Cameron Ford's Supreme Court case notes

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EXTINGUISHMENT OF OBSOLETE EASEMENT

In *Dowd v Various Proprietors* [2016] NTSC 24, Hiley J extinguished under s. 177 of the *Law of Property Act 2000* (NT) a right of way easement granted in 1974. His Honour found that the criteria for extinguishment in s 177(2) were alternatives but that most of them were satisfied, namely the easement was no longer required and was obsolete, it had been and was being misused causing damage, there had been a change in the character of the area, and the existence of the easement is likely to impede the reasonable user of the land.

SEARCH WARRANT VALIDITY

Insufficient particulars of purpose

In *Lawrie v Carey DCM and Anor* [2016] NTSC 23, Mildren AJ held a search warrant under s. 117(2) of the *Police Administration Act* (NT to be invalid because it gave insufficient particulars of its purpose in the context of the case. The warrant sought electronic records of the Northern Territory Government relating to all email communications sent and received by a Minister and four other named staff between 18 December 2013 and 1 April 2015 relating to the offence of making a false statement under oath contrary to 118 of the *Criminal Code 1983* (NT). Almost 12 000 emails were produced in answer to the warrant. His Honour said at [17] that strict compliance was required with the statute in the issue and execution of a warrant, and at [18] that the warrant should disclose jurisdictional and a particular offence. His Honour held at [26] that in the circumstances of this case of the warrant being issued to the government, the emails not being limited to being from any person or about any matter, and the generality of the nature of the offence relied on, it was not proper compliance with s. 117(5)(a) requiring the purpose of the warrant to be stated for it merely to identify the offence. On other cases, for example possession of an illegal drug, it might be sufficient statement of purpose merely to identify the offence.

JUROR APPREHENSION OF BIAS

Miscarriage of justice

In *Ashley v the Queen* [2016] NTCCA 2, the Court of Criminal Appeal allowed an appeal against conviction or murder as a miscarriage of justice as the jury should have been discharged because of a reasonable apprehension of bias. On the eleventh day of trial, a juror had sent a note to the judge saying that a trio of very vocal jurors had maintained since day two that the accused was guilty until there was convincing proof he was innocent, with one of them stridently arguing he was obviously guilty otherwise he would not have been charged. The Court of Criminal Appeal held at [18] that the test was whether it was necessary to discharge the jury, with a reasonable apprehension of bias amounting to necessity. In this case there was such an apprehension because the views had persisted for so long despite a clear note given by the judge to the jurors about their functions, and there had not been any evidence which implicated the accused in the murder.

HEARSAY EVIDENCE ADMITTED

Accused not called

In *Ashley v the Queen* [2016] NTCCA 2, the Court of Criminal Appeal held at [53]–[56] that, if hearsay evidence is tendered under s. 66 of the *Evidence (National Uniform Legislation) Act* (NT), it is for the judge to determine at that time whether the accused ",is to be called,". An undertaking from counsel may or may not be sufficient depending on the circumstances. If the evidence is admitted and the accused not called, the jury can be discharged or an appropriate direction given. If the evidence is not admitted and the accused is called, the evidence can be given in the accused's case.

POOR GROUNDS OF APPEAL WEAKEN GOOD GROUNDS

In *Ashley v the Queen* [2016] NTCCA 2 at [4], the Court of Criminal Appeal reminded counsel that the court is best assisted if they exercise discernment and courage. A poor ground of appeal does not make another poor ground a good ground, and a poor ground potentially weakens a good ground because it has a tendency to distract the Court from the true ground of appeal.

ARREST AND PROTECTIVE CUSTODY

Last resort and alternatives

In *Mole v Prior* [2016] NTCA 2, the Court of Appeal applied an appeal and restored convictions quashed by a single judge on the basis evidence had been improperly admitted at trial in the Court of Summary Jurisdiction. The judge had held that the evidence should have been excluded because police officers did not comply with minimum standards of acceptable police conduct in that their apprehension of the accused was unnecessary and in breach of Police General Order A7 which required arrest as a last resort. The Court of Appeal held at [10] that apprehension under s. 128 of the *Police Administration Act* is not the same as criinal arrest and has both a protective and a preventative element. It is not a pre-condition for the exercise of the power under s. 128 that a police officer must turn his or her mind to what alternatives there may be. Where reasonable minds may differ on the questions police should ask and alternatives they should consider, failing to ask certain questions or consider certain alternatives is not conduct clearly inconsistent with the minimum standards which society should expect and require of those entrusted with powers of law enforcement.

CONTEMPT IN THE FACE OF THE COURT

Litigants in person

In *Jenkins v Todd (No 2)* [2016] NTSC 21, Kelly J found a litigant in person guilty of contempt in the face of the court by constantly interrupting and speaking over Barr J hearing his appeal from a conviction of trespass in the Court of Summary Jurisdiction. Barr J had directed the registrar to apply by summons under r. 75.06 of the *Supreme Court Rules 1987* (NT) to punish him for contempt in the face of the court. Kelly J held that the procedure under r. 75.07 is an alternative to the power to deal summarily with a contempt in the face of the court; any judge may hear a trial for contempt, not only the judge who ordered the registrar to apply by summons; the summary power to charge a person with contempt should be used sparingly and as a last resort; the behaviour of parties should be assessed differently to that of members of the public in court and the remedy of ejection may be less appropriate; words or conduct must interfere or tend to interfere with the course or administration of justice in order to constitute contempt; interference with the course of justice may include physical disruption to proceedings or interference with the authority of the courts; rudeness and disrespectful behaviour may not, in themselves, bring the court into disrepute or constitute contempt; and While self-represented litigants are to be granted greater leniency when assessing the appropriateness of their oral submissions, minimum standards of courtesy and deference to the authority of the court are expected.