at bus stations. Amongst these rules is s 17 which provides:

17 Damage or interference

(1) A person must not, without proper authority, damage or interfere with:

(a) a bus; or

(b) a bus station; or

(c) a sign or equipment on or in a bus or at a bus station.

(2) In this section, damage includes the soiling of, or the painting or marking of graffiti on, a bus, bus station, sign or equipment.

27. On the prosecution evidence, KS was in breach of the rules of behaviour for travel on a public bus. Contravention of a rule of behaviour is an offence under s 22 of the Act. Transit Officers are empowered to give directions where there has been a breach of the rules of behaviour that include a direction to get off a bus and go away and keep away from a bus station. (s 26).
28. Unlike places to which persons may have access for a specific purpose or no purpose, for example the public area of a shopping centre (*Barker v R* (1983) 153 CLR 338) there is no general authority to enter or remain on a public bus. Entry and travel is authorised subject to the passenger complying with conditions, specifically the payment of the fare for travel and in the case of buses to which the *Public Transport (Passenger Safety) Act* 2008 applies, compliance with the rules of behaviour for travel on those buses. In my view, if a person commits a breach of those rules of behaviour his or her authority to be on the bus is revoked by that conduct. The conduct so exceeds the authority to use the bus service that the person becomes a trespasser and is able to be served with a trespass notice. Absent the express evidence of Mr Cottle that she was permitted to be at the “bus stop”, in my view the trespass was likely to have extended to the bus stop at the Casuarina Interchange where KS had alighted and was seated. There was no longer any authorised purpose for her being there as the implied authority for her to board and travel on buses was revoked by her conduct.
29. The view I have expressed is however conditioned on whether a warning to stay off under s 8 may be directed both at multiple places and also to multiple vehicles.
30. Section 8 of the *Trespass Act* is in terms that refer to a warning to stay off “**that** place” and to committing an offence where the person trespasses on **that** place within one year after the giving of the warning.

Is a bus a “place” for the purpose of s 8?

31. “Place” is defined in s 4 to include premises and land (including prohibited land and Crown land). “Premises” is given a broad definition as follows:
- "premises" means –
- (a) a building or structure whether permanent or temporary and whether fixed or capable of being moved;
 - (b) a dwelling-place;
 - (c) any part of a yard, garden or area (whether enclosed or not); or
 - (d) a vehicle (including a caravan), vessel, aircraft or hovercraft;
32. A warning to stay off a vehicle such as a bus is capable of coming within the definition of “premises” and on the face of it able to constitute a “place” for the purpose of s 8. Likewise, a bus stop or bus station might be capable of being a “structure” or might be an “area” as included in the meaning of premises. They may well be identified as “land” and therefore meet the definition of “place”.
33. As mentioned in [12] above, the *Trespass Act* creates four separate trespass offences. The offences distinguish between offences relating to places (s 7 and 8) and prohibited land (s 6) and premises (s 5). It is somewhat easier to see how the inclusion of vehicles, vessels, aircraft or hovercraft operate as part of the definition of “premises” for the purpose of the s 5 offence than it is for the s 8 offence. There is no general authority to board or be on the specified forms of transport unless the person has purchased a ticket for that purpose or otherwise has express permission from the owner or operator. Without that contractual licence the person is, without more, a trespasser who may be prosecuted for the section 5 offence.
34. Although the inclusion of vehicles as part of the definition of premises may be seen to be more readily applicable to the s 5 offence, given the inclusive nature of the definition of “place” to include “premises” there seems no

reason why a warning to stay off a bus (“a vehicle”) cannot be given provided that the requirement that the person is trespassing, has trespassed or there is reasonable cause to suspect that the person was likely to trespass on that vehicle at the time the warning is given in accordance with s 8(1). The circumstances that I have mentioned above regarding breach of the rules for behaviour would in my view constitute a situation where that could occur.

35. Even so, one further issue arises. Section 8 refers to trespass after a warning to stay off a place. The provision refers in singular terms to “a place” and a consequent offence of trespassing on “that place”. The various meanings of premises are likewise provided only as singular references. Although s 24 of the *Interpretation Act* provides for references in the singular to include the plural and vice versa, it is not easy to see that it was intended for the *Trespass Act* to operate in this way, allow for the giving of a warning to stay off multiple places and/or multiple vehicles. I was referred to a decision of the High Court of New Zealand in *Treviranus v Police* [2005] NZHC 85, a case which concerned a person who had been warned to stay off all offices of what seems to be the New Zealand equivalent of Centrelink offices. Section 4(1) of the New Zealand legislation is in the same terms as s 8(1) of the *Trespass Act* (NT) (save that the New Zealand Act does not use gender neutral language). Goddard J did not give any consideration to the question of the validity of a multiple place notice which does not seem to have been an issue raised on the appeal. There is difficulty as accepting as persuasive authority a decision that did consider the question in passing. It may be that the court took no issue with the notice and accepted the validity of a multiple place warning or simply that no attention was given to the issue.
36. I appreciate that considerable difficulty would arise in relation to warnings to stay of buses in the public bus system if such warnings are limited in their terms to single places. However, legislation cannot be interpreted based on what is desirable in terms of public policy, rather it must be interpreted

according to its terms unless that interpretation would defeat the object and purpose of the legislation or lead to an absurd result.

37. It is not necessary for me to make a finding in relation to this issue in the present matter. I consider however that it was appropriate to highlight the issue as it is one that may arise in the future and may need to be considered by the relevant authority.

Dated this 19th day of March 2010.

Sue Oliver
STIPENDIARY MAGISTRATE