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Précis Paper

Contempt – Armidale Local Aboriginal Lands Council v Moran [2020] NSWSC 442

A discussion about the case of *Armidale Local Aboriginal Lands Council v Moran* [2020] NSWSC 442, including a discussion about contempt, the justice system and culturally appropriate practice.

Discussion Includes

- Key facts
- Classes of contempt
- Contempt proceedings
- Discharge motion
- Aboriginal culture
- Justice system
- Culturally appropriate practice

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Contempt - Armidale Local Aboriginal Lands Council v Moran [2020] NSWSC 442

In this edition of BenchTV, Tony McAvoy SC (Barrister, Frederick Jordan Chambers, Sydney) and Jeremy Styles (Managing Advocate, Aboriginal Legal Service, Sydney) discuss the case of *Armidale Local Aboriginal Lands Council v Moran* [2020] NSWSC 442. This edition includes a discussion about contempt, the justice system and culturally appropriate practice.

Key facts

1. Ms Moran was living in an Aboriginal Land Council premises, which was run down and dilapidated. The owners of the premises wanted to demolish it and use the land for other purposes. Ms Moran was squatting in those premises.
2. A process was undertaken to have her move out of the premises and ultimately, the owners brought an action to the Supreme Court of NSW seeking a declaration that she had no right to remain on the land. The Supreme Court granted the declaration.
3. However, Ms Moran stayed in the premises and attempted to negotiate with the owners, suggesting that they should find her alternate premises. The property owners then prosecuted a private contempt in the Supreme Court as a means of enforcing the Court's orders from the earlier declaration proceedings. During those proceedings for contempt, Ms Moran was invited to apologise and comply with the orders of the Court. She was not represented and was not apologetic for the breach. She later stated that she did not understand the orders made.
4. In paragraph 16 of the judgment, Justice Adamson noted Ms Moran's disobedience and non-compliance with the Court order was deliberate and persistent. She did not accept the authority of the Court and insisted in her submissions that her alleged right to occupy the premises overrode the Court's orders to the contrary.
5. The Supreme Court found her guilty of contempt and issued an immediate penalty and sentenced her to fourteen days in custody.
6. Ms Moran's matter was brought to the attention of the Aboriginal Legal Service. The Aboriginal Legal Service sought a discharge of the contempt under Rule 14 in Part 55 of the Supreme Court Rules 1970 (NSW). The case was expedited and Ms Moran was released the day the duty judge heard the discharge motion.

Classes of contempt

7. There are three broad classes of contempt.

8. The first is sub judice contempt, which is committed where there is publication about an ongoing proceeding. One example of this is the case of *Director of Public Prosecutions (Cth) v Wran* (1986) 7 NSWLR 616 where the then Premier Neville Wran made comment about Lionel Murphy being not guilty on the steps of the Court. Mr Wran was found guilty of contempt and fined.
9. The second class is a direct contempt, which is a direct defiance of a court order. This is where Ms Moran's case fits in as she refused to vacate the premises when the Court had declared she do so. Other examples are refusing to comply with a subpoena or other enforcement order, often in civil proceedings. One specific example is *Menzies v Paccar Financial Pty Ltd* [2016] NSWCA 280, which involved a civil dispute where the contemnor had refused to provide vehicles to the plaintiff in a civil action after the action had been found against him.
10. The third class is contempt in the face of the court. This is usually failure to give evidence in a courtroom. Typically, these are immediate orders that are made to send a person elsewhere to contemplate whether they want to change their mind about giving evidence during the course of the proceedings. In more consequential matters like those involving murders, the sentences can be quite significant. The case of *R v Taber and Styman; Re Shannon Styman* [2005] NSWSC 1329 is an example of where the contemnor was sentenced to twelve months' imprisonment.

Contempt proceedings

11. Most contempt proceedings are dealt with by the Supreme Court and can be prosecuted either by a private litigant seeking to enforce the orders previously obtained, or by Prothonotary of the Supreme Court of NSW. In the Supreme Court, they are prosecuted on the basis of evidence, typically transcript and formal papers from the earlier proceedings.
12. The contempt in the face of court matters are often dealt with summarily in the Local Court or District Court because there is an immediate proceeding where someone is refusing to comply with an order in the face of the court. The penalty is immediate and conditional. If the person starts answering questions, then the contempt is purged and the court releases the person back to their former state of liberty.
13. In this case, Ms Moran's option would have been to comply with the declaration of the Supreme Court and apologise. In the proceedings before the Supreme Court, the contempt would most likely have been purged if Ms Moran apologised and undertook to comply with the orders or actually complied with the orders.
14. Purging arises up until contempt is found by the Supreme Court. After that point, if a sentence of imprisonment is imposed, the regulatory application for a discharge can be made under Rule 14 of Part 55 of the Supreme Court Rules 1970 (NSW). The judgment in this case included a finding that the discharge under this Rule does not remove the liability for contempt and does not remove the penalty for contempt or the finding of guilt for that

contempt. What it does is set aside the balance of the penalty if that penalty is a term of imprisonment.

Discharge motion

15. In this case, a notice of motion was brought and there was affidavit evidence from an instructing practitioner and an affidavit from Ms Moran. In her affidavit, Ms Moran apologised and expressed her current understanding of what had happened. Ms Moran stated that although she was warned about being imprisoned, she did not know this could occur immediately. Ms Moran also stated that she did not have legal representation during the declaration proceedings. This was accepted by the Court.

Aboriginal culture

16. An Aboriginal person may fail to understand the possibility of a sentence of imprisonment in the context of a proceeding such as that in Ms Moran's case because one of the deeply embedded aspects of Aboriginal culture is individual freedom and autonomy. Aboriginal traditional society was governed by strict social rules in relation to who you had obligations to, and how you conducted yourself. Beyond that, there was a great level of freedom.

Justice system

17. Diversity on the bench and training of those that sit on the bench and practitioners can assist with making a recurrence of Ms Moran's case less likely.
18. Research completed by the Australian National University showed that three out of four Australian people have a negative implicit or unconscious bias against Aboriginal or Torres Strait Islander people. Of the sample of 11,000 people, showed that the bias was stronger in educated people who were of the age that we would normally expect people to be when sitting on the bench or are leaders of the legal profession. Training is therefore important.
19. Exercising discretion and judgment is what makes the legal system fair and just.
20. One of the aspects of the Australian Law Reform Commission's inquiry into judicial impartiality is diversity on the bench. The inquiry will include an assessment about the propensity or the likelihood of systemic bias in the system. The report is due to be released in September 2021.

Culturally appropriate practice

1. In the medical sector, there is a requirement that doctors complete cultural safety and awareness training before commencing work. In Aboriginal communities, the legal sector does not have a matching requirement.
2. In New Zealand, there is discussion about indigenisation of the law degree in an aim to support greater confidence in the system and ensure it is implemented in a way that is culturally safe and culturally aware. In New Zealand, there are two laws, being the New Zealand law and the Maori law.
3. In Australia, the *Native Title Act 1993* (Cth) recognises there are systems of laws and customs continuing to exist from which rights and interests can be recognised by the common law.
4. In *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3, the High Court recognised that there are political rights attached to a person's identity as Aboriginal and the determination of who was Aboriginal or not depends upon acceptance by that person's nation or group.
5. As Ms Moran's case demonstrates, there seems to be some propensity for courts to expect that Aboriginal and Torres Strait Islander people can understand the court process and what has been said. However, the way in which language is used in courts is inaccessible to many Aboriginal and Torres Strait Islander people.
6. In addition, Aboriginal and Torres Strait Islander communities and individuals are heavily affected by the traumas of the colonisation process and many of these people may not be able to rationally converse about matters connected to the colonial justice system. It also often means they may have difficulty making decisions about court process. The court process is a re-traumatising process in and of itself. This trauma can put into context an Aboriginal or Torres Strait Islander's offending.
7. At times, lawyers may fail to properly engage with Aboriginal clients due to bias, and this may impact on the Aboriginal person's ability to understand why the government or other parties are intervening in their life.
8. It would be a functional improvement if referrals were made by the Supreme Court to Legal Aid and the Aboriginal Legal Service. While a lawyer cannot remedy all injustices built into the system, the lawyer can provide explanations about the matter and risks so the person may respond from an informed viewpoint rather than a traumatised position.

BIOGRAPHY

Tony McAvoy SC

Barrister, Frederick Jordan Chambers, Sydney

Appointed Senior Counsel in 2015, Mr McAvoy has developed a strong native title practice and has successfully appeared for claimants in several land claims. He has also acquired significant experience in the areas of environmental law, administrative law, human rights and discrimination law, coronial inquests and criminal law. Notably, between 2011 and 2013, Tony was an Acting Part-Time Commissioner of the Land and Environment Court.

Jeremy Styles

Managing Advocate, Aboriginal Legal Service, Sydney

Mr Styles is the Managing Advocate for the Aboriginal Legal Service (NSW/ACT) Limited. He has represented clients facing charges from offensive language to murder. As solicitor advocate he has run numerous jury trials, coronial inquest and appeals to the Supreme Court, Court of Appeal and Court of Criminal Appeal, along with innumerable contested matters in Local Courts. Previously, Jeremy was Tipstaff to the Hon. John Dowd AO QC (then Supreme Court Justice); and a secretary of the NSW Council for Civil Liberties. Furthermore, Jeremy is a member of the Criminal Law Committee of the Law Society.

BIBLIOGRAPHY

Articles

Australian Law Reform Commission, 'Judicial impartiality: consultation paper' (30 April 2021)

Makin, Rose, 'Three in four people hold negative view of Indigenous people' (9 June 2020) *Australian National University*

Shirodkar, Siddharth, 'Bias against Indigenous Australians: Implicit association test results for Australia' (2019) 22(3-4) *Journal of Australian Indigenous Issues* 3–34

Cases

Director of Public Prosecutions (Cth) v Wran (1986) 7 NSWLR 616

Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3

Menzies v Paccar Financial Pty Ltd [2016] NSWCA 280

R v Taber and Styman; Re Shannon Styman [2005] NSWSC 1329

Legislation

Native Title Act 1993 (Cth)