

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : TEY -v- PLOTZ [2010] WASC 163

CORAM : JENKINS J

HEARD : ON THE PAPERS

DELIVERED : 30 JUNE 2010

PUBLISHED : 30 JUNE 2010

FILE NO/S : SJA 1139 of 2009
SJA 1033 of 2010

BETWEEN : KOK YONG TEY
Appellant

AND

MARTIN DANIEL PLOTZ
Respondent

ON APPEAL FROM:

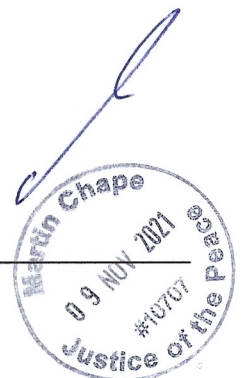
Jurisdiction : MAGISTRATES COURT OF WESTERN
AUSTRALIA

Coram : MAGISTRATE B A LANE

File No : PE 41286 of 2009

Catchwords:

Criminal law - Offender's application for leave to appeal from decision in
Magistrates Court criminal proceedings - Identity of the respondent to the appeal
- Prosecutor named as WA police - Prosecution commenced by a police officer



Legislation:

Alterations of Statutory Designations Act 1974 (WA)
Criminal Appeals Act 2004 (WA), pt 2, s 10(5)(b)
Criminal Investigation (Identifying People) Act 2002 (WA), s 16(6)
Criminal Procedure Act 2004 (WA), s 3, s 20, s 20(3), s 23(1), sch 1 cl 3
Criminal Procedure Regulations 2005 (WA), reg 8(1), sch 1 form 3
Criminal Procedure Rules 2005 (WA), r 67
Official Prosecutions (Accused's Costs) Act 1973 (WA), s 4, s 5
Police Act 1892 (WA), s 5, s 6, s 7

Result:

The titles of SJA 1139 of 2009 and 1033 of 2010 be amended to substitute Martin Daniel Plotz as the respondent

Category: A

Representation:

Counsel:

Appellant : No appearance (on the papers)
Respondent : No appearance (on the papers)

Solicitors:

Appellant : In person
Respondent : State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Templeton v Leviathan Pty Ltd (1921) 34 CLR 34



1 **JENKINS J:** Both these appeals relate to the one conviction of the appellant in the Magistrates Court at Perth on 20 November 2009 for the offence of failing to comply with a request to give police personal details contrary to the *Criminal Investigation (Identifying People) Act 2002* (WA), s 16(6). The appellant appeals against her conviction and sentence. In each appeal notice the appellant has named the respondent to the appeal as 'WA Police'. In each appeal the State Solicitor for Western Australia has filed a notice of respondent's intention, which states:

The issuing officer Martin Daniel Plotz in Prosecution Notice No. PE41286/09 who should be named as the respondent intends to take part in this appeal.

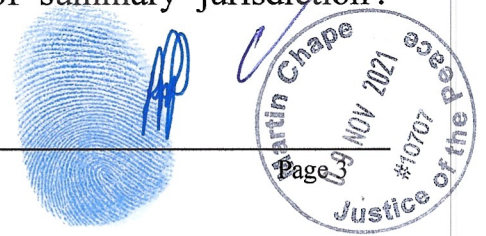
2 At a directions hearing on 3 May 2010, the appellant took issue with the form of the notices of respondent's intention and submitted that the proper respondent to the appeals was the WA Police. In response to that submission, the respondent's counsel sought leave to amend the notices so that the notices would name WA Police as the respondent. I ordered that the respondent have leave to file and serve within seven days amended notices of respondent's intention which named WA Police as the respondent.

3 On 7 May 2010 the State Solicitor's Office filed an application on behalf of the respondent seeking orders that the interim order which I made on 3 May 2010 be recalled and secondly that the titles of these appeals be amended to name the respondent to them as Martin Daniel Plotz.

4 The application, supporting affidavit and written submissions were apparently served on the appellant. By letter dated 20 May 2010, the appellant advised that she did not wish to be heard on the application but did not consent to it. Given that on 3 May 2010 I heard the appellant's objection to the notices and given that I am in receipt of the respondent's written submissions, I have decided to deal with the application on the papers. These are my reasons for allowing the application.

The law

5 To commence an appeal against a decision of a magistrate in a criminal proceeding pursuant to the *Criminal Appeals Act 2004* (WA) pt 2 an accused who is aggrieved by the decision must, among other things, serve a copy of the application of leave to appeal on 'the other party or parties to the proceedings before the court of summary jurisdiction': *Criminal Appeals Act* s 10(5)(b).



6 '[A] respondent' who has been served with an appeal notice may lodge a notice of respondent's intention. Such a notice must be served within seven days after the date on which the respondent is served with the appeal notice. If a respondent does not lodge a notice within the seven days or any extension of that period ordered by the court, the respondent is not entitled to take part or be heard in the appeal and is not a party to the appeal: *Criminal Procedure Rules 2005 (WA)* r 67.

7 The *Criminal Procedure Act 2004 (WA)* s 3 defines 'party' in relation to a charge to mean the 'prosecutor or the accused'. The 'prosecutor' is, in turn, defined to mean:

[I]n a prosecution in a court of summary jurisdiction, the person who commenced the prosecution or a person who in court represents that person.

8 Neither the *Criminal Appeals Act* or the *Criminal Procedure Rules* define 'the other party' or 'a respondent'.

9 A prosecution for an offence in a Magistrates Court may only be commenced by certain persons, including a police officer: *Criminal Procedure Act* s 20(3). The *Criminal Procedure Act* does not expressly provide for WA Police to commence a prosecution. However, it does permit a public authority, an employee of a public authority or a person authorised in writing by a public authority, amongst others, to commence a prosecution for an offence: *Criminal Procedure Act* s 20. 'Public authority' is relevantly defined to include a department of the Public Service or a body, whether incorporated or not, that is established for a public purpose under a written law and that, under the authority of a written law, performs a statutory function on behalf of the State: *Criminal Procedure Act* s 3. If a prosecution is being commenced by 'an authorised investigator', it must be signed by that investigator. An authorised investigator includes a police officer and an officer of a public authority who is authorised to commence prosecutions: *Criminal Procedure Act* s 18 and s 23(3).

10 The *Criminal Procedure Act* s 23(1) states:

Schedule 1 has effect in relation to prosecution notices and charges in them.

11 The *Criminal Procedure Act* sch 1 cl 3 states:

(1) A prosecution notice must identify the prosecutor.



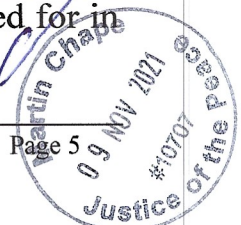
- (2) For the purposes of subclause (1) it is sufficient for a prosecution notice -
- (a) if a prosecution is being commenced by a police officer, to name the 'WA Police' as the prosecutor;
 - (b) if a prosecution is being commenced by a person who is acting in the course of his or her duties as a public authority or as an employee of a public authority, or who is authorised by a public authority to commence the prosecution, to name the public authority as the prosecutor,
- if the prosecution notice identifies the individual who issues the notice and is signed in accordance with section 23(3).
- (3) An indictment must be commenced in the name of the State of Western Australia.

12 The prescribed form of a prosecution notice provides separate spaces for the name of a 'prosecutor' and a 'person issuing' the notice: *Criminal Procedure Regulations* reg 8(1) and sch 1 form 3.

13 The *Police Act 1892* (WA) provides for the appointment of a commissioner of police, commissioned police officers and non-commissioned officers. The commissioner of police is charged with the general control and management of the 'police force' of Western Australia: *Police Act* s 5 - 7. Throughout the *Police Act*, the police who are under the control of the commissioner of police are uniformly referred to, collectively, as the 'police force'. There is no reference to a body known as WA Police. The Act also refers to the appointment of other persons, such as special constables, and provides that these people are not members of the police force. However, the *Police Act* does not provide that the broader group of people is the WA Police.

14 By the *Alteration of Statutory Designations Order* (No 2) 1997 made under the *Alteration of Statutory Designations Act 1974* (WA), it was directed that a reference to the department in the public service designated as 'police department' contained in any law, instrument, contract or legal proceedings shall be read and construed as a reference to the department in the public service designated as 'police service'. I have not been directed to any subsequent order which has changed this designation.

15 Thus, the WA Police is not a person, a corporation, a statutory body, a public authority or corporation sole. In short, it is not a body known to the law other than as a 'sufficient' name of a prosecutor as provided for in



the *Criminal Procedure Act* sch 1. Neither is WA Police a 'public authority' as that term is defined in the *Criminal Procedure Act*.

- 16 Generally speaking, a court does not have jurisdiction over a person or legal entity unless they are joined before the court as a party or unless they are treated by statute as if they were a party. Unless a person or other legal entity is joined as a party to a legal proceeding, they are not bound by a decision of the court in that proceeding: *Templeton v Leviathan Pty Ltd* (1921) 34 CLR 34, 70. A corollary to this principle is that a party which does not exist as a legal entity can not sue or be sued as such misnomer would give rise to a risk that any order made by a court in the proceedings would be unenforceable against that party.

Determination of the application

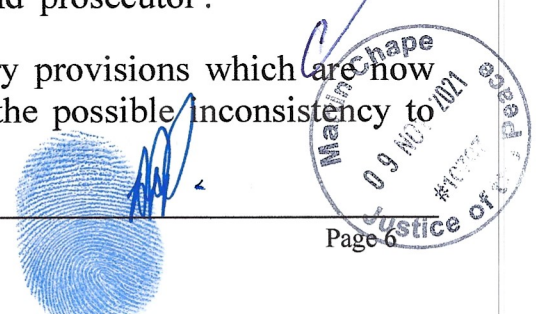
- 17 In this case, the prosecution notice names Martin Daniel Plotz (regimental number included) as the person issuing the prosecution notice. I will assume that the signature which appears alongside that name is the signature of Officer Plotz, although the signature itself is illegible. The prosecution notice states that the prosecutor is WA Police.

- 18 Putting aside the question of joinder to an appeal of a respondent who was not a party to proceedings in the Magistrates Court, the proper respondent to an offender's appeal from a decision of a Magistrates Court is the prosecutor of the relevant charge or charges in the Magistrates Court. So much is clear from the provisions of the *Criminal Appeals Act*, the *Criminal Appeal Rules* and the *Criminal Procedure Act*.

- 19 Relevantly, the prosecutor in the Magistrates Court is the person who commenced the prosecution. In the case of a prosecution commenced by a police officer, the respondent is that individual police officer. Thus, the proper respondent to these appeals is Martin Daniel Plotz.

- 20 The statutory provisions which have caused me to pause before making this decision are the *Criminal Procedure Act* s 23(1) and sch 1 cl 3. If those provisions are read as meaning that where a prosecution notice is issued by a police officer and the notice names the WA Police as the prosecutor, the prosecutor for the purposes of the *Criminal Procedure Act* is the WA Police, they would be in direct conflict with the other provisions of the *Criminal Procedure Act* to which I have referred, in particular s 20 and the definitions of 'party' and 'prosecutor'.

- 21 Given the importance of many statutory provisions which are now contained in schedules, I do not think that the possible inconsistency to



which I have adverted can be resolved by applying the 'old view' that if there is conflict between the body of the Act and the schedule, the schedule gives way: Pearce DC, Geddes RS, *Statutory Interpretation in Australia* (6th ed, 2006) 157 - 158 [4.45].

22 Rather, I think that the answer is that Parliament did not intend that sch 1 cl 3 of the *Criminal Procedure Act* would alter the effect of the substantive provisions set out in the body of the Act but, instead, intended that sch 1 cl 3 would provide a mechanism by which prosecutions commenced by police officers can conveniently be identified in a generic way as police prosecutions. There are several factors which have caused me to arrive at this conclusion. The first I have already mentioned. It is to avoid conflict with the provisions in the body of the Act.

23 The second factor is that the phrase 'it is sufficient' in sch 1 cl 3(2) is a limiting phrase. '[I]t is sufficient' implies that the naming of the WA Police as the prosecutor in a prosecution notice is not necessarily a complete description or identification of the prosecutor for all purposes. The use of that phrase in sch 1 cl 3(2) can be contrasted with its absence in sch 1 cl 3(3) which states that an indictment 'must be commenced' in the name of the State of Western Australia. This latter phrase indicates that the State of Western Australia is the prosecutor for all purposes in respect to charges on an indictment.

24 The third factor is that, as I have explained, WA Police is not a legal entity. It is not logical that Parliament would specify a party to proceedings which did not exist at law. If it had done so there would be an issue, which I do not decide, as to whether successful appellants in this Court, and successful accused in the Magistrates Court, could obtain and enforce costs orders and other orders against the WA Police, in that name.

25 Different considerations may apply in respect of an appeal from a decision made on a prosecution notice which was issued by an individual on behalf of a public authority. This decision does not automatically apply to such an appeal.

26 The respondent also submits that the *Official Prosecutions (Accused's Costs) Act 1973* (WA) (the OPACA) s 4 and s 5 which provide that a successful appellant from an official prosecution may be entitled to costs paid by the State and not by a respondent who is a police officer, are an indication that the legislature contemplated that the party commencing proceedings in a police prosecution and the respondent to an appeal from a police prosecution would be an individual member of the police force.



27 The OPACA provisions indicate that Parliament foresaw the potential problem if an individual police officer had a personal liability to pay costs in criminal proceedings to which he or she was a party in an official capacity. I do not accept that the legislative scheme says anything about the propriety of another legal entity being properly joined as a party to an appeal or commencing an official prosecution and being liable to pay costs, with or without being subject to the OPACA.

28 On the other hand, as I have indicated earlier in these reasons, I am of the opinion that it is relevant to my determination that if I was to hold that the appropriate respondent to an appeal of this nature was the WA Police, a successful appellant may not be able to obtain or enforce a costs order of any sort. That would be because the 'WA Police' is not a legal entity and the OPACA may not apply.

29 For the above reasons my provisional decision is:

1. The interim order made on 3 May 2010 giving the respondent leave to file and serve amended notices of respondent's intention within seven days in respect of appeals SJA 1139/09 and 1033/10 be recalled; and
2. The titles of appeals SJA 1139/09 and 1033/10 be amended to substitute Martin Daniel Plotz as the respondent.

