

CITATION: O'Neill v Bangun [2022] NTLC021

PARTIES: JULIE ANN O'NEILL

v

DEREK BANGUN

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO: 22215811

DELIVERED: 20 OCTOBER 2022

HEARING DATES: 4, 5 and 6 OCTOBER 2022

DECISION OF: ACTING JUDGE NEILL

CATCHWORDS:

Consideration of "escape from lawful custody" within the meaning of section 112(1) of the Criminal Code Act and "in the lawful custody of the Commissioner" within the meaning of subsection 9(1)(a) of the Correctional Services Act; the relationship between section 112(1) "lawful custody" and the exercise of control by the custodian.

Criminal Code Act sections 1, 111 and 112

Correctional Services Act sections 4, 9, 10, 11 and 12

Rex v Keane N.Z.L.R. [1921] 581

R v Ryan and Walker [1966] V.R. 553

R v Scott [1967] V.R. 276

REPRESENTATION:

Counsel:

Prosecution: Ms R. Everitt

Defence: Ms C. White

Solicitors:

Prosecution: DPP

Defence: NTLAC

Judgment category classification: B

Judgment ID Number: [2022] NTLC 021

Number of paragraphs: 40

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22215811

BETWEEN:

JULIE ANN O'NEILL

AND:

DEREK BANGUN

REASONS FOR DECISION

(Delivered 19 October 2022)

ACTING JUDGE JOHN NEILL

Introduction

1. Derek Bangun ("the Defendant") is a 19 year-old man who is currently an inmate at Darwin Correctional Centre at Holtze ("the Centre"). It is common ground that as at 22 May 2022 he was a prisoner in lawful custody following his conviction for an offence. He has subsequently been charged that he has committed a further offence, namely:

"On the 22nd May 2022 at Darwin in the Northern Territory of Australia

1. *being a prisoner in lawful custody following conviction, escaped from such custody:*

Contrary to section 112(1)(a) of the Criminal Code".

2. Section 112(1) of the *Criminal Code Act* relevantly provides as follows:

"112 Escape from lawful custody

(1) Any person who:

(a) is a prisoner in lawful custody following his arrest or conviction for an offence;

(aa) and (b) – (not relevant)

And who escapes from such custody, confinement or detention, is guilty of an offence."

3. The Defendant is charged only that he escaped from lawful custody. There is no charge of attempting to escape, or of being at any time in the course of escaping, from lawful custody.
4. The Defendant has defended this charge. The matter came before me for hearing on 4 October 2022 and submissions continued for an hour or so on each of 5 and 6 October 2022. I reserved my Decision.

The Evidence

5. The hearing proceeded on the basis of agreed facts which were received as Exhibit P1. There was no live evidence. In the course of submissions I also received a copy of the NT Government Gazette published 8 October 2014 as Exhibit D2 and copies of four Natural Resource aerial maps published by the NT Department of Environment, Parks and Water Security, as Exhibit D3.
6. I set out the agreed facts in Exhibit P1, as follows:

***Police v Derek Bangun
22215811
Statement of Agreed Facts***

Background

1. *The defendant in this matter is Derek Bangun. At the time of the incident he was serving a term of imprisonment at Darwin Correctional Centre (the Centre). The defendant was housed in Sector 11, the Centre's Low Security Area.*
2. *A google map image depicted the Centre in marked Annexure A to these Facts.*
3. *The co-defendant, Dennis WATERS, was also a serving prisoner and housed in Sector 11.*
4. *Sector 11 is outside of the main complex of Centre. A Google map depicting Sector 11 is marked Annexure B to these Facts.*
5. *Prisoners in Sector 11 are advised that they are not permitted to leave the Sector at any time except when escorted by Correctional Officers or unsupervised when walking from Sector 11 to the main complex and back again for approved purposes. Sector 11 prisoners are required to register their arrival at the main complex (via an electronic badge register) within a prescribed window of time otherwise an alarm triggers. Additionally, prisoners who are undertaking work tasks are permitted to move around the Centre (including the area between the Sector 11 fence and the perimeter fence) at the direction of Correctional Officers who have general supervision of the work party. They are permitted to move freely within the Sector.*
6. *Sector 11 is surrounded by a 1.2m fence. The external perimeter fence is less than 200m from the Sector 11 perimeter fence. In between the Sector 11 fence and the external perimeter fence is bushland and a dirt road.*

7. The external perimeter fence is interrupted by the entrance road, which is monitored by CCTV cameras. There are numerous CCTV cameras around the Centre, including that at the entrance, which are all monitored by Correctional Officers in the Intelligence Office.

8. The external perimeter fence wraps around the road, finishing a short distance inside the entrance road.

22 May 2022

9. Shortly before 4:36pm on 22 May 2022, the defendant and co-defendant climbed over the Sector 11 fence.

10. The defendant and co-defendant were captured on CCTV climbing over the fence and running into the adjacent bushland, away from the entrance road. This is depicted in Annexure C to these Facts.

11. Other prisoners within Sector 11 informed the Correctional authorities that two prisoners had left Sector 11. Accordingly an emergency muster was called, which confirmed that the defendants were no longer within the Sector and their identities.

12. At approximately 4:45pm, Correctional Officers commenced vehicle patrols of the Centre and adjacent roads.

13. At around 5:15pm the defendants were sighted running from the bushland towards Sector 11. This is depicted in Annexure D to these Facts.

14. The defendants then jumped the fence back into Sector 11. This is depicted in Annexure E to these Facts.

15. Upon their return, the defendants were directed to the Sector 11 Office, where they searched and then transported to Sector 5 Charlie to be placed into separate confinement.

16. The defendants were asked if they left to collect contraband, to which WATERS advised that they were "getting smokes".

17. There is no evidence to indicate that the defendants were outside the external perimeter fence.

18. At no time did the defendants have permission to leave their assigned accommodation areas.

Annexure A

My description - Google aerial map of the buildings, roads and fences comprising all of Darwin Correctional Centre.

Annexure B

My description - Google aerial map of the buildings and nearby roads and fences comprising Sector 11 of Darwin Correctional Centre.

Annexure C

My description - still photo taken from CCTV of defendant and co-offender, one having climbed over from inside the Sector 11 1.2 metre fence and running away from it, and the other still within Sector 11 and running at the fence apparently intending to climb over it.

Annexure D

My description - still photo taken from CCTV of defendant and co-offender running from outside Sector 11 towards the Sector 11 fence with external perimeter fence to their rear.

Annexure E

My description - Still photo taken from CCTV of defendant and co-offender, one having climbed over the Sector 11 fence and now inside Sector 11, and the other in the act of jumping over that fence and re-entering Sector 11".

Correctional Services Act

7. The Northern Territory *Correctional Services Act* provides for the declaration of correctional services establishments and the management and control of those establishments and offenders, and related purposes.
8. Subsection 9(1)(a) of the *Correctional Services Act* provides that a prisoner "... is in the lawful custody of the Commissioner" if the prisoner "... is at a custodial correctional facility". Section 4 of this Act is the interpretation section, and "Commissioner" is defined to mean the "Commissioner of Correctional Services appointed under section 17(1)" of this Act.
9. "Custodial correctional facility" is defined in subsection 11(1)(a) of this Act as follows:

"11 Correctional Services Establishments

(1) *Each of the following is a correctional services establishment:*

(a) *a custodial correctional facility, which is one of the following:*

(i) *a correctional centre;*".

10. A "correctional centre" is defined in section 12 of this Act as follows:

"12 Correctional centres

(1) *The Minister may, by Gazette notice, declare a place to be a correctional centre.*

(2) *The Minister may assign the correctional centre a name".*

11. Exhibit D2 in this proceeding includes on its page 17 a Gazette notice dated 22 September 2014 in which the then Minister for Correctional Services declared Lot

6222 in the Hundred of Bagot to be a correctional centre, pursuant to section 12 of the *Correctional Services Act*.

12. The aerial maps in Exhibit D3 depict Lot 6222 in the Hundred of Bagot. They show a complex of buildings and surrounding fences all of which are located entirely within the boundaries of Lot 6222 in the Hundred of Bagot. It was common ground in the parties' submissions before me, and I was able to determine independently from a comparison of these aerial maps with Annexures A and B to Exhibit P1, that this complex of buildings is the Darwin Correctional Centre at Holtze, including the buildings comprising Sector 11.

Findings and Observations

13. On the basis of this foregoing evidentiary material I am able to make some findings of fact, and make some related observations.
14. I find that at all material times the Defendant was serving a term of imprisonment at Darwin Correctional Centre ("the Centre"), and that he was housed in Sector 11, the Centre's Low Security Area.
15. I find that at some material time the Defendant climbed over the fence which provides the boundary around Sector 11 and he was then outside Sector 11 for a period of time, in breach of the Centre's rules/requirements for prisoners accommodated in Sector 11.
16. There is no evidence before me that the Defendant was outside the Centre's external perimeter fence at any material time.
17. There is no evidence before me that the Defendant was outside the boundaries of Lot 6222 in the Hundred of Bagot at any material time.
18. I find that at all material times the Defendant was at a custodial correctional facility within the meaning of the *Correctional Services Act*.
19. I find accordingly that the Defendant at all material times was "*in the lawful custody of the Commissioner (of Correctional Services)*" within the meaning of subsection 9(1) of the *Correctional Services Act*.

Lawful Custody of the Commissioner

20. Counsel for the prosecution submitted that a prisoner could be "*in the lawful custody of the Commissioner (of Correctional Services)*" within the meaning of the *Correctional Services Act* but nonetheless not be in "*lawful custody*" within the meaning of section 112 of the *Criminal Code Act*.
21. The expressions "*custody*" and "*lawful custody*" appearing in section 112 of the *Criminal Code Act* are not defined in that Act. "*Custodial correctional facility*" is defined in Definition section 1 of the *Criminal Code Act*, where the definition in

subsection 11(1)(a) of the *Correctional Services Act* is adopted. However, that expression “custodial correctional facility” does not appear in section 112 of the *Criminal Code Act*. It does appear in subsection 111(b) of that Act but only in the context of an offence of conveying something into a “custodial correctional facility” for the purpose of facilitating the escape of a prisoner.

22. I am satisfied that the purpose and functions of the *Correctional Services Act* are related to administrative and management matters relevant to the control of prisons and prisoners. I am satisfied that the concept of “in the lawful custody of the Commissioner” as established within the *Correctional Services Act* has not been adopted into the *Criminal Code Act* and I conclude that concept is not identical with the concept of “lawful custody” as used in section 112 of the *Criminal Code Act*. Accordingly, my finding in paragraph 19. above does not conclude this matter.

Lawful Custody

23. In this proceeding the prosecution must establish beyond reasonable doubt that the Defendant had escaped from the Darwin Correctional Centre.

24. A distinction between the process of escaping and the concluded fact of having escaped is well-established – see for example *Rex v Keane* [1921] NZLR 581 (“Keane”) at page 583.4 to 583.9, and specifically at 583.5 where Sim A.C.J. delivering the judgment of the Court of Appeal said:

“If a prisoner has regained his liberty by getting away from the precincts of the prison, and also from the sight and control of all prison officials, he then has made his escape, and is no longer in lawful custody”.

25. In *R. v Ryan and Walker* [1966] V R 553 the Full Court of the Supreme Court of Victoria held that the offence of escaping from prison is not necessarily concluded once the prisoner has escaped from the confines of the prison. At page 556.2 the Court unanimously said:

“... the offence of escaping from gaol involves as one of its essential elements the regaining by the prisoner of his liberty; that this element is not satisfied the moment a prisoner sets foot outside the walls of his gaol if he is followed immediately by his gaolers in pursuit of him who have not lost sight of him and are hot on his heels”.

26. I was referred to the Decision of the Full Court of the Supreme Court of Victoria in *R. v Scott* [1967] V.R. 276 (“Scott”). In that Decision Smith J said the following:

“The definitions of the crime of escape (by a prisoner) that are to be found in the books indicate that the essence of the offence is the act of going at large out of an actual custody then existing. Thus in Stephen’s Digest of Criminal Law, 3rd Ed. (1883), art. 152, it is said that the crime is committed by a person “who, being lawfully in custody for a criminal offence, escapes from that custody”. In Russell on Crime, 11th ed., p.359, it is said that “an escape is when one who was arrested gains his liberty before he is delivered by due course of law”; and references then made by the author to the use of

the terms “escape”, “prison breaking” and “rescue” to describe different ways in which “the liberation... is effected”. In Archbold, Criminal Pleading, Evidence and Practice, 35th ed., s.3428 of the same work it is stated that to support a charge of negligently permitting an escape it must be proved that the prisoner was in “actual custody”.

“Furthermore, in Hawkins, Pleas of the Crown, vol. 2, Ch. 19, s. 14, it is stated that an indictment for escape against the jailer must expressly show that the prisoner was “actually in the defendant’s custody” and that he “went at large”. To the same effect is Chitty’s Criminal Law, 2nd ed., vol. 2, p. 172 (n). And this view is confirmed by the old precedents of indictments for escape by a prisoner, which normally allege, inter alia, that at a specified time and place the defendant whilst in the custody of a named person escaped and went at large from and out of that custody: compare Chitty, op. cit., vol. 2, pp.158, 161, 171, 191-2: Burn’s Justice of the Peace, 29th ed, (1845), vol. 2, pp. 346-9.

“It is clear also, I consider, that the element of going at large out of an actual custody, which is essential to constitute an escape, must be a conscious act done by the prisoner with the intention of liberating himself from that custody. This conclusion is supported by the general principles of the common law; for it is a “cardinal rule” that “the intent and the act must both concur to constitute the crime” - citations omitted”.

27. In the same Decision Barry J held at page 284 as follows:

“A successful escape from imprisonment under a judicial sentence may be effected by escaping from the precincts of the gaol or from the custody of the gaoler when outside the precincts of the gaol, for example when on a work party or when receiving hospital treatment”.

28. Further in the same decision, Gillard J held at page 291 as follows:

“In this context, it appears to me that the word “escape” must bear its common law meaning, namely, an unauthorised voluntary departure of the prisoner either from a place (the gaol) or a relationship of keeper and prisoner. So far as an escape from gaol is concerned, the physical act of departure from the place would be as it was at common law the most significant characteristic of the escape”.

29. These Decisions raise for consideration in the present matter an analysis of “the place (the gaol)” from which Mr Bangun is said to have escaped - what were the limits of that place by reference to the “precincts of the gaol” and can it be concluded that the Defendant departed from those limits and was at large and free “from the custody of the gaoler”, namely the Darwin Correctional Centre, as discussed in Scott? Can it be concluded that the Defendant had got away from “...the sight and control of all prison officials”, as discussed in Keane?

30. The Agreed Facts establish that a fence marks the boundary around Sector 11. This fence does not however create a significant barrier to departure from Sector 11. The fence is only 1.2 metres in height and the photographs being Annexures C, D and E to the Agreed Facts show that there is no razor wire or barbed wire or other

significant physical obstacle in the structure of this fence preventing anyone from stepping over it or climbing over it by placing their foot or feet on top of the upright bars.

31. About 200 metres outside the fence surrounding Sector 11 there is the perimeter fence which surrounds the entire Centre. The height of this perimeter fence is not provided in the Agreed Facts but its height can be assessed from the photograph in Annexure D, which shows that fence in the background and the Defendant and his co-offender by way of contrast in the foreground. In addition to this evidence in the Agreed Facts, I take judicial notice of the appearance and height of the perimeter fence around the Darwin Correctional Centre based on my having visited and inspected the Centre in my role as a Local Court Judge.
32. I find that the perimeter fence surrounding the Centre is between 3 and 4 metres in height.
33. I find that the perimeter fence surrounding the Centre presents a very formidable barrier which would be extremely difficult for any person to climb over without equipment such as a ladder or a rope.
34. The Agreed Facts establish that the Defendant once outside the Sector 11 fence could not pass beyond the perimeter fence surrounding the Centre except by walking around to the entrance road to the Centre where that road interrupts the perimeter fence, and then taking that road out of the area surrounded by the perimeter fence. The Agreed Facts establish that there are numerous CCTV cameras around the Centre, including at the entrance where the perimeter fence is interrupted by the entrance road, and that these CCTV cameras are all monitored by Correctional Officers in the Centre's Intelligence Office.
35. The Agreed Facts go on to establish that the Defendant and his co-offender were captured by CCTV cameras at 4:36 PM on 22 May 2022 climbing over the Sector 11 fence and then running into the adjacent bush land, "*away from the entrance road*" - that is, they did not at that time move towards the one gap in the perimeter fence surrounding the Centre. Other prisoners within Sector 11 informed the Correctional authorities who called an emergency muster and then at 4:45 PM that day, a bare nine minutes after the Defendant and his co-offender had climbed over the Sector 11 fence, commenced vehicle patrols of the Centre and adjacent roads.
36. It was submitted on behalf of the prosecution that although there was extensive CCTV camera surveillance of all the relevant areas, these were not monitored by Correctional officers in real time. Accordingly, it was submitted, it was possible a prisoner could climb over the Sector 11 fence, walk around to the entrance road and walk via that road through the gap in the perimeter fence and away from the Centre when nobody was actively monitoring the feed from the relevant CCTV cameras. However, there was no evidence before me of the number of officers engaged at any material time in such monitoring. There was no evidence of the number of screens requiring such monitoring. There was no evidence of how much time might pass when any particular CCTV camera feed might not be monitored.

37. I conclude on the evidence before me that the Defendant was not at any material time outside the precincts of the Darwin Correctional Centre after he had climbed over the Sector 11 fence. He was still constrained by the external perimeter fence. To escape that constraint he would have needed to walk around to the entrance road, and then exit along that road through the gap in the perimeter fence and move away from the Centre.
38. I further conclude on the evidence before me that the Defendant had not at any material time got away "*from the sight and control of all prison officials*"; nor was he "*at large and free from the custody of the gaoler*". He could not have walked out along the entrance road without being under CCTV surveillance, and he was under CCTV surveillance over much of the area between the Sector 11 fence and the external perimeter fence. The very prompt response time shown by Correctional officers after the Defendant was reported outside the bounds of Sector 11 is further evidence of the custody and control exercised over the Defendant and the co-offender by the "*gaoler*" in the circumstances of this proceeding.
39. There is no doubt on the evidence before me that the Defendant breached management rules and requirements of the Darwin Correctional Centre by being where he was not permitted to be. This breach however did not amount to a complete or even a major failure of the control over the Defendant exercised by the Darwin Correctional Centre at any material time. It did not amount to an escape from lawful custody.
40. I find the Defendant not guilty of count 1.