

FEDERAL COURT OF AUSTRALIA

Wotton v State of Queensland (No 5) [2016] FCA 1457

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at www.fedcourt.gov.au together with this summary.

- 1 This is a case about race discrimination. Its focus is on the conduct of officers of the Queensland Police Service (QPS) on Palm Island between 19 and 28 November 2004. The case has been brought by Mr Lex Wotton, his partner Ms Cecilia Wotton, and Mrs Agnes Wotton, who is Mr Wotton's mother. All three were living on Palm Island at the time and were affected by what occurred.
- 2 The case is a representative proceeding, which means the three applicants bring the proceeding as representatives of a group of people affected, they allege, by unlawful race discrimination of QPS officers during that time. The 'group members' are people who were ordinarily resident on Palm Island on 19 November 2004 and who remained ordinarily resident there until 25 March 2010. The applicants also bring the proceeding on behalf of a 'subgroup' of people who were affected by an operation carried out by armed officers of the Special Emergency Response Team (SERT) on 27 and 28 November 2004. The subgroup includes children who were in or near the houses that were entered and searched by SERT officers.
- 3 The respondents are the State of Queensland and the Commissioner of Police for Queensland. The individual police officers have not been named as respondents. However, the State of Queensland has accepted that all QPS officers were acting in the course of their duties as police officers and that the State of Queensland is liable for their conduct.

4 On the morning of 19 November 2004, a 36-year-old Aboriginal man named Cameron Doomadgee died in police custody on Palm Island. He is now known, posthumously, as Mulrunji. He had been arrested by Senior Sergeant Christopher Hurley in a suburban street, not far from the police station, for yelling out what Senior Sergeant Hurley considered to be abuse directed at Senior Sergeant Hurley and an Aboriginal police liaison officer who was also on duty. Affected by alcohol, protesting and struggling, Mulrunji was brought into the Palm Island Police Station. Near the door to the police station, a struggle and fall with Senior Sergeant Hurley occurred. Mulrunji was then dragged limp and unresponsive into a cell. Within an hour, this man, known to many people on Palm Island as an active and likeable person, was dead.

5 Mulrunji's death, and the way QPS officers dealt with its aftermath, led to three coronial inquests, a review by the Crime and Misconduct Commission in Queensland, two reviews by the QPS, criminal proceedings against Senior Sergeant Hurley in which he was acquitted of manslaughter, and litigation by police officers about potential disciplinary action against them. There were a large number of criminal proceedings against Palm Islanders, including Mr Wotton and Mrs Agnes Wotton, concerning their conduct on 26 November 2004. What happened on Palm Island during this time has been examined from many perspectives and has damaged many lives, on all sides.

6 This case is about the role played by race in the QPS response to Mulrunji's death. The Court has been asked to decide whether, in the police investigation into Mulrunji's death, in the management of community concerns, tensions and anger on Palm Island in the week after his death, and in the police responses to protests and fires that occurred on 26 November 2004, officers of the QPS contravened section 9(1) of the *Racial Discrimination Act 1975* (Cth).

7 The applicants claimed that the police officers conducted themselves differently because they were dealing with an Aboriginal community and the death of an Aboriginal man.

8 The State of Queensland and the Commissioner denied all of the applicants' allegations. The trial was a fully contested one, on all factual and legal issues arising from the applicants' claims. The Court sat on Palm Island for the first week of the trial, and as part of the trial visited most of the key places referred to in the evidence. The remainder of the trial was conducted in Townsville.

9 One of the central purposes of the *Racial Discrimination Act* is to enact into Australian law international obligations assumed by Australia in the *International Convention on the Elimination of All Forms of Racial Discrimination*. In broad terms, section 9(1) of the *Racial Discrimination Act* prohibits differential treatment of people based on race where that treatment has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by them of identified human rights. In this case, those rights include the right to equality in the application of the law, the right to access police services that are impartial and independent, the right to liberty and security of the person, and the right not to have one's privacy, family and home interfered with in an unlawful or arbitrary way.

10 I have decided that a number of the applicants' claims should succeed, but not all of them, and that they should be given some but not all of the relief they seek. In summary, I have found that the following conduct by QPS officers contravened section 9(1) of the *Racial Discrimination Act*:

- (a) The QPS officers with command and control of the investigation into Mulrunji's death between 19 and 24 November 2004 did not act impartially and independently. Contrary to what would have occurred in an impartial, independent and effective investigation, Senior Sergeant Hurley picked up the investigators from the airport when they arrived and had a meal with them at his house that evening. He was never treated as a suspect, nor promptly removed from the island. The police officers discounted and ignored accounts from Aboriginal witnesses implicating Senior Sergeant Hurley. Incorrect and stereotypical information about Mulrunji and the circumstances of his death was passed to the coroner, while relevant information from Aboriginal witnesses was not passed on.
- (b) During the week after Mulrunji's death and prior to the protests and fires that occurred on 26 November 2004, there were substantial failures by QPS officers on the island to communicate with the Palm Island community and defuse tensions, including by not proactively participating in community meetings and by not providing timely and accurate information about the cause of Mulrunji's death and the progress of the investigation, which the community was waiting to hear. The local Council and its members were scarcely consulted. Instead, there was a focus on increasing security and police numbers.

- (c) An emergency declaration issued under the *Public Safety Preservation Act 1986* (Qld) after the police station was set on fire had the consequence of shutting off the island from flights and ferry transport. It also triggered the evacuation of non-Aboriginal people from the island. I have found the emergency declaration was part of facilitating an excessive and disproportionate policing response, including the use of SERT officers. The declaration also meant local Palm Islanders could not travel to and from the island, although non-Aboriginal people, media, police and authorities could. Police behaved as if there were threats to non-Aboriginal people living on the island, when there were not.
- (d) The use of SERT officers to arrest suspects on 27 and 28 November 2004, and to conduct entries and searches of 18 houses on Palm Island. Despite the entire population of Palm Island (including children) being less than 2000, between 88 and 111 police officers (including SERT and the Public Safety Response Team) were on the island over the period covered by the emergency declaration. I have not accepted evidence suggesting the people to be arrested were reasonably suspected of having any weapons nor that there were any acts or threats of violence after the fires subsided on the evening of 26 November 2004. Yet, during the SERT operations, armed, masked SERT officers broke into the houses of 18 families on Palm Island, with assault rifles raised, confronting unarmed men, women and children in and around those houses. Mr Wotton was tasered in front of his family. I have found the use of SERT officers to effect the arrests was unnecessary, disproportionate and undertaken as a show of force against local people who had protested about the conduct of police. Women and children in and around the houses attended by SERT officers, who had nothing to do with the protests and fires, were terrified. Those women and children who gave evidence have suffered a lasting detrimental impact from the SERT operation.

11 I have found that police acted in these ways because they were dealing with an Aboriginal community, and with the community of Palm Island in particular. I have found they conducted themselves, including Senior Sergeant Hurley while he was there, with a sense of impunity, impervious to the reactions and perceptions of Palm Islanders who were, in large numbers, distressed and agitated about the death of Mulrunji. Officers preferred confrontation

to engagement and operated very much with an “us and them” attitude. I am comfortably satisfied QPS officers would not have taken a similar approach, in any of the respects I have outlined above, if a tragedy such as this had occurred in an isolated non-Aboriginal community in Queensland. The investigation would have been impartial. A person in Senior Sergeant Hurley’s position would have been suspended and treated – at least initially – as a suspect. Eyewitnesses would have been taken seriously. Accurate information would have been passed to the coroner. There would have been engagement and good communication with the community and, if tensions and protests had erupted as they did on 26 November 2004, there would have been a more proportionate and regulated response. I do not consider an entire community would have been locked down in the way Palm Island was. I am satisfied that armed, masked SERT officers would not have forced their way into houses occupied by unarmed families, including young children, and pointed assault rifles at them, yelling at them to lie down and not move, making those families think they were in danger of being shot.

12 There will be declarations reflecting the contraventions of section 9(1) I have found proven. I have also found the arrests, entries and searches were unlawful under Queensland law. I have awarded Mr Wotton \$95,000 in damages for the way he was treated when arrested, and for the interference with his home, family and privacy. I have awarded Ms Cecilia Wotton \$115,000 in damages for the way she was treated and the interference with her home, family and privacy. I have awarded Mrs Agnes Wotton \$10,000 for the interference with her home. She was not present when SERT officers came to her house (although a young girl who gave evidence in this proceeding was at the house, as was a two-year-old boy). I have rejected the applicants’ claims for aggravated damages and found the Court has no power to award exemplary damages under the *Racial Discrimination Act*.

13 In my reasons, I have indicated that I will not order an apology, but the Commissioner of Police should be required to consider whether it is appropriate to make an apology to the residents of Palm Island. I have given the parties an opportunity to make submissions on this issue. They also have an opportunity to make further submissions on some consequential issues such as costs, and the way the remainder of the proceeding should be dealt with, because any individual claims by group members and subgroup members are not finally determined by this judgment.

- 14 In conclusion, there are three aspects of this proceeding I wish to emphasise. First, although these events have been examined before, in this proceeding the parties each made a series of choices about the evidence they put before the Court. They also made choices about which witnesses they called. The Court can only determine the claims made under section 9(1) on the basis of the evidence before it.
- 15 Second, the SERT officers who were deployed to Palm Island are not the subject of any adverse findings. They performed their duties in the manner they had been trained to do: it was those who decided to use them to effect arrests of unarmed people at home with their families who are subject to adverse findings by the Court.
- 16 Third, the parties and their legal representatives were cooperative and courteous in the conduct of this proceeding, although it was at times difficult for all concerned. The Court is grateful to them for that. The State of Queensland and the Commissioner, in particular, defended this proceeding in a commendable manner, making appropriate concessions and conducting themselves, through their legal representatives, with the kind of responsibility and sensitivity that should be a model for litigation on behalf of government.

MORTIMER J

5 December 2016