SATELLITES, CITIZENS AND SECRETS: *R v Law & Others*

RUSSELL GOLDFLAM

SPACE JUNK COULD HIT NT

A blown-apart US space spy satellite is being monitored amid concerns that pieces of debris could rain down on the Territory. (NT News, 22 February 2008, page 1)

For once, the *NT News* had found something other than a croc story for its readers to get their teeth into. And how peculiarly apt, for at 11:50 am on this very same day, a US spy satellite base prosecution was blown apart by the Court of Criminal Appeal of the Northern Territory, when it allowed an appeal, quashed convictions and directed judgments and verdicts of acquittal to be entered in favour of four radical Christian anti-war activists, who, 26 months previously, had penetrated the Joint Defence Facility at Pine Gap.[1]

Communists and lighthouses

The story of the Pine Gap 4's exceptional legal journey goes back more than half a century. In 1951 the High Court decided *Australian Communist Party v The Commonwealth*.[2] Sitting at the height of the Cold War shortly after the invasion of South Korea by its Stalinist neighbour, the Court ruled that the Menzies government's legislation dissolving the Communist Party was unconstitutional, and shot it down. It was a controversial and complex case, but from it emerged a proposition as simple as it is fundamental: Parliament cannot 'recite itself' into power.[3] As Fullagar J memorably put it, 'a power to make laws with respect to lighthouses does not authorise the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse'.[4] The government of the day may well have been satisfied that communism was an unacceptably dangerous revolutionary movement, but, as six of the seven judges held, Parliament's constitutional power to give effect to that view depended on whether or not such a law was in fact one for the purpose of the defence of the Commonwealth. And that in turn was a question to be decided by the judiciary — not the legislature, and not the executive.

It was in that context that the following year the *Defence (Special Undertakings) Act 1952* (Cth) was enacted. At the time, Australia was preparing to host offshore British nuclear tests in the Monte Bello Islands. Section 8 of the Act empowered the Defence Minister to declare a 'prohibited area', and the Act contained all sorts of draconian provisions designed to ensure the security of sensitive military installations. But the Minister couldn't declare just anywhere a prohibited area. With an eye steadily on the *Communist Party* Case, the parliamentary draftsman had carefully included a restriction. Under s 8, the Minister can only make a prohibited area declaration if to do so is 'necessary for the purposes of the defence of the Commonwealth'. Such a law was (and is) appropriately adapted to the *Constitution*, which empowers Parliament to make laws with respect to the defence of the Commonwealth.[5] Had, on the other hand, the Act provided that the Minister could declare a prohibited area merely because he was satisfied that to do so was necessary for defence purposes, the Act would have been vulnerable to a challenge like the one which had floored the *Communist Party Dissolution Act*.

It would be another 54 years before anyone was to be prosecuted under this law, and for the significance of the words in s 8 to be considered by a court.

The troublemakers

In the early hours of 9 December 2005, Jim Dowling, Adele Goldie, Bryan Law and Donna Mulhearn, with their conspicuous white overalls and 'Citizens Inspection Team' insignia, set off for Pine Gap, tramping across several kilometres of spinifex scrub and cutting their way through a couple of fences. They were not thinking about the subtleties of drafting which had creased the brows of the architects of the *Defence (Special Undertakings) Act*, and which in due course would crease the brows of those called on to construe it. They were thinking about the victims of Australia's war in Iraq. They were reflecting on the exemplary disobedience of their spiritual leader, who had defied the Pharisees and broken the law of the Sabbath to heal the sick.[6] They were also worried about being lost, blundering around in the bush. As they neared the 'technical area', where the giant dishes and supercomputers are located, they wondered why on earth they had not yet been detected and arrested. After all, only hours before, they had been chatting to Ken Napier, head of security at the base, and, as he later conceded in cross-examination at their trial, he had told them they would never get anywhere close to the technical area. That they did so was, they believed, a miracle. When they were eventually caught, they were ordered to their knees. 'That's a good idea', said Dowling, and knelt in prayer.

Let us pause a moment to examine this business of the Pine Gap 4, with their miracles and their prayers. The Pine Gap 4 are deeply, doubly troublesome. They trouble conservatives because they calmly and cheerfully insist on breaking the law. In his closing address to the jury, Law said that he disagreed with

REFERENCES

1. *The Queen v Law & Ors* [2008] NTCCA 4.
2. (1951) 83 CLR 1.
3. See (1951) 83 CLR 1 at 206, per McTiernan J.
4. (1951) 83 CLR 1 at 259.
5. *Constitution*, s 51(vi).
6. Mark III: 3 – 6.

Throughout the proceedings the Pine Gap 4, as Christian pacifists, repeatedly turned the other cheek. And, as tactically astute and audacious activists, they also showed a lot of cheek. The mix was beguiling and exasperating, subversive and empowering.

only one allegation made by the prosecutor against him — that 'our action was deliberately, coldly planned.' To the contrary, he rejoined, 'our action was deliberately, warmly planned.'

And they trouble progressives because they insist on professing their faith. 'So', said a colleague, 'you're going off to defend those fundamentalists'. Many of my progressive friends and comrades, among them veterans like myself of mass civil disobedience actions at Pine Gap in the mid 1980s, harbour a visceral suspicion of the Pine Gap 4, not because they are ratbags, but because they are believers. And believers who, by the way, are as theologically removed from fundamentalists as Jesus was from the Pharisees.

A couple of weeks before the Court of Criminal Appeal considered the case of the Pine Gap 4, the commencement of the legal year had been marked, as usual, by a service at the Alice Springs courthouse. Her Honour Justice Sally Thomas (who had presided over the trial of the Pine Gap 4) and His Honour Tom Pauling QC, the Administrator of the Northern Territory, were among those who gave the readings, of divine law-giving on Mount Sinai, and divine law-breaking by Jesus of Nazareth. The annual event affirms that our courts, with their solemn rites, their ceremonial vestments, their sworn oaths and their sacred texts, derive and continue to rely for their mystique and power at least in part on the authority of the church and the Bible. But then in her address, our local no-nonsense Uniting Church minister uncomfortably reminded us that at the heart of the gospel there is also a troubling antinomian counter-current of justified, loving disobedience — the disobedience impelled by the need to avert evil.

Crime and punishment

At their trial, the Pine Gap 4 tried — and failed — to convert this theological doctrine into a viable legal defence.[7] We were, they argued, responding to a sudden or extraordinary emergency. We knew that the war in Iraq was illegally killing defenceless people daily, and we honestly and reasonably believed from our researches that Pine Gap was being used to prosecute that illegal war. We had written letters, and gone to demonstrations against the war, to no avail. And so our hearts told us it was necessary to go to Pine Gap, the heart of the war machine in the heart of Australia, to disrupt its operations. And what is more, our actions were restrained, non-violent and a reasonably proportionate response to the appalling evil we needed to avert.

But Thomas J, like others before her, instructed the jury that in Australian law a defence like this could not be raised in circumstances like these. Even so, the jury members, visibly moved by the testimony and sincerity of the unrepresented accused, took five hours to examine their consciences before bringing in the all-but-inevitable guilty verdicts. In a similarly sympathetic spirit, Thomas J rejected the prosecution demand for terms of imprisonment to be inflicted, and instead imposed modest fines.[8]

The Crown appealed, claiming that to punish these crimes of conscience with mere fines was an act which itself 'shocked the public conscience'. A few months later, a new national government was swept to power on the back of a campaign which prominently featured a commitment to withdraw Australian troops from Iraq. In that light, the Crown claim that the public had been shocked by the mercy shown to four peaceful trespassers agitating for an end to such an unpopular war seemed difficult to sustain, but in the event the issue was never considered by the Court of Criminal Appeal, because in the meantime the Court had acquitted the Pine Gap 4.[9]

The first point

The accused, as conscientious citizens committed to taking personal responsibility for their conduct, had always intended to represent themselves in court, as they did throughout the preliminary committal hearing before a magistrate in 2006, and then again at their jury trial in the Supreme Court of the Northern Territory sitting at Alice Springs the following year. During their trial, they were confronted by up to nine lawyers at a time, including a brace of senior counsel, representing various Commonwealth entities which, besides the Commonwealth Director of Public Prosecutions on behalf of the Crown, included the Secretary of the Department of Defence, the Federal Commissioner of Police and the Director-General of Security. It was a daunting and exhausting experience for the four lay litigants, as the judge, after hearing extensive argument, ruled adversely to them in every one of a complex series of questions involving public interest immunity, parliamentary privilege, the laws of evidence and the scope of defences under the *Criminal Code 1995* (Cth).

Many months earlier, however, while preparing her case, Mulhearn had approached former Federal Court

7. See *The Queen v Bryan Joseph Law & Ors* [2007] NTSC 45.

8. The sentencing remarks are accessible at <www.nt.gov.au/ntsc/doc/sentencing_remarks/2007/06/pdf/15062007lawors.pdf> at 13 June 2008.

9. Only the convictions for offences against the *Defence (Special Undertakings) Act* were quashed. The Pine Gap 4 did not challenge their convictions for damaging property under the *Crimes Act 1914* (Cth).

judge Ron Merkel QC, hoping he would help her to give legal legs to her proposed defences of necessity and self-defence. Merkel was willing to help, but started by going back to basics, asking himself what it was that the Crown had to prove. An element of each of the charged *Defence (Special Undertakings) Act* offences was that something had been done in a 'prohibited area'. And, as has been seen, there was a statutory pre-condition to declaring an area prohibited: pursuant to s 8, it had to be necessary for the purposes of the defence of the Commonwealth.[10] And thus was exposed an intriguingly novel point.

It was novel because, curiously, no-one had ever been prosecuted under this Act before. During the trial, the Deputy Chief of Facility gave evidence that he thought this was because the Pine Gap 4 were the first protesters ever to have penetrated the 'technical area'. However, back in the 1980s, when there were hundreds of arrests inside the base, I seem to recall at least one action in which someone managed to graffiti a radome. Perhaps that person wasn't caught. I am not sure. What is certain, however, is that the security of the base was under far more threat in 1983 and 1987, when activists (some of them neither calm nor cheerful) swarmed over the fence en masse, than it was on 9 December 2005, when the Pine Gap 4 undertook their symbolic inspection.[11] What had changed, of course, was the world after September 11, and the enactment in Australia of an extraordinary array of anti-terrorist legislation which had criminalised a broad range of hitherto lawful political activity. But in the flurry of passing and then repeatedly amending the *Anti-Terrorism Act 2004* (Cth) and a raft of other associated laws, all drafted in the context of contemporary understandings of the scope, limits and interaction of executive, legislative and judicial powers, it seems that no-one had thought to examine the dusty *Defence (Special Undertakings) Act 1952* (Cth), to see if it would still pass muster.

10. Sections 6 and 7 between them establish a different mechanism by which a prohibited area can be established, with a different (but somewhat similar) pre-condition. Pine Gap was also declared a prohibited area under these provisions, but the Crown ultimately elected not to rely on them in its prosecution, and so their meaning and effect were not judicially considered.

11. An annotated bibliography of internet sources on the history of Pine Gap protests (as well as the facility itself) is accessible at: <www.globalcollab.org/Nautilus/australia/australian-defence-facilities/pine-gap> at 13 June 2008.

The s 8 point was raised for the first time by the Pine Gap 4. For reasons which will be seen, it is most unlikely ever to be raised again.

Interlocutory fun

Prior to trial, the defence requested the Crown to provide particulars of what it proposed to rely on to prove that Pine Gap was a prohibited area. The Crown responded by providing a copy of the declarations of the Minister of State for Defence published in the Government Gazette on 9 November 1967, that the 'Defence Space Research Facility Pine Gap' was a 'special defence undertaking' (pursuant to s 6) and a 'prohibited area' (pursuant to s 8). When in due course the Crown was directed by the Court to provide particulars, it nailed the Gazette notice to its mast, effectively proclaiming that as far as it was concerned, that was all the proof it needed, and that no more would be provided.

Ultimately, the appeal court found that reliance on the Gazette notice *could* amount to proof that Pine Gap indeed was and had remained a validly declared prohibited area. The s 8 declaration averred that the Minister was satisfied that it was necessary for the defence of the Commonwealth to declare Pine Gap to be prohibited. But (remember the *Communist Party Case*), just because the Minister believed it, didn't necessarily make it so. The declaration, it was held on appeal, was prima facie evidence, but it was not conclusive, and if the defence sought to rebut the allegation that it was necessary for defence purposes to declare the base to be a prohibited area, then that alleged fact, like any other element of a criminal charge, remained for the prosecution to prove beyond reasonable doubt.

Before Thomas J in the court below, however, the Crown argued that the Gazette notice was, in effect, conclusive. Arguments like this about Ministerial decisions made pursuant to modern legislation are routinely won by the Crown, because these days laws designed to give effect to Ministerial fiat are routinely hedged with ouster clauses which (for the most part) effectively prevent troublesome judges sticking their noses in political decisions. Back in 1951, however, Parliament had not yet contrived such fancy statutory devices.

To win its argument, as it did before Thomas J, the Crown conceded that when the Act said that a declaration could only be made if it was necessary for defence purposes, what the Act really meant was that it could only be made *if the Minister was satisfied* it was necessary for defence purposes. The Judge agreed, and read those words into s 8. Given the clear words in the Gazette, how could one avoid concluding that the Minister (now long since deceased) was so satisfied, and accordingly the Judge went on to find 'as a matter of law' that the Gazette established that Pine Gap was a prohibited area. As a consequence, during the trial, every time the Pine Gap 4 tried to cross-examine Crown witnesses about what Pine Gap did, they were quickly shut down: what the base actually did was not, the Judge repeatedly held, relevant to any fact in issue

Pine Gap remains a prohibited area, entering it remains illegal, and the Crown can simply avoid repeating the debacle of this failed prosecution by resuming their previous reliance on the trespass provisions of the Crimes Act.

in the trial. Similarly, the accused were not permitted to call witnesses themselves to give expert evidence about what Pine Gap did. As a result of her ruling, the Judge had converted an element of the offence — a question of fact which should have been determined by the jury — into a question of law, for the Judge alone to determine. The very issue which the Citizens Investigation Team had sought to agitate all along was thus bracketed out of the trial.

As was ultimately held on appeal, the Judge's decision was flawed: there was really no proper basis for reading the words *if the Minister was satisfied* into the Act, which, after all, included phrases just like this elsewhere in its provisions. If Parliament had meant to add those words, it could and would have done so. But it could not have afforded to do so, because, as has been seen, of the fatal problem which had killed the *Communist Party Dissolution Act*.

Having failed on this point, the accused proceeded to apply for an order that the Commonwealth provide discovery of, among other things, the documents relied on by the Minister back in 1967 (and again in 1992, when further similar declarations were made over Pine Gap) in reaching his state of satisfaction that defence purposes necessitated the declaration of Pine Gap as a prohibited area. That application also failed.[12] But, tainted as it was by the erroneous earlier ruling, this decision was also flawed, as the appeal court later confirmed.

Keeping secrets

Even if discovery had been ordered, the Commonwealth would undoubtedly have claimed public interest immunity to prevent the accused actually getting access to any sensitive documents about Pine Gap. To properly adjudicate such a claim, the Judge would have had to examine the documents herself and decide whether they should be withheld on the basis that in all the circumstances the interests of national security outweighed the interests of the accused. The accused argued that if as a result they would have been effectively deprived of a chance of a fair trial, they should be entitled to a stay of the proceedings either permanently, or until such time as the documents were released to them.

Throughout the proceedings the Commonwealth, although not a party to the prosecution itself, sought to intervene to protect the shroud of secrecy which has always enveloped Pine Gap. Information about Pine Gap available to the Australian public is scant, but in 1996 a Parliamentary Committee inquired into the functions and operations of the base, heard evidence, and published its findings. At their trial the accused sought to refer to this material,[13] but the Commonwealth objected, invoking the *Parliamentary Privileges Act 1987* (Cth), which, they argued, prevented anything said in Parliament (subject to some inapplicable exceptions) from being repeated in a court. To the dismay of the unrepresented accused, who had assumed that Parliament would be regarded by a court as a particularly authoritative source of information, the objection was upheld.

This was by no means the only such intervention by the Commonwealth. Much earlier in the proceedings, the Crown had (it must be assumed, inadvertently) supplied the defendants with a document which illegally named and identified as an ASIO agent a person who had briefly spoken to two of the protesters while they were in custody shortly after their arrest.[14] When this awkward fact emerged, the Commonwealth engaged senior counsel who sought and obtained ex parte orders imposing a broad range of restraints and obligations on the defendants, including a prohibition on publicly acknowledging the existence of the orders themselves. The defendants were denied an explanation for the making of the orders, and were denied access (either personally or by their lawyers) to any of the material relied on by the Commonwealth to obtain the orders in the first place. After a few months of inconclusive court events and extensive and at times testy discussions between the parties, embarrassing reports began to emerge in the media that the Crown had accidentally disclosed the name of an ASIO agent to the Pine Gap 4. Shortly thereafter the Commonwealth agreed to have the orders discharged, on condition that the defendants (and their lawyers) relinquish all of the offending information, which they readily did.

This shadowy sideshow was graphically illustrative. To the defendants, the Commonwealth's response was a ham-fisted and oppressive waste of time and resources, typical of the obsessively secretive hyper-sensitivity that has long been associated with Pine Gap. And to the Crown and the Commonwealth, the smilingly obdurate defendants were as usual, frustratingly difficult to contain, both legally and politically.

The Commonwealth subsequently applied to intervene in the hearing of the offenders' appeal against conviction. This time, however, leave was refused, prompting Crown counsel to seek a brief adjournment

12. *The Queen v Bryan Joseph Law & Ors* [2007] NTSC 26.

13. Not for the purpose of challenging the validity of the prohibited area declaration, which the Judge's previous ruling had prevented them from doing, but to show that their beliefs about Pine Gap's purposes were reasonable, in order to establish an element of their defences of necessity and self-defence.

14. It is an offence to name an ASIO agent: *Australian Security Intelligence Organisation Act* 1979 (Cth), s 92.

on the ill-conceived ground that 'the situation has now dramatically changed', a final hint to the Pine Gap 4 of the possibility that the strings of the prosecution were being pulled by others, in Canberra or perhaps even further afield.

The tactics of cheek

Throughout the proceedings the Pine Gap 4, as Christian pacifists, repeatedly turned the other cheek. And, as tactically astute and audacious activists, they also showed a lot of cheek. The mix was beguiling and exasperating, subversive and empowering.[15]

They had written to the Minister of Defence and invited him to join them on their proposed inspection of the base. When he declined, they told him they would go ahead anyway, and then travelled to Alice Springs where, wearing their rather ridiculous Citizens Inspection Team outfits, they purchased maps and bolt-cutters from local suppliers, brazenly explaining what they were planning to use them for. They claimed that their actions were transparent, but (presumably to give themselves a sporting chance of success) they did not provide security staff with the precise time and entry point of their incursion.

Dowling made a point of attending court in bare feet, and of remaining seated when ordered to rise. He refused to enter a plea, saying he didn't recognise the jurisdiction of the court.[16] Otherwise, however, he and his co-accused actively, courteously and diligently participated in the trial process, cross-examining witnesses, making legal submissions and addressing the jury. Nevertheless, they took considerable advantage of the allowances which must be accorded by a trial judge to unrepresented accused. They complained to the jury that they had been singled out for prosecution under the *Defence (Special Undertakings) Act*, about the evidence they had wanted to call which had been suppressed, of the ruling to withdraw all their defences, and that they were facing lengthy prison terms, all submissions defence counsel would never have been permitted to make. The Crown's objections, however technically sound, were often counter-productive because their opponents, with their effective jury advocacy skills, could not be made to play the justice game by the conventional rules.

When it came to the arguing of the interlocutory points, and to their appeal against conviction arising from those matters, they retained counsel: there was no jury to play up to, and besides, the legal submissions were technical and complex.

The business of negotiating when, whether and how to be represented — and unrepresented — was ongoing, delicate and complicated, both for the accused and their lawyers. For me, it was both exhilarating and challenging to play the various roles of advisor, instructing solicitor, occasional junior counsel[17] and legal aid officer. As a former Pine Gap protester myself I personally identified with Jim, Adele, Bryan and Donna. However, bearing steadily in mind my professional duties to the court, my clients, my colleagues and my employer, I kept my distance and stuck to defending the case, leaving the cause to Dowling, Goldie, Law and Mulhearn. It was wonderfully refreshing (and utterly unprecedented for this legal aid lawyer) to be favoured with instructions by clients who were so unfailingly peaceful, honest, thoughtful, articulate, courteous, compassionate, conscientious — and sober. It was, however, a constant struggle to justify and find the time and energy required by this case when so many other less attractive clients were in so much greater need of urgent assistance.

The last point

Civil disobedience exposes those who engage in it to the risk of vigorous litigation, substantial penalties, and public opprobrium.[18] It also exposes the state to risk: police and prosecution agencies may be embarrassed, confidence in the legal system can be impaired, and public support for important government decisions can be undermined.

The Pine Gap 4 won a spectacular but incomplete legal victory. The case was unprecedented, but is unlikely to establish much of a precedent.[19] Pine Gap remains a prohibited area, entering it remains illegal, and the Crown can simply avoid repeating the debacle of this failed prosecution by resuming their previous reliance on the trespass provisions of the *Crimes Act*. The endeavour to call in aid legal defences such as necessity and self-defence to justify acts of civil disobedience was unsuccessful, and on that important issue the trial judge's reasons for ruling against the accused, which summarise and apply the relevant authorities, were neither challenged, considered nor disturbed on appeal.[20]

But the case does epitomise some strengths of our much-maligned criminal justice system. Notwithstanding the formidable forces representing the executive arm deployed in court, the trial judge showed great flexibility, respect and mercy in her treatment of these resolutely unconventional defendants. Subsequently, an appeal court sustained their rights through the robust and rigorous application of legal principle. The accused had always said they wanted to put Pine Gap on trial. In the end it was effectively held that they were entitled to do just that in the unique context of their particular prosecution.

But all along, Pine Gap itself, its spider's nest of white eggs glimpsed only obscurely from a distance, has remained as secretive and disturbing, now and for the foreseeable future, as ever.

RUSSELL GOLDFLAM is an Alice Springs legal aid lawyer.

The views expressed in this article are his, and not those of the Northern Territory Legal Aid Commission. The author acknowledges with gratitude those who assisted with the preparation of this article, particularly Ron Merkel QC, Bryan Law and Richard Tanter.

Email: russell.goldflam@ntlac.nt.gov.au

15. Law's own account of the trial is at <http://webdiary.com.au/cms/?q=node/1944> at 13 June 2008.

16. Similarly (along with Goldie) he did not admit that Pine Gap was on Commonwealth land, asserting that it is on unlawfully acquired Arrernte land.

17. Ron Merkel QC was principally assisted by Rowena Orr in the interlocutory and appeal proceedings.

18. 'A former beauty therapist will start a petition in Alice Springs to send anti-war activist Bryan Law back to jail if he breaks into Pine Gap again', *Centralian Advocate* (Alice Springs) 29 February 2008, 7.

19. Except, perhaps, in relation to the important but technical issue of the nature and scope of discovery in criminal proceedings: *The Queen v Law & Ors* [2008] NTCCA 4 at: [48] – [89] per Martin (BR) CJ; [129] – [134] per Angel J; [157] – [159] per Riley J.

20. *The Queen v Bryan Joseph Law & Ors* [2007] NTSC 45. See also *Limbo v Little* (1989) 65 NTR 19 per Martin (BF) J (Kearney and Rice JJ concurring) at 45–48, in which similar defences raised by a protester convicted of trespassing at Pine Gap on 19 October 1987 were rejected by the Northern Territory Court of Appeal, for similar reasons.