32/08; [2008] VSC 232

SUPREME COURT OF VICTORIA

RIXON v THOMPSON

Harper J

1 May, 27 June 2008 — 185 A Crim R 517

CRIMINAL LAW – PROCEDURE – DUPLICITY – ONE CHARGE OF AN INDECENT ACT LAID WHERE EVIDENCE OF THREE SEPARATE ACTS – DEFENDANT FOUND GUILTY – RULE AGAINST DUPLICITY – APPLICABLE PRINCIPLES – WHETHER MAGISTRATE IN ERROR IN FINDING CHARGE PROVED.

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." The magistrate found this charge proved and the second charge was dismissed. Upon appeal—

HELD: Appeal dismissed.
1. The rule against duplicity is designed to promote fairness and the orderly administration of justice. Duplicity tends to inhibit both, although this is by no means an inevitable result. 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.

2. In the present case, there was no unfairness to R. in that there was nothing about which he could 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.

HARPER J:

1. The appellant, Corey Rixon, was on 17 January 2007 charged with one count of committing an indecent act with a child under the age of 16, and one count of indecent assault. The principal issue on this appeal is whether the first count is in breach of the rule (to which there are exceptions) that no more than one offence should be charged in an information or in a count in an indictment. An information or count drawn in such a way that the rule is breached is said to be duplicitous; and the rule itself is known as the rule against duplicity. It is an issue in this case because the single count with which I am principally concerned, after alleging that the appellant "at Mentone on 8 December 2006 did wilfully commit an indecent act" proceeds immediately afterwards to describe that act in the following words (and I quote from the relevant summons, which is dated 17 January 2007): "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".

2. The charges were heard in the Magistrates' Court at Melbourne on 23 July 2007 and the following day. Mr Rixon was convicted on the first count. He has appealed to this Court against his conviction. I should add that, although there is some doubt about how the magistrate disposed of the second count, it is certain that no finding of guilt was made in respect of it. In these circumstances, and so that no contentious question of *autrefois acquit* or *autrefois convict* may arise in the future, the proper course in my opinion is to take it that this charge was dismissed.

3. The first count is, the appellant submits, patently duplicitous. The count encompasses three actions, each of which is, if proved, an offence in itself. Depending upon the circumstances, kissing a child may without more constitute an act of indecency. By alleging in the charge that the accused kissed the complainant, the prosecution is alleging not only the kiss, but also that, by taking this step, the accused acted indecently. If the prosecution proves both the kiss and the circumstances which made it indecent, then (so the submission continues) the criminal offence of committing an indecent act is complete. Likewise, if the prosecution proves that the child was fondled, and that in the circumstances that act is properly characterised as indecent, another criminal offence is made out. Similar reasoning applies to the third particular of indecency.

4. The appellant argues that the prosecution ought in these circumstances have been required by the Magistrate to make an election between the individual acts. If, however, there is substance in the complaint that one count covering three acts of indecency was inappropriate, it is more logical that Mr Rixon be charged with three offences. Indeed, the effect of the submissions made on Mr Rixon's behalf is that he should have been charged not with one offence but with three.

5. The rule against duplicity is designed to promote fairness and the orderly administration of justice. Duplicity tends to inhibit both, although this is by no means an inevitable result. 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. I agree, with respect, with the words of Lord Morris of Borth-y-Gest in his speech in the House of Lords in *R v Merriman*:[1]

> My Lords, as was pointed out in *R v Assim* [1966] 2 QB 249 questions of joinder ... are very considerably matters of practice on which the court unless restrained by statute has inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice. Here is essentially a field in which rules of fairness and of convenience should be evolved and where there should be no fetter to the fashioning of such rules. The current rules in regard to indictments are really a reflection of what has been thought to be fair: fair in the interests of the community in the preservation of law and order: fair in the interests of those who are charged and are tried.

6. The temptation, however, is to be over-impressed by arguments which concentrate not upon the fundamental issues of statutory construction, fairness and the proper administration of criminal justice, but upon technicalities. Such an approach can result in the rule against duplicity being turned into a weapon wielded, according to the circumstances, by prosecution or defence in ways which are inimical to the cause of justice.

7. An accused is, as a matter of basic fairness, entitled to know what case he or she has to meet.[2] Yet a duplicitous charge may obscure the real allegation that the prosecution will seek to prove. The injustice that might flow from placing an accused in such a position is obvious. *R v Robe*[3] provides an example. The accused, the clerk of an eighteenth century English market, was charged with "several counts specifying sums taken of particular persons". He was acquitted of each. A further charge was in different, more general, terms: "that, under colour of his said office, he did illegally cause his agents to demand and receive of several other persons several other sums of money, on pretence of weighing and examining their several weights and measures." It was held "that this is so general a charge, that it is impossible any man can prepare to defend himself on this prosecution, or have the benefit of pleading it in bar to any other".

8. An accused is entitled to be confident that the decision of the tribunal has been lawfully reached. If that tribunal is a jury, the accused is entitled to be certain that any verdict of guilty is one in which the entire jury have properly joined (or, where a majority verdict is lawful, that each member of the majority has properly joined). Under the baleful influence of a duplicitous count, that may not be a result about which the disinterested observer, let alone a very interested accused, could be confident. Several examples will illustrate the point. The first is taken from *S. v R.*[4] In that case, the accused, who in the report of the case is referred to merely as "S", was charged with three counts of carnal knowledge. One of the alleged offences was said to have occurred on a date that could not be identified other than that it fell between 1 January 1980 and the end of that year. Different but comparable particulars were given of the other two counts. In this context, it is to be noted that the second alleged act of intercourse was said to have taken place between the beginning and the end of 1981, while the third partially overlapped the second, falling (it was alleged) between 8 November 1981 and 8 November 1982. Further particulars were sought, but to no avail.

9. The complainant, the daughter of S, gave evidence of two specific acts of intercourse, but there was no evidence linking either with any one of the three specified periods. The daughter also gave evidence of numerous other acts of carnal knowledge. The accused was convicted on each count.

10. The High Court quashed the convictions. In a joint judgment, Gaudron and McHugh JJ said:

> The basis upon which the evidence was left to the jury illustrates a fundamental problem which is addressed by the requirement for certainty as to the offence charged, which requirement also underlies the rule against duplicitous counts. Even leaving aside the problem referable to the overlapping of the second and third periods specified in the indictment, the basis upon which the evidence was left to the jury allowed for the real possibility that different jurors might have different acts in mind when they came to consider each of the verdicts. Indeed, in view of the way the matter was left to the jury, it might even be possible that, in relation to one or all of the counts, individual jurors had no specific act in mind, but simply reasoned from the evidence as to the frequency that the applicant committed one such act within each of the specified periods. In these circumstances, it is impossible to say, in relation to any one count in the indictment, that the jury as a whole was satisfied as to the applicant's guilt of an individual act answering to the description of the offence charged.

11. A second example has much in common with the first. In *R v Nickel*[5] the appellant had been charged with "sexual intercourse" which, it was plain, occurred at some point within a broadly-defined period. The complainant gave evidence of two separate acts of assault. One was said to have occurred in a bedroom, and the other in the kitchen of the same house. Gleeson CJ, with whom Lee CJ at CL and Allen J agreed, said:[6]

> 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.

12. The third example comes from Victoria. In *R v Trotter,*[7] the accused was convicted of (among other things) unlawfully and indecently assaulting a male person under the age of 16 years. The evidence of the complainant disclosed two indecent assaults. The appeal was allowed. It was held by the Court of Criminal Appeal (McInerney, Anderson and Gobbo JJ) that there had been a miscarriage of justice because the prosecutor had not been required to specify which assault was the indecent assault the subject of the charge. Whilst it was clear that the jury must have been unanimous that the accused had committed an indecent assault on the child, it was impossible to know whether there was unanimity in respect of one or other of the two impugned acts.

13. As I have already observed, the rule against duplicity – generally enforced because and to the extent that it promotes fairness to an accused – may also be invoked as assisting in the orderly administration of criminal justice. For example, by isolating each offence, an accused may be encouraged to acknowledge responsibility for aspects of his or her conduct. If, by contrast, these aspects are combined in one count with other matters, in respect of which there is a contest, a plea of not guilty to the composite count is inevitable.[8] Secondly, in order to ensure that evidence is properly admitted, and in order to give the jury proper instructions about the law to be applied, a court must know what charge it is entertaining. Thirdly, 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*.[9] But these ends may not be achievable where more than one offence is joined in one count of an indictment. As (David) Kirby J observed in *Khouzame & Saliba*,[10] an indictment covering all the possibilities in an incident with multiple accused and a multiplicity of possible offences is likely to be long; but the undesirability of unnecessarily long and prolix indictments has frequently been the subject of judicial criticism.

14. Despite the many good reasons for the existence of the rule against duplicity, it must not be allowed to frustrate the due administration of justice. Technical objections to the way in which a charge has been formulated may, depending on the circumstances, have merit; or they may not. The touchstone against which technical objections are to be assessed is that of fairness, and – to the extent that fairness is not impaired – of efficiency. 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*[11] the "facts [are] so closely related that they amount to the one activity". One issue in such cases is whether the prosecution case really is, or whether the evidence actually shows,

that there was in truth but one event (or incident, transaction or episode) albeit that more than one offence was committed within that event. Another consideration is that the charges should reflect the degree of criminality involved.

15. Lord Morris of Borth-y-Gest addressed the first of these issues in *R v Merriman*.[12] The accused had been charged with wounding with intent to do grievous bodily harm. The Crown case was that a knife was used to stab the victim. His Lordship said:[13]

> 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 10 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; (1971) 56 Cr App R 229. 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.

16. *Jemmison v Priddle* was a case in which the accused, while on farm land, fired three shots at two running red deer. He had the farmer's permission to act in this way, and to that extent was not required to hold a shooter's licence; but he had no permission from a neighbouring farmer to shoot over the neighbour's land. The first shot missed its target. The second killed a hind on the neighbour's farm. The third hit a second hind, which then ran over the boundary between the two properties and on to the neighbouring farm, where it died. The accused was charged with killing game without a licence. He was convicted. On appeal, his counsel submitted that the information was bad for duplicity. The information, it was said, related to two red deer; and, because the killing of each was a potential offence, separate charges should have been laid.

17. Lord Widgery CJ, with whom Ashworth and Griffiths JJ agreed, was not impressed with this argument. In the opinion of the Chief Justice, it was (in that case at least) "legitimate to charge in a single charge one activity, even though that activity may involve more than one act". The Chief Justice continued:

> One looks at this case and asks oneself what was the activity with which this man was being charged. It was the activity of shooting red deer without a game licence, and although as a nice debating point it might well be contended that each shot was a separate act, indeed each killing was a separate offence, I find that all these matters, occurring as they must have done within a very few seconds of time and all in the same geographical location, are fairly to be described as components of a single activity, and that made it proper for the prosecution in this instance to join them in a single charge. I would find, therefore, that the information was not bad for duplicity.

18. In *R v Slade*,[14] the accused was charged with two counts of aggravated assault (counts 1 and 2), one of indecent assault (count 3) and one of rape (count 4). He pleaded guilty to each count; but, in doing so, was unrepresented. Counsel appeared for him on his sentence, and applied for leave to withdraw the plea of guilty on count 3. The application was based upon the ground that the act of indecent assault occurred, at the most, only a few minutes before the rape. In reality, therefore, it had "merged" in count 4 – so that, at least as a matter of fairness if not of strict law, it should not have been separately charged, but should have been treated as absorbed within the count of rape.

19. Everett J accepted this argument. The evidence was that the total time involved in the commission of all four crimes was approximately 20 minutes. In her own proof of evidence, the complainant said that the act of indecency lasted "a few minutes". It was against this background that the Judge said:[15]

> 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. The consequences include unnecessary work for all involved, the possibility of confusion in the minds of the jury and the opening up of avenues for undesirable, or even unjust, compromises.

20. In circumstances analogous to those which obtained in *Slade*, where a lesser offence is committed as a preliminary to one that is more serious, "the courts have repeatedly said that the accused should only be charged with the [latter]."[16] In other words, the appropriate course is, or at least will probably be, to treat the lesser offence as having merged in the more serious, with the result that no charge is laid in relation to the lesser. This was the approach taken by Edmund Davies LJ in *R v Harris*.[17] In a passage which, in the context of the present case, resonates as being particularly pertinent, his Lordship said:

> It is perfectly clear … 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.

21. In the present case, Mr Rixon complains that he was charged with one indecent act, although particulars were given of three. In these circumstances, he submits, the Magistrate ought to have directed the prosecution to specify which act of the three constituted the charge. Her Honour's failure to take that step has the result, he submits, that the conviction should be quashed. 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.

22. In written submissions made on his behalf, Mr Rixon argues that the failure of the prosecution to specify which of the three allegedly indecent acts was the subject of the count "makes the conviction uncertain on the basis outlined in *R v Trotter*".[18] But that case involved a jury trial in which, as in *Nickel*, there was a rational basis upon which individual jurors ultimately could have concluded that any one of the alleged incidents occurred but not the others – with, for that reason, an absence of the necessary unanimity in relation to any of the alleged incidents. There was no jury in Mr Rixon's case, and so *R v Trotter* is not in point. The Magistrate must have found at least one of the individual acts – the kiss, or the fondling, or the incident with the penis – to have been proved beyond reasonable doubt. That being so, a conviction necessarily followed. The fact that Mr Rixon might not know whether the Magistrate was so satisfied in relation to one, or two, or all three, could be the result of his not having asked. I cannot be sure, because that part of the proceedings that is relevant to this issue was not transcribed. Certainly, he was entitled to know; and if the Magistrate did not herself in her sentencing remarks tell him, he was entitled to ask her, and to have an answer from her. He was also entitled to know whether, in arriving at an appropriate sentence, the Magistrate took into account all three, or only two, or only one, and if so which, of the three incidents in question. All of this may be achieved, however, when the tribunal is a magistrate, although it might be impossible with a jury. Mr Rixon does not complain that he is unable to discover the answer to these questions.

23. The point was made in submissions before me that when, in the course of the evidence as the trial proceeded before her Honour, the prosecutor responded to a request for particulars, he did so by attributing the kiss, and the fondling, and the incident with the penis, to both the "indecent act" charge and the "indecent assault" charge. It was then submitted that the evidence disclosed only one kiss, and that that kiss must be taken to form part of the second (indecent assault) count and so not of the first count (indecent act). In my opinion, this argument does not assist the appellant, if only because there is as much logic as including this incident in the first count as in the second. I add that, in my opinion, were Mr Rixon to be charged in the future with any offence in relation to any incident referred to in the evidence before the Magistrate arising from his encounter with the complainant in Mr Rixon's home in Mentone on 17 January 2007, he would be able to answer that charge by saying that the matter had already been the subject of proceedings which had disposed of it.

24. The notice of appeal in this case includes a complaint that the Magistrate failed to direct the prosecution to produce all relevant witnesses. This ground of appeal was abandoned in the course of the proceedings before me.

25. I should before concluding this judgment explicitly mention an argument that was ventilated at some length before me. It concerned the question whether the three nominated incidents were in this case properly to be regarded as part of one composite event, or two events one of which was composite, or three single events. 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.

26. For these reasons, the appeal must be dismissed.

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[1] [1973] AC 584 at 592; (1972) 3 All ER 42; (1972) 56 Cr App R 766.
[2] *S. v R* [1989] HCA 66; (1989) 168 CLR 266 at 285; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126 per Gaudron and McHugh JJ.
[3] [1760] EngR 480; (1735) 2 Str. at 999; 93 ER 159 at 993-994.
[4] [1989] HCA 66; (1989) 168 CLR 266; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126.
[5] Unreported, New South Wales Court of Criminal Appeal, 16 November 1988; referred to by (David) Kirby J in *Khouzame & Saliba* [1999] NSWCCA 173 at [72]; (1999) 108 A Crim R 170 at [88] (NSW Court of Criminal Appeal).
[6] At p4.
[7] (1982) 7 A Crim R 8.
[8] *Khouzame & Saliba* (NSW Court of Criminal Appeal) (1999) 108 A Crim R 170; [1999] NSWCCA 173 at [60]. per Kirby J.
[9] *S v R* [1989] HCA 66; (1989) 168 CLR 266 at 284; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126 per Gaudron and McHugh JJ.
[10] (1999) 108 A Crim R 170 at [88]; [1999] NSWCCA 173 at [68].
[11] [1996] HCA 26; (1996) 188 CLR 77 at 112; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4.
[12] [1973] AC 584 at 593; (1972) 3 All ER 42; (1972) 56 Cr App R 766.
[13] At 593.
[14] (1982) 7 A Crim R 43.
[15] At p45.
[16] *Khouzame & Saliba* [1999] NSWCCA 173; (1999) 108 A Crim R 170 at [70] per (David) Kirby J.
[17] [1969] 2 All ER 599; [1969] 1 WLR 745 at 746; (1969) 53 Cr App R 376.
[18] (1982) 7 A Crim R 8.

APPEARANCES: For the appellant Rixon: Mr JP Dickinson with Mr C Mandy, counsel. Ann Valos Criminal Law, solicitors. For the respondent Thompson: Mr T Gyorffy, counsel. Solicitor for Public Prosecutions.
