13/09; [2009] VSCA 84

SUPREME COURT OF VICTORIA — COURT OF APPEAL

RIXON v THOMPSON

Maxwell P, Weinberg JA and Kyrou AJA

21 April, 1 May 2009 — (2009) 22 VR 323; [2009] 195 A Crim R 110

CRIMINAL LAW – CONVICTION – INDECENT ACT WITH CHILD – SINGLE CHARGE ALLEGED APPELLANT 'KISSED, FONDLED AND ALLOWED THE CHILD TO FEEL HIS ERECT PENIS' – WHETHER CHARGE BAD FOR DUPLICITY – WHETHER CHARGE ENCOMPASSED SINGLE CRIMINAL ACTIVITY OR SERIES OF SEPARATE OFFENCES – QUESTION OF FACT AND DEGREE – REVIEW OF MAGISTRATE'S DECISION NOT TO REQUIRE ELECTION DID NOT INVOLVE CHALLENGE TO EXERCISE OF DISCRETION – RULE AGAINST DUPLICITY AS STRICT IN MAGISTRATES' COURT AS ELSEWHERE – ISSUE OF DUPLICITY NOT TO BE APPROACHED SOLELY ON BASIS OF WHETHER DEFENDANT TREATED UNFAIRLY – OTHER CONSIDERATIONS INVOLVED – APPEAL DISMISSED.

R. was charged with one count of committing an indecent act with a child under the age of 16 years and one count of indecent assault. The first charge described the act as "namely kiss, fondle and allow the child to feel his erect penis." Various acts of indecency took place over a period of several hours in several different locations. The magistrate found the first charge proved and the second charge was dismissed. An appeal to the Supreme Court was dismissed (cf MC32/2008). Upon appeal to the Court of Criminal Appeal—

HELD: Appeal dismissed.

1. It is a basic rule of the common law that no count in an indictment should charge the defendant with having committed two or more separate offences. It seems well established that the rule against duplicity applies with equal force to both summary offences and indictable offences triable summarily.

2. The submission that the rule should operate less strictly in relation to proceedings in the Magistrates' Court than it does in relation to proceedings on indictment is rejected. Such a submission is contrary to principle and to much of the case law on this subject. As the present case illustrates, a defendant may be as much at risk of imprisonment through being dealt with summarily as he or she would be if tried on indictment. No lesser standard of fairness is expected in relation to summary proceedings than proceedings brought before a jury.

3. The rule against duplicity is a rule of law, and does not involve the exercise of a discretion. It is true that there are exceptions to the rule and that some of these exceptions involve questions of 'fact and degree', and that reasonable minds may differ as to how a particular case should be viewed. That does not convert a rule of law into the exercise of a discretion.

4. A Court should not approach the question of duplicity by asking simply whether the defendant was in some sense treated unfairly. The rule itself is grounded upon considerations which include, but also extend beyond fairness. One important consideration is the orderly administration of criminal justice.

***Rixon v Thompson* [2008] VSC 232; 185 A Crim R 517; MC32/2008, overruled.**

***Walsh v Tattersall* [1996] HCA 26; (1996) 188 CLR 77; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 15 Leg Rep C4, considered.**

5. This case fell within one of the recognised exceptions to the rule against duplicity, described as the 'single transaction analysis'. Although the events in question took place over several hours, they could properly be viewed as a single, continuous transaction commencing with the incident at the computer, and concluding with the touching in the car during the drive home. There were at least broad similarities between the various acts alleged and the time that elapsed from the first act of indecency to the last – a period of several hours – was not so long as to prevent the conduct from being characterised as a single criminal activity. There was one victim only and one alleged offender.

6. In relation to the fairness question characterising the conduct as a single transaction does not produce unfairness. R. was apprised of the legal nature of the offence with which he was charged, and also of the particular act, matter or thing alleged as the foundation of the charge and could have been in no doubt as to the case to be presented against him. The charge identified unambiguously the three categories of conduct which would be relied upon as the foundation of the offence alleged. On that view, characterising the events as a single transaction, and charging them as a single count,

resulted in no unfairness. Although the acts were pleaded conjunctively, it was readily conceded that there could be no defence based upon the proposition that there was (for example) proof of fondling and touching the penis, but no actual kissing.

***R v Heaney* [2009] VSCA 74; (2009) 22 VR 164; (2009) 194 A Crim R 562, and**
***Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104, applied.**

7. The Magistrate plainly accepted the complainant as a credible witness (much of whose evidence was not specifically challenged, at least as to its truthfulness), and she had no evidence before her to contradict him. In these circumstances, it must be supposed that she found all of the acts alleged proven.

MAXWELL P, WEINBERG JA and KYROU AJA:

1. This is an appeal, pursuant to leave, from a decision by a judge of the Trial Division dismissing an appeal under s92 of the *Magistrates' Court Act* 1989. The appellant, Corey Rixon, pleaded not guilty to one count of committing an indecent act with a child under the age of 16 (charge 1)[1] and also, in the alternative, to one count of indecent assault (charge 2).[2] On 23 July 2007, the charges were heard summarily.

2. Charge 1 was in the following terms:

> The defendant at Mentone on 8th December, 2006, did wilfully commit an indecent act namely kiss, fondle, and allow the child to feel his erect penis with a child under the age of 16 to whom he was not married.

3. On 24 July 2007, the appellant was found guilty of that charge. He was sentenced to a term of six months' imprisonment. Three months of that term were suspended for a period of 12 months. He was granted bail pending appeal.

4. No verdict was taken on charge 2. For present purposes, that charge should be regarded as having been dismissed.

5. The appellant could, of course, have appealed to the County Court pursuant to s83 of the *Magistrates' Court Act*. Any such appeal would have been by hearing *de novo*. However, he elected instead to appeal to the Supreme Court on a question of law. He contended that the charge upon which he was convicted was bad for duplicity.

6. On 27 June 2008, that appeal was dismissed. The appellant now contends that the judge below erred in rejecting his contention as to duplicity.

Facts of the case

7. In the course of his evidence, the 13-year-old complainant told how, during the afternoon of 8 December 2006, he had had an argument with his mother. As a result, he went to the home of the appellant, who was the former husband of a family friend. He arrived there at about 6 pm.

8. According to the complainant, he and the appellant had a conversation in the lounge room. At one point, a friend rang the complainant on his mobile, and they spoke for some time. The complainant spilt some tea on his shirt. The appellant gave him a clean top to wear. He also gave the complainant some beer, which the complainant drank. They then had a further conversation.

9. The two of them then sat down at the appellant's computer. The complainant was shown a series of photographs, a number of which were sexually explicit in nature. They showed the appellant, together with others, naked and engaged in masturbation.

10. After viewing the photographs, but while still seated at the computer, the appellant started to massage the complainant's shoulders. He put his hands down the front of the complainant's shirt, and began rubbing his chest. Initially, the complainant said nothing. However, shortly thereafter, he asked the appellant to stop. The appellant then got up, left the computer, and went and sat down on the couch. The complainant joined the appellant there, and they then had a further conversation.

11. According to the complainant, the next thing that happened was that they 'just ended up

hugging'. The appellant began to 'stroke' him, and attempted, without success, to kiss him. He then put his head on the complainant's chest. He rubbed the complainant's leg, and stroked his arms, back and inner thigh.

12. The complainant said: 'I felt like his lips against mine a bit and I pushed him away and told him to stop.' That was the only evidence adduced of any actual kissing.

13. After some further conversation, the appellant left the lounge room and went into his bedroom. For reasons that were never clearly explained, the complainant followed him. Eventually, the two of them sat on the bed. They then lay back facing each other. The complainant acknowledged that, by that stage, he may have been subconsciously 'flirting' with the appellant. He claimed that the appellant again tried to kiss him. However, he resisted, and succeeded in pushing him away.

14. After this, the two of them returned to the lounge room. By this time, it was about 9.30 pm. The complainant's mother telephoned. She spoke to the appellant, telling him that he had to bring her son home immediately.

15. After that call, the appellant and the complainant sat together again on the couch. The appellant recommenced stroking the complainant's arms, leg, chest and crotch. He licked the complainant on the neck. The complainant then ran his hands over the appellant's penis, initially from outside the appellant's trousers, but subsequently from within. The appellant then again tried to kiss the complainant. However, he was again pushed away.

16. At about 10.30 pm, the appellant drove the complainant home. According to the complainant, during the course of the drive, the appellant ran his hand down the complainant's inner thigh. He said that he, for a time, reciprocated.

17. At the close of the prosecution case, counsel for the appellant submitted, for the first time, that charge 1 was bad for duplicity. He said:

> The difficulty with having multiple acts under one charge is the trier of fact, whether it be a magistrate or a jury, are put in the position of having to determine which of the allegations effectively they're dealing with at any particular time, and of course the accused is in that difficult position of not knowing what the trier of fact is addressing in their deliberations.
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> This is dealt with [in] *Johnson v Miller* (1937), the High Court case, and it's also dealt with in that well-known case of *S v R* (1989) 64 CLR 126. *Johnson v Miller*, Your Honour, is [1937] HCA 77; (1937) 59 CLR 467. I say that the proper course is the prosecution must elect which act attaches to which charge. Perhaps in a more down-to-earth way, Charge 1 specifies that 'the defendant at Mentone on 8 December 2006 did wilfully commit an indecent act', in the singular, and then goes on to specify three acts. I say that the emphasis that I place on the word 'act' as singular is highly relevant. In fact, it's in accordance with the statute. To have multiple acts under that one charge is inappropriate. The prosecution ought to select which act they rely upon to found the charge.

18. In reply, the senior constable who was prosecuting the matter, submitted:

> Indeed, there's one charge which contains multiple particulars. It was only yesterday that counsel asked for particulars in relation to this charge. As I stated yesterday, if they were asked for before yesterday's date we would have gotten the informant to type out an individual charge for each individual act that makes up the indecent assault. Your Honour, we still say that that charge is valid on the basis of each of those acts. In fact, it would be the prosecution's viewpoint that it's a course of conduct over a specific meeting which involved various acts which all come together to create the indecent assault. If Your Honour was to find that only one or two of them were found then it would be a matter for the court as to whether that charge could be made out. We say it's the entirety of those actions which constitute that charge being made out, as well as individual facets of the particular as well make out that charge. That's the submission of the prosecution.

19. Regrettably, the transcript of the proceeding before the Magistrate is incomplete. It omits any mention of a ruling regarding the submission as to duplicity. It contains only the words 'Portion Missing' at the place where a ruling would be expected.

20. However, in an affidavit sworn by counsel who appeared on behalf of the appellant in the

Magistrates' Court, it is said that her Honour did not, at any stage, rule upon that submission. The affidavit deposes:

> It is my recollection that at no stage did the Magistrate require the Prosecution to elect which act was relied upon to found charge 1, despite the Defence making submissions that the Prosecution ought be called upon to elect. It is notable that the Prosecutor in the case made submission at page 157 of the transcript that it is the entirety of the acts which are relied upon by the Prosecution to found charge 1.
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> It is my recollection that the Magistrate failed to detail which alleged act or acts were relied upon to find charge 1 proven against the Appellant. It is noteworthy that the Magistrate in her sentencing remarks at page 160, line 26 of the transcript, refers to acts, plural, when sentencing the Appellant.
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> The Magistrate in giving her decision and her reasons for decision did not detail which act or acts were relied upon to sustain charge 1 and which act or acts were not relied upon in making her determination in respect of charge 1.

21. The Magistrate, by her finding of guilt, must have rejected the submission that the charge was bad for duplicity and that the prosecution ought therefore to have elected which of the many acts spoken of by the complainant was relied upon to constitute the offence under charge 1. Moreover, her Honour at no stage in her sparse reasons for sentence gave any indication of what act or acts she found had been committed. She did no more than refer to the appellant's conduct, in the broadest of terms, as 'predatory'.

Decision in the Supreme Court

22. The judge of the Trial Division[3] observed in his reasons for decision that the rule against duplicity was designed to promote both fairness and the orderly administration of justice.[4] His Honour said that duplicity tended to inhibit both, although this was by no means inevitable. He said:

> Apart from relevant legislative provisions, the exceptions to the rule arise when, despite its general tendency, a duplicitous charge either gives rise to no unfairness, or (to the contrary) in fact promotes fairness and efficiency. It follows that, when deciding whether or not a count or charge is bad for duplicity, it is to any applicable legislation, and then to notions of fairness and the due administration of justice, that the court should have regard.[5]

23. The judge noted, however, that there was a temptation to be over-impressed by arguments which concentrated upon technicalities and 'not upon the fundamental issues of statutory construction, fairness and the proper administration of criminal justice'. He stated that such an approach could result in the rule against duplicity being turned into a 'weapon' wielded by lawyers for the prosecution or defence in ways which are 'inimical to the cause of justice'.[6]

24. The judge observed that an accused was, as a matter of basic fairness, entitled to know the case that he or she had to meet.[7] A charge that was duplicitous might obscure the real allegation that the prosecution was seeking to prove.[8] His Honour then referred to a number of cases, looking in detail at some examples where charges had been held to be duplicitous.[9]

25. The judge then explained just how the rule against duplicity could operate to assist in the orderly administration of criminal justice. By isolating each offence, an accused might be encouraged to acknowledge responsibility for aspects of his or her conduct. Secondly, in order to ensure that evidence was properly admitted, and the jury were given proper instructions about the law to be applied, a court had to know precisely what charge it was dealing with. Thirdly, in the event of conviction, a court needed to know the offence for which the defendant was to be punished.[10] The record had to show the offence in relation to which the person had been acquitted or convicted in order for that person to avail himself or herself, should the need arise, of a plea of *autrefois acquit* or *convict.*[11]

26. His Honour said that despite the many good reasons for the existence of the rule, it ought not be allowed to frustrate the due administration of justice. The touchstone against which 'technical objections' were to be assessed was fairness and, to the extent that fairness was not impaired, efficiency.[12]

27. He said:

> The point may be illustrated by reference to cases in which several separate offences have been committed, or are alleged to have been committed, in close proximity of time and space: where, in the words of (Michael) Kirby J in *Walsh v Tattersall* the 'facts [are] so closely related that they amount to the one activity'.[13]

28. His Honour then reviewed some further cases dealing with duplicity.[14]

29. The judge noted the appellant's argument that although he had been charged with one act of indecency only, the particulars of the charge identified three separate and distinct types of conduct as constituting that act of indecency. These were kissing, fondling and allowing a child to feel an erect penis. Each of these types of conduct on its own was said to amount to an indecent act. In these circumstances, so it was submitted, the prosecution should have been required to specify which of them gave rise to the offence contained in charge 1. Her Honour's failure to take that step meant that the conviction should be quashed.

30. The judge rejected that submission. He said:

> But this is really to submit that he ought to have been charged with three offences. And so, as a matter of good practice in the drafting of an information or indictment, he should, if there were credible evidence that three separate indecent acts were committed. But if on analysis the 'facts [are] so closely related that they amount to the one activity', or if the degree of criminality involved did not seem to a merciful prosecutor to warrant laying multiple counts, fairness might have persuaded that prosecutor that it would be appropriate to charge Mr Rixon with only one indecent act, 'so that hereafter it [will not] appear to those not familiar with the circumstances that [three] entirely separate offences were committed'. The irony, in those circumstances, of Mr Rixon then turning such mercy into a reason why his conviction should be quashed is too obvious to require comment.[15]

31. The judge also rejected a variant of the same submission. This was that the prosecutor's failure to specify which of the three forms of conduct identified in the charge constituted the indecent act made the conviction 'uncertain'.[16] Broadly speaking, the principle invoked was that discussed in *R v Trotter*.[17]

32. His Honour observed that *Trotter* involved a jury trial in which there was a rational basis upon which individual jurors could, ultimately, have concluded that any one of a series of alleged incidents had occurred, but not the others. That would have meant an absence of necessary unanimity in relation to any one of those incidents. The case of Mr Rixon was different, however, because it did not involve a jury. The Magistrate must have found at least one of the three individual forms of conduct identified in the charge – the kiss, the fondling, or the incident with the penis – to have been proved beyond reasonable doubt.

33. His Honour said that that being so, a conviction must necessarily follow. He accepted that this might leave the appellant uncertain as to which of the various matters particularised had been found to constitute the indecent act. The missing part of the transcript only added to the mystery. However, he said that the appellant could have overcome any possible prejudice arising from such uncertainty by seeking clarification from the Magistrate had he wished to do so. The appellant had not, at any stage, complained, after having been found guilty, that he was uncertain as to what he had been found to have done. Moreover, he had not sought to be heard in relation to the facts upon which he should be sentenced.[18]

34. Finally, the judge concluded his reasons by specifically mentioning an argument that had been ventilated before him at some length. This concerned the question whether the three nominated categories of behaviour were properly to be regarded as part of one composite event, or whether they should be viewed as two or more separate events. Ultimately, he observed:

> I do not find it necessary to come to a concluded view about this because, if the appellant is correct and there was more than one event, then he had the good fortune to be charged with only one. There was no unfairness to him in that, and he has nothing about which he can, in my opinion legitimately complain. On the contrary, he was the beneficiary of a prosecutorial decision which left him less exposed to the rigours of the criminal law than he might have been.[19]

35. His Honour's reasoning, in the passage set out above, gave rise to considerable debate during the course of the hearing before us. It was submitted that it reflected a serious error of principle. We shall return to that issue shortly.

Appeal to this Court

36. By notice of appeal filed on 15 September 2008, pursuant to the grant of leave, the following question of law upon which the appeal was brought was formulated:

> Did the Magistrate err in failing to direct the prosecution to elect or specify which act of the accused was being relied upon to found the charge of wilfully commit an indecent act?

37. This was accompanied by the following ground of appeal:

> The Appeal Judge erred in law in not deciding that the prosecution at first instance was required to elect which of the 3 acts specified within the information was relied upon to found the charge.

Submissions to this Court

38. It was submitted on behalf of the appellant that the prosecutor's failure to elect which of the three categories of conduct particularised in the charge against him was the subject of that charge made his conviction 'uncertain', in the sense spoken of in *Trotter*.[20] It was further contended that this had compromised counsel's ability to direct submissions towards a specified act, which would have been possible had such an election been made. It was also argued that there was unfairness because the appellant could not ascertain whether he had been sentenced on the basis that one, some, or all of the acts alleged against him had been proved.

39. It was submitted that had there been an election, proper consideration could have been given to the basis upon which evidence of other acts might be received, and argument advanced as to the limited use that could be made of that evidence.

40. The respondent argued, in reply, that the Magistrate had correctly held that the charge was not bad for duplicity. It was submitted that the appellant had engaged in a continuing course of conduct, or single criminal enterprise, from the time that he showed the complainant the sexually explicit photographs to the time that he drove the complainant home. That single course of conduct entailed what was described as 'grooming'. The acts alleged all involved the same victim. They all took place at about the same time, and in broadly the same location. The motive for them all was the same, and there was no realistic prospect that different defences might apply to different acts. In short, there was no logical basis upon which this single course of conduct should be broken up into discrete offences.

41. The respondent drew attention to *R v Khouzame & Saliba*.[21] In that case, the evidence disclosed a number of discrete acts of sexual intercourse. The issue raised was whether or not there was duplicity because more than one act was involved in the charge laid. The case set out some of the essential principles relating to duplicity, which the respondent said were:

- ordinarily separate offences should be the subject of separate charges, except where they are continuing offences, or amount to the one activity;[22]
- one count may be used where the acts may be considered as one transaction or criminal enterprise;[23]
- if a precise understanding of the charge laid, although evidenced by multiple acts, is that it represents a single crime, then a single count is permissible;[24]
- it is a question of fact and degree in each case whether it is one charge or more than one; and
- the indicia for deciding whether there should be one charge or more are:
  - the connection of events in point of time;
  - the similarity of the acts;
  - the physical proximity of the place where the events happened; and
  - the intention of the accused throughout the conduct.

42. The respondent submitted that it was clear beyond argument that the appellant knew precisely the case that he had to meet. He had been provided with a detailed statement made by the complainant, and the evidence that the complainant gave accorded closely with that statement.

43. Although it was true that the appellant had requested particulars of each charge prior to the commencement of the proceeding, and those particulars had not been supplied, he made no

complaint about being uncertain as to the case against him until after all the evidence had been led. The appellant had the benefit of a single clearly identified charge, which he was perfectly able to defend, as opposed to a series of separate charges, each one based on a separate act.

44. The respondent submitted that the question to be determined on this appeal was simply whether the appellant had suffered any injustice. The short answer to that question was that there had been no unfairness of any kind.

45. Finally, the respondent submitted that this Court should approach this matter on the footing that what was at issue was a challenge to the exercise of a judicial discretion. Moreover, in his submission, the rule against duplicity ought not be applied strictly to proceedings in the Magistrates' Court, having regard to the exigencies governing proceedings in that very busy court.

Law regarding duplicity

46. It is a basic rule of the common law that no count in an indictment should charge the defendant with having committed two or more separate offences. The rule was discussed at some length by Thomas Starkie in his classic work, *A Treatise on Criminal Pleading*, published in 1822. [25]

47. Until recently, the rule found statutory force in England in the *Indictments (Procedure) Rules* 1971 (UK), though earlier rules date back to the *Indictments Act* 1915 (UK). Those rules have now been repealed, but the rule against duplicity is said to be implicit in Rule 14.2(1) of the *Criminal Procedure Rules* 2005 (UK).[26]

48. In Victoria, the position regarding presentments is set out in the sixth schedule to the *Crimes Act* 1958. Rule 3(2) provides that where more than one offence is charged in a presentment, the particulars of each offence so charged shall be set out in a separate paragraph called a count.

49. Although there is no equivalent provision regarding the formulation of charges laid in the Magistrates' Court, it seems well established that the rule against duplicity applies with equal force to both summary offences and indictable offences triable summarily. Indeed, a number of the leading authorities dealing with duplicity concern charges laid in Local Courts.[27]

50. In *S v The Queen*,[28] Gaudron and McHugh JJ explained the basis of the rule as follows:

> The rule against duplicitous counts in an indictment originated as early as the seventeenth century ... It may be ... that the rule grew out of the strict formalities associated with criminal pleadings at a time when the difference between misdemeanour and felony was the difference between life and death. However, the rule against duplicitous counts has, for a very long time, rested on other considerations. One important consideration is the orderly administration of criminal justice. There are a number of aspects to this consideration: a court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of *autrefois acquit* or *autrefois convict* ...
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> The rule against duplicitous counts has also long rested upon a basic consideration of fairness, namely, that an accused should know what case he or she has to meet.

51. In *Walsh v Tattersall*,[29] the High Court was concerned with a single charge alleging that the defendant had dishonestly obtained payments and benefits under the *Workers Rehabilitation and Compensation Act* 1986 (SA) between October 1992 and October 1993. At the relevant time, s120(1) of that Act provided:

> A person who – (a) obtains by dishonest means any payment or other benefit under this Act ... is guilty of an offence.

52. The issue was whether there should have been separate charges in respect of each occasion on which the defendant had received the payments during this period.

53. The High Court did not speak with one voice regarding this issue. Gaudron and Gummow

JJ held that the conviction should be quashed upon the basis that the defendant had not been charged with any offence created by the relevant section. That was because, as a matter of construction, the section displayed an intention to create a discrete offence upon the receipt of any one payment or benefit.

54. Dawson and Toohey JJ dissented. Their Honours noted that the case against the appellant was not that, on each occasion that he received a payment, there was a separate dishonest pretence that he was incapacitated for work. Rather, it was a case of one continuing representation amounting to a single compendious false pretence. As such, there was only one offence charged.

55. Kirby J alone held that the charge was bad for duplicity. His Honour referred to a number of previous decisions in which questions of duplicity had arisen, and set out a series of principles which governed this area. After tracing the history of the rule and noting its importance, he observed that even in cases where the point had no substantive merit, other than the legal merit of the objection to duplicity, courts had always regarded that objection as sufficient provided that the complaint as to form had been taken.[30]

56. His Honour went on to provide guidance as to when the rule could be said to apply, and when an exception to the rule might operate. He said:

> 5. The apparent artificiality of insisting on applying the rule against duplicity in its full rigour has been highlighted by actual and theoretical instances that have arisen, or been contemplated, where criminal acts occurred in **very close proximity to each other.** If, for example, criminal acts occurred **within a few minutes of time and in close physical proximity**, could they be regarded as **components of the one activity**, so as to be susceptible to treatment as a single count? If the events were seen as **part of the one transaction or criminal enterprise** this approach has been held to be permissible in England. If a precise understanding of the charge laid, although evidenced by multiple acts, is that it represents **a single crime**, then a single count is permissible. Many of the apparently conflicting judicial opinions, so criticised by the commentators, represent nothing more than attempts by judges to characterise multiple acts upon which the prosecution relied and to decide whether or not they could be fairly viewed as the **one transaction or criminal enterprise** so as to escape an attack on the ground of alleged duplicity. The usual explanation given for adopting this approach is that, only by doing so, would the judges be able to avoid reducing the law to technical absurdity.
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> 6. Particular problems arose for the application of the duplicity rule in the case of offences which, of their definition, were constituted by **continuous activity**. Such offences as keeping a brothel, required proof of particular acts at different times. Similarly, conduct which need not, but in some circumstances might, be constituted by activity over time could quite properly be charged in a single count. Instances where this qualification to the rule against duplicity has been upheld include cases involving charges of harassment and trafficking in drugs. Obviously, nice questions arise as to whether individual acts of supply of prohibited drugs create the same, or substantially the same, offence so as to sustain a single count and to resist an allegation of duplicity. **Various verbal formulae have been offered as a suggested test for whether the criminal acts are sufficiently close in time and space as to 'fairly and properly be identified as part of the same criminal enterprise or the one criminal activity'.** These valiant attempts by judges have been criticised as 'glib'. Judges themselves have acknowledged that judicial views in particular cases are not always easy to reconcile. Ultimately, what is presented is a **question of fact and degree** for decision in each case. Various indicia are proposed to sustain a single count against the charge of duplicity, notwithstanding that it may permit evidence to be adduced of events which, taken individually, could constitute separate offences. **The indicia include: (a) the connection of the events in point of time; (b) the similarity of the acts; (c) the physical proximity of the place where the events happened; and (d) the intention of the accused throughout the conduct.** Perhaps an indication of the considerable difficulty of the task to be found in is the fact that, in many of the leading cases, there is (as in this case) a division of judicial opinion. For instance, Latham CJ dissented in *Johnson v Miller*; Kitto J dissented in *Montgomery v Stewart*; and Brennan J (as he then was) dissented in *S v The Queen*.
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> 7. Because of the foregoing, it must be accepted as correct that 'the courts have never managed to produce a technical verbal formula of precise application which constitutes an easy guide ... as to whether the common law rule [against duplicity] has been infringed'. A choice of legal principle or policy is therefore presented in this appeal which this Court should resolve. Not a great deal of help is given to decisions in a particular case by saying that the test is to look to 'the gist of the offence'. Nor is much help afforded by saying that the test is whether multiple acts can 'fairly and properly' be identified as part of the same criminal enterprise or activity. With respect, it is not very useful to say that it is 'desirable' or 'preferable', where separate offences are arguably shown, that the prosecution should formulate separate charges. Unless courts are prepared to support

> such homilies with sanctions in the case of breach they are unlikely to much influence day to day prosecution practice. Not a great deal of help to the primary decision-maker is given by suggesting that the test is whether the charge, as formulated, has the potential to confuse or embarrass the accused. Clearly, a great deal depends on the nature of the offence. Where the alleged duplicity in the charge is latent, it may only be manifested by the way in which evidence is presented to support the charge. It may not be until the prosecution's case is concluded that it becomes apparent that the prosecution cannot prove all of the acts that have been rolled together in a single composite charge, making plain the unsuitability of the process reliant on that charge. **Exceptions to the general rule against duplicity have been allowed where the multiple acts relied on by the prosecution are so close in time and place that they can be viewed as one composite activity; where the offence is one that can be classified as continuing in nature; and in other anomalous cases.** However, such cases apart, although the courts in England and New Zealand have taken a more lenient view, **this Court has, until now, favoured a rule of strictness.** The question is whether this Court should now soften that stance.[31]

57. His Honour went on to say that there was no reason why a duplicity objection should not be entertained merely because it had not been raised at first instance, and had only arisen on appeal.[32] He added that a finding of duplicity would not oblige a court hearing the charge to dismiss it. Where the defect was one of patent duplicity, the proper course was to put the complainant to an election. Where the defect was latent and had not been removed by the provision of particulars, there were additional remedial steps available.[33]

58. Kirby J concluded that the purpose of s120 was to create a separate offence for each payment or benefit.[34] He went on to say that, save for statutory warrant, and for exceptional cases of continuing offences so closely related that they amount to one activity, separate offences should always be the subject of separate charges.[35]

59. The careful analysis by his Honour of the rule, and its operation, was of course a singular opinion and not a judgment of the Court. Nonetheless, it represents a most helpful analysis of what might otherwise be seen as nothing but a wilderness of single instances.

60. In *Khouzame & Saliba*, to which we earlier referred, the New South Wales Court of Criminal Appeal (Ireland, Kirby and Bell JJ) considered whether a single count of aggravated sexual assault was bad for duplicity having regard to the complainant's evidence that she had been sexually assaulted in a number of ways during the same encounter with the accused. Consent was the only issue. The appellants contended that there was latent duplicity within the indictment which, by the end of the evidence, had become patent.

61. The Court referred to the judgment of Kirby J in *Walsh v Tattersall*, and concluded that his Honour's formulation of principle regarding duplicity correctly stated the law. Their Honours went on to hold that there was no statutory warrant for aggregating in the one count a number of separate acts of sexual intercourse.[36] The charges against the appellants could not be characterised as a continuous activity,[37] nor did they fall so close in time and place that they could be regarded as a composite activity.[38] The alleged acts by each accused were separate and distinct.[39] Accordingly, each act of penetration should have been made the subject of a separate count.

62. The Court in *Khouzame & Saliba* observed that, at least before *Walsh v Tattersall*, some judges had encouraged prosecuting authorities to take a broad view in respect of an episode giving rise to sexual charges. In circumstances where, for example, a lesser offence was committed as a precursor to a more serious offence, the courts had held that the accused should generally be charged only with the more serious offence.[40]

63. In *Harris*,[41] Edmund Davies LJ said:

> It is perfectly clear on reading the transcript that the two charges related to one and the same incident. There is no suggestion of any indecent assault upon this same boy except that which formed the preliminary to and was followed very shortly thereafter by the commission of the full act of buggery. It does not seem to this court right or desirable that one and the same incident should be made the subject-matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed. Were this permitted generally, a single offence could frequently give rise to a multiplicity of charges and great unfairness could ensue.[42]

64. Similarly in *R v Slade*,[43] which also preceded *Walsh v Tattersall*, a nurse was sexually assaulted over a 20-minute period after she was grabbed on her way home. Two charges of aggravated assault, one of indecent assault, and one of rape were laid against her assailant. Everett J said:

> In my opinion it is undesirable that the facts and circumstances of what is in reality one incident or episode should be minutely dissected in order to distil from them as many different crimes as possible and include them as separate counts in the same indictment.[44]

65. Both parties to the present appeal drew comfort from *Khouzame & Saliba*. The appellant relied upon the adoption by the Court of the strict approach to duplicity favoured by Kirby J in *Walsh v Tattersall*. The respondent noted that *Khouzame & Saliba* turned in part upon the fact that there were two separate alleged offenders in that case, and different defences might have been available in relation to each, as well as in relation to the separate acts of penetration.

66. Recently, this Court has had occasion to consider the present state of the law regarding duplicity. In *R v Heaney*,[45] Ashley JA (with whom Redlich and Kellam JJA agreed) comprehensively reviewed the authorities. The appellant had been tried for attempted murder but convicted of the alternative offence of intentionally causing serious injury. That conviction was challenged on appeal on the basis that the count was bad for latent duplicity and/or uncertainty.

67. The facts were as follows. On the day in question, the appellant was involved in an altercation with the victim, a woman aged about 50. There was no dispute about the fact that he had stabbed her twice, once to the chest and once to the abdomen. The wounds were inflicted by two different knives.

68. It was common ground that each stab wound had inflicted serious injury. The critical question was whether the Crown had proved that at least one of the wounds was brought about by a conscious and voluntary act, accompanied by the intent to cause serious injury.

69. It was submitted, on the appeal, that the jury might not have been unanimous with regard to their verdict. Some members of the jury might have focused upon the first wound as the basis for convicting, while others might have focused upon the second. The two wounds were inflicted within moments of each other. Ashley JA concluded that there was no risk that the jury might have thought that a guilty verdict could be returned if some of its members were satisfied that one stabbing had been a conscious and voluntary act done with requisite intent, whereas others were satisfied that only the other stabbing had been done in that way.[46] He regarded the incident as 'a single (sometimes it is called 'composite') transaction'.[47]

70. His Honour referred to *Director of Public Prosecutions v Merriman*,[48] where Lord Morris said the following:

> It is furthermore a general rule that not more than one offence is to be charged in a count in an indictment. By rule 4 of Schedule 1 to the *Indictments Act* it is provided as follows:
>
> (1) A description of the offence charged in an indictment, or where more than one offence is charged in an indictment, of each offence so charged, shall be set out in the indictment in a separate paragraph called a count.'
>
> The question arises – what is an offence? If A attacks B and, in doing so, stabs B five times with a knife, has A committed one offence or five? If A in the dwelling house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery CJ in a case where it was being considered whether an information was bad for duplicity: see *Jemmison v Priddle* [1972] 1 QB 489 at 495. I agree respectfully with Lord Widgery CJ that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act. It must, of course, depend upon the circumstances.[49]

71. Ashley JA also referred to the speech of Lord Diplock (with whom Lord Salmon agreed). His Lordship said:

> The rule against duplicity, viz that only one offence should be charged in any count of an indictment, which is now incorporated in rule 4(1) of Schedule 1 of the *Indictments Act 1915*, has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count of an indictment.[50]

72. Ashley JA then went on to consider *Walsh v Tattersall*. After referring to what might be described as the strict approach to duplicity taken by Kirby J in that case, his Honour noted that Kirby J was in a minority on that issue.[51]

73. Ashley JA next referred to *Gardner v Caporn*,[52] a decision of the Western Australian Court of Appeal, in which Roberts-Smith JA reviewed a number of decisions of other Australian superior courts. We will not set out in any detail that analysis, as it is fully recorded in the judgment of Ashley JA.[53] It is sufficient to note that the authorities all seem to say that the question whether a charge encompasses a single criminal activity, or a series of separate offences, is regarded as one of fact and degree. While it cannot be correct to say that every single blow in a continuous attack must be charged as a separate assault, there may be cases where some singling out of separate charges does become necessary.

74. It is not difficult to think of examples. There may be different defences available. The first blow struck might be in response to a threatened attack, and thereby give rise to a possible defence of self-defence. However, if that first blow rendered the victim unconscious, any subsequent blow might be viewed in an entirely different light.

75. *R v Chen*[54] provides another example. There the appellant challenged two convictions of assaulting police officers. The police had been called to a Chinese medical centre, where they told the appellant to leave. There was an altercation. The appellant pushed Constable 'A' hard in the chest. That was one assault. The officers attempted to arrest him. He evaded them. Constable 'B' struggled with the appellant. During that incident, the appellant grabbed Constable 'B' by the genitals. That was a second assault. Constable 'B' then tried to handcuff the appellant who swung the handcuffs around and struck Constable 'A' with them on the nose. That was a third assault. The appellant then spat at Constable 'B', hitting him on the cheek. That was a fourth assault. While being put in the police car, he subsequently spat at Constable 'B' again, thereby committing a fifth assault.

76. It was held that throughout this single episode a series of separate assaults could be identified. Although the whole incident took only moments, the offences were sufficiently separated in time, and in nature, as to warrant separate charges. It was particularly significant that there were defences open to some of the charges, which arguably were not open to others. The evidence was different in part because various witnesses who came in and out of the premises saw different parts of what had occurred.[55]

77. The Court (Davies JA, Shepherdson and White JJ) concluded:

> Unlike those cases where events are so close in time and place that they can be viewed as one composite activity, the latent duplicity here, once exposed, left the appellant without knowledge of the particular act alleged as the foundation of the charge resulting thereby in a substantial miscarriage.[56]

78. Once again, both parties sought to rely upon Heaney before us. The appellant submitted that, although both duplicity and uncertainty had been rejected in that case, the facts were plainly distinguishable. The two wounds were inflicted within moments of each other, and as part of one continuing attack. The respondent submitted that Heaney reflected a more pragmatic and less strict approach to duplicity than that endorsed by Kirby J in Walsh v *Tattersall*.

Conclusion

79. We should dispose at once of several of the arguments that were advanced during the course of the appeal.

80. As previously noted, it was submitted on behalf of the respondent that the appeal from the Magistrate's decision not to require the prosecution to elect should be regarded as akin to a challenge to the exercise of a discretion. That would mean that the appeal could not succeed unless we were of the view that the discretion had miscarried in the sense described in *House v The King*.[57]

81. We reject that submission. The rule against duplicity is a rule of law, and does not involve the exercise of a discretion. It is true that there are exceptions to the rule. It is also true that some of these exceptions involve questions of 'fact and degree', and that reasonable minds may differ as to how a particular case should be viewed. That does not convert a rule of law into the exercise of a discretion. We approach this appeal on the basis that we must decide for ourselves whether the charge, as preferred, was bad for duplicity. We do not ask whether it was open to the Magistrate to come to the view that she did.

82. It was next submitted on behalf of the respondent that the rule should operate less strictly in relation to proceedings in the Magistrates' Court than it does in relation to proceedings on indictment. No authority was cited in support of that submission, which we reject. We regard it as contrary to principle and to much of the case law on this subject. As the present case illustrates, a defendant may be as much at risk of imprisonment through being dealt with summarily as he or she would be if tried on indictment. No lesser standard of fairness is expected in relation to summary proceedings than proceedings brought before a jury.

83. Moving on to the facts of the present case, we should say at once that we do not accept the respondent's submission that one approaches the question of duplicity by asking simply whether the defendant was in some sense treated unfairly. It is true, as Gaudron and McHugh JJ made clear in *S v The Queen*, that the rule against duplicity has long rested upon a basic consideration of fairness, namely that an accused should know what case he or she has to meet. It does not follow that, provided the accused does know the case to be met, there can be no difficulty associated with a duplicitous charge. In the first place, the rule itself is grounded upon considerations which include, but also extend beyond, fairness. As their Honours made clear, one important consideration is the orderly administration of criminal justice. And, as their Honours also made clear, there are a number of aspects to that consideration.

84. Of course, the requirement that an accused be informed clearly of the case that he or she must meet is based on a broader principle than that which underlies the rule against duplicity. In the present case, the appellant was fully aware of precisely what the complainant claimed had occurred. He was provided with a detailed statement, setting out each specific act that the appellant was alleged to have committed. To that extent, the requirements of *Johnson v Miller* were satisfied.

85. However, that is by no means the end of the matter. If upon a fair reading of the charge, it alleged the commission of two or more separate offences, then prima facie it would be what is often described as 'patently duplicitous'. The problem could then only be cured by an election. We say 'prima facie' because even an apparently duplicitous charge will not fall foul of the rule if one of the recognised exceptions to the rule is made out.

86. As we have previously outlined, it was submitted on behalf of the appellant that the judge approached this matter on an erroneous footing. His Honour asked himself, in the broadest of terms, whether the appellant suffered any unfairness. Having concluded that there was no unfairness, his Honour dismissed the appeal. That was entirely the wrong question and reflected the wrong approach. He was obliged to determine whether the charge was duplicitous. If so, he had to go on and consider whether one of the exceptions to the rule could be invoked, and thereby sustain its validity.

87. The respondent challenged this interpretation of his Honour's judgment. He submitted that although his Honour did not state in terms that a recognised exception to the rule was applicable, it was at least implicit in his Honour's reasons that he was of that opinion.

88. Paragraph [25] of his Honour's judgment is pivotal. We think that the appellant is correct in his submission that the judge did not determine the duplicity issue, but rather focused upon

an overarching principle of fairness. It would have been preferable had he not done so. He ought to have considered this case in the light of the authorities, and determined on which side of the line the charge lay. As we have said, while fairness is one of the principles which underlie the rule, the question whether the defendant was treated fairly is not determinative of whether the rule was breached.

89. There are cases not dissimilar from the present in which duplicity has been held to exist. In *R v Nickel*,[58] for example, the appellant was charged with 'sexual assault'. The complainant gave evidence of two separate acts of assault, one taking place in the bedroom and the other in the kitchen. Gleeson CJ, Lee CJ at CL and Allen J agreeing, held:

> Without going into the detail of the evidence, it suffices to say that there was a rational basis upon which individual jurors ultimately could have concluded that either one of the alleged incidents occurred but not the other. For example, in considering whether the bedroom incident occurred, a juror could well have had a doubt by reason of the evidence of the complainant's mother, which in effect contradicted the complainant's account of that incident. In relation to the kitchen incident, a doubt could have arisen in the mind of an individual juror by reason of certain inconsistencies in evidence which the complainant had given about that matter.[59]

90. The basis upon which it was held in that case that duplicity was made out was the realistic possibility that there might be different findings made in relation to the various incidents alleged. That seems to us to be a cogent argument in favour of requiring separate charges to be laid even where there are similar acts closely connected in time, place, and general circumstance.

91. We should say that we have particular concerns about the judge's conclusion that the appellant was treated mercifully because he faced only one charge in this case, rather than a number. That would be true of many, if not all, cases where duplicity is alleged. It is no answer to the complaint of duplicity to say that the appellant was better off because separate charges might have exposed him to a heavier penalty. If a complaint is made about the form of the charge, and it is justified in law, the appellant is entitled to succeed in his challenge. It matters not in the least that he may thereby be exposed to a harsher result.

92. Of course, the question to be determined in this appeal is not whether the judge's reasoning commends itself entirely to this Court, but whether his decision to uphold the charge as valid was correct.

93. The present case is, in our view, finely balanced. It can be said in support of the appellant that the various acts of indecency detailed by the complainant took place over a period of several hours and occurred in several different locations. It could be argued that there were some breaks in the chain of continuity. For example, after the first set of incidents on the couch, the appellant went into the bedroom, alone. He may at that stage have planned to desist from any further contact. The complainant followed him into the bedroom. That could be regarded as the beginning of a separate episode of offending. Likewise, the incidents that took place in the car on the way home could be regarded as a third, disconnected episode of offending.

94. On the other hand, there is also much to be said for the view that what took place on the day in question was one continuous criminal episode, albeit punctuated by a number of specific acts of indecency. The showing of the photographs to the complainant, and the supply of beer, strongly suggests a form of 'grooming'. There was one victim only, and one alleged offender. There were at least broad similarities between the various acts alleged, whether they be characterised as kissing, fondling, or allowing the complainant to touch the appellant's penis.

95. This was not a case where different defences might realistically have been available in relation to some acts, but not others. Had there been no prelude to the initial massage of the chest, it could have been said that such touching did not take place in circumstances of indecency. As a matter of practical reality, however, that argument was not open in the circumstances of this case.

96. It does not seem to us to be decisive that some of the acts took place in the lounge room, while others took place in the bedroom. The car is more problematic, but even there what occurred can sensibly be characterised as a continuation of the same overall predatory conduct

on the part of the appellant towards the complainant. The time that elapsed from the first act of indecency to the last, a period of several hours, was not so long as to prevent the conduct from being characterised as a single criminal activity.

97. In short, we think that this case fell within one of the recognised exceptions to the rule against duplicity, described by Ashley JA in *Heaney* at [34] as the 'single transaction analysis'. Although the events in question took place over several hours, we think that they can properly be viewed as a single, continuous transaction commencing with the incident at the computer, and concluding with the touching in the car during the drive home.

98. If there is a fairness question to be addressed as well, then we are of the view that characterising the conduct as a single transaction does not produce unfairness. In the language of *Johnson v Miller*, the appellant was apprised of the legal nature of the offence with which he was charged, and also of the particular act, matter or thing alleged as the foundation of the charge.

99. The appellant could have been in no doubt as to the case to be presented against him. The charge identified unambiguously the three categories of conduct which would be relied upon as the foundation of the offence alleged. On that view, characterising the events as a single transaction, and charging them as a single count, resulted in no unfairness.

100. Importantly, it was not suggested for the appellant that there was any unfairness in the prosecution pleading three distinct forms of conduct, and being able to secure a conviction by proof of only one. Although the acts were pleaded conjunctively, it was readily conceded that there could be no defence based upon the proposition that there was (for example) proof of fondling and touching the penis, but no actual kissing.

101. It may be that there was an element of uncertainty associated with the sentence ultimately imposed. The reasons were sparse, and no findings of fact were stated. However, any such uncertainty was a product of a deficiency in the sentencing process, and not in the way the charge itself was formulated. The appellant could have sought clarification from the Magistrate as to what facts she had found as the basis upon which she convicted and sentenced. For whatever reasons, he chose not to do so.

102. The Magistrate plainly accepted the complainant as a credible witness (much of whose evidence was not specifically challenged, at least as to its truthfulness), and she had no evidence before her to contradict him. In these circumstances, it must be supposed that she found all of the acts alleged proven.

103. In our opinion the appeal should be dismissed, with costs.

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[1] *Crimes Act* 1958, s47.
[2] *Crimes Act* 1958, s39.
[3] *Rixon v Thompson* [2008] VSC 232; 185 A Crim R 517.
[4] Ibid [5]. See also *S v R* [1989] HCA 66; (1989) 168 CLR 266, 284; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126 (Gaudron and McHugh JJ).
[5] Ibid [5].
[6] Ibid [6].
[7] Ibid [7], citing *S v R* [1989] HCA 66; (1989) 168 CLR 266, 285; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126 (Gaudron and McHugh JJ).
[8] Ibid.
[9] Ibid [7]-[12]. These included: *R v Robe* (1735) 2 Str 999; *S v R* [1989] HCA 66; (1989) 168 CLR 266; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126; *R v Nickel* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Lee and Allen JJ, 16 November 1988) and *R v Trotter* (1982) 7 A Crim R 8.
[10] Ibid [13].
[11] Ibid, citing *S v R* [1989] HCA 66; (1989) 168 CLR 266, 284; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126 (Gaudron and McHugh JJ).
[12] Ibid [14].
[13] Ibid. (Citation omitted.)
[14] Ibid [15]-[20]. These included: *DPP v Merriman* [1973] AC 584; (1972) 3 All ER 42; (1972) 56 Cr App R 766; *Jemmison v Priddle* [1972] 1 QB 489; (1971) 56 Cr App R 229; *R v Slade* (1982) 7 A Crim R 43 and *R v Harris* [1969] 1 WLR 745; [1969] 2 All ER 599; (1969) 53 Cr App R.
[15] Ibid [21].

[16] Ibid [22].
[17] (1982) 7 A Crim R 8.
[18] *Rixon v Thompson* [2008] VSC 232, [22]; 185 A Crim R 517.
[19] Ibid [25]
[20] (1982) 7 A Crim R 8.
[21] [1999] NSWCCA 170; (1999) 108 A Crim R 170.
[22] *Walsh v Tattersall* [1996] HCA 26; (1996) 188 CLR 77, 112; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4.
[23] *DPP v Merriman* [1973] AC 584, 607; (1972) 3 All ER 42; (1972) 56 Cr App R 766.
[24] *Montgomery v Stewart* [1967] HCA 11; (1967) 116 CLR 220; [1967] ALR 449; 40 ALJR 534.
[25] See Thomas Starkie, *A Treatise on Criminal Pleading* (1822), vol 1, 245-247.
[26] See *Archbold: Criminal Pleading, Evidence and Practice (2009),* [1-135].
[27] See, for example: *Byrne v Baker* [1964] VicRp 57; [1964] VR 443 and *Walsh v Tattersall* [1996] HCA 26; (1996) 188 CLR 77; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4.
[28] [1989] HCA 66; (1989) 168 CLR 266, 284-5; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126.
[29] [1996] HCA 26; (1996) 188 CLR 77; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4.
[30] Ibid 104-107.
[31] Ibid 107-109. (Citations omitted. Words in bold are our emphasis.)
[32] Ibid 109-110.
[33] Ibid 110.
[34] Ibid 111.
[35] Ibid 112.
[36] [1999] NSWCCA 170; (1990) 108 A Crim R 170, 182.
[37] Ibid 183.
[38] Ibid 184.
[39] Ibid.
[40] Ibid 181.
[41] [1969] 1 WLR 745.
[42] Ibid 746. In *R v Whelan* [1973] VicRp 26; [1973] VR 268, a similar view was expressed by the Full Court.
[43] (1982) 7 A Crim R 43.
[44] Ibid 45.
[45] [2009] VSCA 74; (2009) 22 VR 164; (2009) 194 A Crim R 562.
[46] Ibid [28].
[47] Ibid [31].
[48] (1973) AC 584; (1972) 3 All ER 42; (1972) 56 Cr App R 766.
[49] Ibid 593.
[50] Ibid 607.
[51] *R v Heaney* [2009] VSCA 74, [45]; (2009) 22 VR 164; (2009) 194 A Crim R 562.
[52] [2005] WASCA 153.
[53] *R v Heaney* [2009] VSCA 74, [48]-[53]; (2009) 22 VR 164; (2009) 194 A Crim R 562.
[54] [1997] QCA 355 (Unreported, Davies JA, Shepherdson and White JJ, 21 October 1997).
[55] Ibid 4.
[56] Ibid 5.
[57] [1936] HCA 40; (1936) 55 CLR 499, 504-505; 9 ABC 117; (1936) 10 ALJR 202.
[58] Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Lee CJ at CL and Allen J, 16 November 1988.
[59] Ibid 4.

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