

**Toohey v Peach**

**2, 11 December 2003**

**Mildren, Thomas & Bailey JJ**

**[2003] NTCA 17, 143 NTR 1**

Toohey, an investigative journalist, pleaded guilty in the Court of Summary Jurisdiction to one count of entering Aboriginal land without having been issued with a permit to do so, contrary to s.4 of the *Aboriginal Land Act*. The maximum penalty was a fine of \$1000. The sentencing magistrate found the charge proved and, without recording a conviction, ordered the charge be dismissed pursuant to s.7(a) of the *Sentencing Act*.

The defendant wished to travel to Wadeye to report on an incident in which a man died and which was the subject of media interest. He made several applications to the local Community Government Council for a permit to enter Wadeye. The Council refused permission on each occasion out of respect for the deceased's family and community feelings. The defendant then drove to and entered Wadeye on the day of the funeral and took photographs and attempted to interview members of the deceased's family immediately after the funeral.

The prosecution appealed to the Supreme Court against the magistrate's sentencing order on the grounds that (i) the sentencing magistrate wrongly exercised his discretion under section 8(1) of the *Sentencing Act*, and (ii) that the magistrate's order was manifestly inadequate in the circumstances of the case.

The Supreme Court allowed the appeal, quashed the sentencing order and in lieu thereof ordered that a conviction be recorded and discharged the defendant. The Supreme Court found that it was incumbent on the magistrate to form the opinion that the circumstances of the case including one or more of the factors contained in s.8(1) of the *Sentencing Act* provided a sufficient ground to justify a conclusion not to record a conviction. The Supreme Court found that the learned magistrate did not expressly advert to s.8(1) of the *Sentencing Act*. The Supreme Court also found that the offence was a deliberate contravention of the legislation committed by the defendant in full knowledge that he had no permit to travel to Wadeye on the day in question, and that his responsibility as a journalist was to act lawfully, not unlawfully.

Accordingly, the defendant's duty as an investigative journalist did not constitute an extenuating circumstance for the purpose of s.8 of the *Sentencing Act*. The defendant's offence was more serious in that it was wilful and calculated. In the circumstances, the Supreme Court found that even taking account of the good character and antecedents and age of the defendant, the sentencing magistrate's exercise of discretion had miscarried and a conviction ought to have been recorded.

From that decision the defendant appealed to the Court of Appeal. The appeal was heard on 2 December 2003 and the decision was reserved. On 11 December 2003 the court unanimously allowed the appeal and restored the orders of the magistrate.

The court expressed itself to be satisfied that the magistrate had before him significant material which, from the appellant's standpoint as an investigative journalist, provided him with very strong, even compelling, reasons to travel to Wadeye on the day of the funeral. From his perspective there was a very good reason to think that

“events” of public interest might occur at or immediately after the funeral at Wadeye. The appellant’s purpose was to provide press coverage of events as they unfolded on the day of the funeral. This could not be achieved by delaying his visit to Wadeye to some later date.

The court considered that there were facts in the appellant’s case which could justify the sentencing magistrate exercising his discretion to not record a conviction. The court found that while criticism might justifiably be made that the magistrate did not expressly refer to s.8(1) of the *Sentencing Act* and provide comprehensive reasons for his decision not to record a conviction, any deficiencies in that regard did not result in any substantial miscarriage of justice.