

SEPARATE TRIALS

THE RULE AND THE PROVISO TO THE RULE

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February 2015

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INTRODUCTION:

Whilst the legal principles attaching to applications for separate trials are relatively straightforward and stable, the various factors that must be taken into account do not all head in the same direction. Indeed, in many cases they are opposing.

However, in cases where the difference between a possible acquittal and certain conviction is a separate trial from a co-offender, the stakes could not be higher.

As we all know, different judges see situations differently. One judge's irremediable prejudice is another's protection by direction.

The purpose of this paper therefore is to alert practitioners as to what matters are considered relevant in separate trial applications and to provide practical guidance in the making of such applications.

LEGISLATION:

Section 21 – A General Gateway:

Under section 21(2) Criminal Procedure Act (NSW):

'If of the opinion:

- (a) that an accused person may be prejudiced or embarrassed in his or her defence by reason of being charged with more than one offence on the same indictment, or*
- (b) that for any other reason it is desirable to direct that an accused person be tried separately for any one of more offences charged in an indictment,*

the court may order a separate trial of any count or counts in the indictment.'

For practitioners looking for assistance in the wording of s.21, there is little to be had. Its terms are historical in nature, tracing their origins to the predecessors of the English Indictments Act 1915, the terms of which have hardly changed in almost 100 years.

Section 21 is a gateway clause, enlivening the court's jurisdiction to order a separate trial 'for any other reason it is desirable to direct that a person be tried separately'.

The principles to be applied in consideration of any application for separate trial are well settled and established and have been summarised and commented upon in a number of cases.¹

In short, there is a rule, and a proviso to the rule.²

¹ For example in **Baladjam (No 49)** and **Baladjam (No 57)** and in **Symss**

² **Patsalis** at [6]

THE RULE:

The decided cases establish the following principles illustrating the nature and operation of the rule:

1. Where the Crown case is that the accused persons were parties to some form of joint enterprise, the starting point is that they should be tried jointly.³
2. The ordering of separate trials is not automatic just because there will be some evidence led in a joint trial that will be inadmissible against one accused.⁴
3. The rule applies particularly in cases when two or more co-accused attempt to place the blame on each other;⁵
4. It is highly desirable that the same verdict and the same judgment should be returned against all those concerned in the same offences. That is to say, there is a need to avoid a situation, which might commonly arise where inconsistent verdicts might be given because of the holding of separate trials. It is not simply a question of saving time and money, although this is a consideration that may be taken into account.⁶

King CJ dealt with this issue in **Collie** saying that:

*'the interests of justice demand that the jury should have the whole picture presented to them and not half of it, and should see the person on whom blame is sought to be cast as well as the person seeking to cast it.'*⁷

It has been said that the '*whole picture*' argument is of greater significance in cut-throat defence cases.

³ **Assim; Webb & Hay** at 88-89; and **Domican** at 26

⁴ **Gulder; Sims**

⁵ **Webb & Hay; Ignjatic** at 339; **Demirok** at 254; **Fernando**; and **Grondkowski**

⁶ **Merrett; Fernando** at [195] – [226]; **Beavan**; and **Lake**

⁷ at 308 relying on **Gibbons and Proctor** at 137; and **Grondkowski**

In **Kerekes** Herron J said:

'of [the accused], two have blamed one and the remaining one ...blamed the other two. In the light of commonsense and reason, it might be contrary really to the true interests of justice if the whole picture was not presented to the jury at the same time'.

Later, in **Beavan** a case similar to Kerekes, Herron J said:

'If separate trials were had, very often only one half of the picture could be presented to the jury. In order to do complete justice, juries are entitled to see and hear all of those who are alleged to have acted in common purpose, and it is neither a rule of law nor of practice that were an essential part of one accused's defence amounts to an attack on a co-accused there must be separate trials'.

It must be said that this 'whole picture' basis fell out of favour in later cases particularly with David Hunt J. In **Farrell & Cotton** Hunt J was of the view that Herron J's notion contained a fallacy, as in the case that the offending statements were confined to police interviews or even in court dock statements, the evidence of one could never be admissible against the other, and in which case the jury would be told in strong terms to completely disregard that other half of the picture in any event.⁸

However, shortly after this the High Court set out the tests in **Webb & Hay**, approving King CJ's comments in **Webb & Hay** on appeal and in **Collie** and **Demirok** as well.

Later still, in **Patsalis** Kirby J pointed out that since 10 June 1994 accused persons no longer have the right to make a dock statement. As such, if a version beyond that contained in a record of interview is to go to the jury, it would be from the witness box and available for testing. There is no longer any middle ground on that issue.⁹

⁸ His Honour went on to say that since **Darby** and **Gulder** those statements of Herron J were no longer binding.

⁹ at [30]

Finally, In **Symss** Sheller JA summarized the rule as:

*'For present purposes I regard it as sufficient to emphasise the factors identified by King CJ in Collie and Webb & Hay and adopted by Webb & Hay in the High Court. There are important matters of principle and policy why persons charged with committing an offence jointly ought to be tried together, particularly where each seeks to cast the blame on the other. The dangers from the admission of evidence which would not have been admitted if the appellant had stood trial alone can be obviated by express and careful directions....'*¹⁰ⁱ

5. There is also to some lesser degree¹¹ the question the general administration of justice and of balancing prejudice with convenience with the latter identified as the efficient dispatch of trials, the conserving of costs, and the avoidance of inconvenience to witnesses by having to attend a number of trials.¹²
6. In determining the issue as to whether a separate trial should be ordered, the court must take into account not only the interests of the applicant but also the interests of the administration of justice. In fact, it is the interests of justice as a whole that are to be the governing factor. But, of course, among those interests are the interests of the accused.¹³
7. In cases where separate trials are not ordered, the risks to an accused must be obviated by express and careful directions to the jury as to the use that they may make of the evidence as it concerns each accused.¹⁴

¹⁰ at [66] – [77]

¹¹ Those issues having in the past been said to be as relevant as the interests of the parties – see **Flaherty** at p.145 and **Palmer**

¹² **Patsalis** at [9] quoting **Oliver** at page 547; **Demirok** at 254; and as described as 'less persuasive but not insignificant' by Hulme J in **Hawi (No. 3)** at [49]

¹³ **Merritt & Rosso** at 364

¹⁴ **Webb & Hay** at p.89; **Towle** at 340; and **Cosgrove & Hunter** (1988) at 303

THE PROVISIO TO THE RULE:

The proviso to the rule has its roots in conspiracy cases, which had, at one stage a unique anachronistic feature, that is, if two persons were charged with conspiracy and one was acquitted then the other was entitled to an acquittal. For this technical reason the issue of whether trials should be held separately was sometimes an acute one in conspiracy cases.

In **Darby**, a conspiracy case, the High Court in dealing with the issue of the effect of an acquittal of one conspirator on another, approved of the Canadian case of **Guimond** which said that in cases where the evidence against one accused is significantly different from the evidence against another, then separate trials should be ordered. The High Court said it would encourage the adoption of such a practice.

In both **Guimond** and **Darby** the courts were dealing with cases in which material was sought to be tendered which was inadmissible against one of the accused, but highly prejudicial to that party.

Of course, it should be remembered that the High Court was speaking there in the context of conspiracy cases, where the possibility of different cases being put forward against different accused is a frequent by-product of such prosecutions.

However, the proposition remains and has been held to be equally applicable to other cases in which there are multiple accused, such as where a joint criminal enterprise is alleged.¹⁵

As such, the proviso to the rule was succinctly expressed by Hunt J in **Middis** where the various principles were drawn together this case still remains the major touchstone as to when trials should be separated.

¹⁵ **Gulder** at p.16

The accused Middis was charged with the murder of his wife. Four other accused were said to have been present when Middis strangled the deceased and assisted in various ways in that endeavour. The Crown case was based on common purpose, the foundational crime being (apart from perhaps for Middis) that the deceased would be bashed but that each of the other accused contemplated that in carrying out the unlawful purpose, Middis might murder her. Hunt J was of the view that the case would have been better presented as principle and accessory, rather than common purpose.

In the course of his judgment Hunt J set out the following principles, stating that a separate trial should be ordered when an applicant is able to demonstrate three things:

- **The evidence against the applicant is significantly weaker than, and different to, that which is admissible against another co-accused with whom he is to be tried:**

In **Dellapatrona** the Court of Criminal Appeal said in this regard:

*'It should be emphasized that separate trials will not be granted merely because there is evidence admissible against one accused but inadmissible against another accused to whom it is prejudicial. The decision of the Supreme Court of Canada [Guimond] proceeded on the clear basis that separate trials should only be granted in such a case where the evidence admissible against the second accused (to whom the prejudice is caused) is substantially weaker than that admissible against the first.'*¹⁶

Although not entirely free from controversy, some later cases suggest that this is not now necessarily such a relevant consideration.

¹⁶ at p.134C

In **Pham**, Adams J said in this regard:

'I interpolate that, with unfeigned respect, I am doubtful that the weakness of the applicant's case as compared with that of the co-accused against whom it is proposed to tender the prejudicial evidence can be a relevant consideration. Assume that the case against the co-accused was much weaker than the applicant, even with the prejudicial evidence. If there was a significant risk that the prejudicial evidence could be used by the jury adversely to the applicant and that evidence was itself significantly prejudicial, I am unable to see why the mere fact that it was adduced in a weaker co-offender's case is material. Indeed, the opposite would seem to be the case since, if the co-accused's case was weak, or weaker than the applicant's, the prejudicial evidence might well assume even more importance than otherwise. As it seems to me, with respect, the crucial issue is the potential effect of the inadmissible evidence on the jury's consideration of the applicant's case'.¹⁷

This comment was specifically approved of by Hodgson JA in **Maduboku**.¹⁸ It was also approved of in **Lu & Pham**. On the other hand, a similar submission was earlier rejected by Whealy J in **Baladjam (No 49)**.¹⁹

In **Iskander** Davies J appeared to leave open the question of whether **Pham** has modified this aspect of **Middis**, saying:

*'If the first principle in Middis has been modified in Pham so that the issue is not, in the first place, a consideration of the relative strengths and weaknesses of the applicant and the co-accused' case respectively, the inquiry is a similar one – whether there will be a positive injustice to the applicant by the evidence being likely to turn a potential acquittal into a conviction: **Pham** at [39]. But as Adams J goes on to point out, if the likelihood is real as distinct from inconsequential, then there will be a positive injustice to the applicant.'²⁰*

Further, the test is a comparative one and even a strong case will meet this criteria. In **Baartman** Gleeson CJ granted a separate trial to an accused, against whom the case was described as '*formidable*'.

¹⁷ at [40]

¹⁸ at [29]

¹⁹ at [17] – [19]

²⁰ at [30]

- **The evidence against the other accused contains material which is highly prejudicial to the applicant, although not admissible against him:**

Often this evidence will speak for itself. Material contained in co-accused's ERISPs form the majority of this sort of material. Care must be taken when relying solely on this sort of prejudicial material as courts are very slow to grant separate trials in this event that this is the extent of the prejudicial material. For reasons discussed below, cut-throat defences would generally not fit this criteria.

The question of prejudice must be examined from the viewpoint of the accused, asking the question: is the reception of evidence at the trial admissible against A, but inadmissible against B, such as to endanger the prospect of a fair trial for B? ²¹

- **There is a real risk that the weaker Crown case against the applicant will be made *immeasurably* stronger by reason of the prejudicial material:**

In this regard Adams J in Pham said that the term '*immeasurably*' means '*significant although not incommensurable*'.²²

The crucial issue is the potential effect of the inadmissible evidence on the jury's consideration of the applicant's case.²³

The accused bears the onus of establishing the reasons for the making of an order granting a separate trial.²⁴

²¹ **De Jesus**

²² **Pham** at [39]

²³ **Pham** at [40]

²⁴ **Bikic**

To succeed, the applicant for a separate trial must demonstrate that there is a real risk that a *positive injustice* would be caused to him as a consequence of a joint trial.²⁵The likelihood of positive injustice must be real and not inconsequential.

As was pithily put by Adams J in **Pham**, a way of demonstrating '*positive injustice*' is if by placing the irrelevant and prejudicial material on the scales, it would be likely to turn a potential acquittal into a conviction.²⁶

The proper balance by the court of these factors will depend on the circumstances of each case, and it has been said to be undesirable to lay down any rules as to how the discretion should be exercised in each case.²⁷

The tests propounded in **Middis** have been approved of in NSW and other Australian jurisdictions on many occasions,²⁸subject to the point of difference between Adams J in **Pham** and Whealy J in **Baladjam (No 49)**.

However, it must be remembered that the Middis considerations are just one expression of the rule - the touchstone remains that of fairness and a risk of injustice can arise in any number of circumstances.

In **Patsalis** Kirby J suggested the following potential circumstances which might give rise to a real risk of positive injustice:

- Such as described in Middis;

²⁵ The genesis of the formulation of the exception is found in **Oliver** which quoted from the discussion in **Darby** with approval which in turn adopted the principles set out in the Canadian case of **Guimond**

²⁶ at [39] which test was approved of and applied in **Madubuko** [[32]

²⁷ citing **Gulder** at 16-17

²⁸ **Baartman; Fernando; Georgiou; Patsalis & Spathis; Privett; Bikic; Pinkstone; Bui; McDonald; Symms; Bartle; Chami & Sheik; Alexander; Crowther-Wilkinson; Johnson; Ronen; McKeon; Pham; CE; Pham [2006]; Darwiche; Jones (No 1); Friend; Lu & Pham; Ford; Hawi No.3; Madubuko; Parland & Wingate; Iskander; Lockett; and Kearns & Paton** but remains subject to the point of difference between Adams J in **Pham** and Whealey J in **Baladjam (No.49)**

- Because of the nature of the allegations being made by an accused against a co-accused, which are not gratuitous, which are crucial to the defence and yet highly damaging to the co-accused; and
- In circumstances where one accused has a criminal history, and the other does not. The accused with the history may, in a joint trial, feel some inhibition in giving evidence.

WHAT MATTERS MAY RESULT IN SEPARATE TRIALS:

Guilt by association:

- **Chami & Shiek** at [27]. In that case Shiek was caught up in, in a minor manner, in the Skaf trials. There was little evidence against him except that he associated with the group of accused in the Skaf sexual assault trials. Ipp JA said:

'Nevertheless, it seems to me, the issue regarding Shiek, when stripped of irrelevancies and fallacious tactical arguments, comes down simply to a balancing exercise, between on the one hand, the potential prejudice to Shiek in being associated with persons who perpetrated these monstrous crimes (and having to bear several weeks of unnecessary legal costs) and, on the other, the public interest in having all of the accused persons face trial together, taking into account the suffering and inconvenience of cost that will result from witnesses having to testify twice'.

Where admissions by a co-accused are made:

- **Harpreet Singh** (page 42)
- **Pham** (page 37)
- **Baartman**
- **Kearns** (page 50)
- **Lu & Pham** at [28] – [29]. In that case a co-accused had implicated another in his ERISP of murder. The evidence of a witness had the potential to strengthen the admissions in the ERISP which were inadmissible against the accused. It was determined that there was a real risk of positive injustice in that the relevant prejudice could not be cured by direction.

Where the accused has a minor role:

- **Chami & Shiek** at [22]

Where evidence is dramatic or emotive:

- **Bartman** where Gleeson CJ described the secretly recorded response to a number of the co-accused to a TV piece on the murder as '*dramatic, incontrovertible and highly prejudicial*' to the accused.
- **Harpreet Singh** where the evidence of admissions of the co-accused would have to be extracted from a witness (her sister) by cross examination.
- **Pham** at [32] where Adams described Phong's account as '*dramatic and memorable*'.
- **Lockett** (page 48) at [27] where a co-accused had given a '*colourful description*' of seeing the applicant assaulting the deceased.
- **Tolliday** (page 31) at [17] where a co-accused description of the murder was described as '*detailed, emotional and disturbing*'.
- **Kearns** where evidence of an aunty of the co-accused to whom a confession had been made was described '*as may well be dramatic*' given her relationship to him.
- **Alexander & McKenzie** (page 25) at [24] where there was a suggestion that the applicant had a predilection for '*threesome sex*'.
- **Piller & Ors** where Dowd J was of the view that the force of his directions in relation to what use the jury could make of the co-accused ERISP's of the various co-accused would be distorted by the '*high impact*' that those interviews would have on the jury.

Where one accused is claiming duress:

- **CE** at [6] where a co-accused proposed to give evidence to the effect that the applicant had threatened him with a knife to do his bidding and that he has known the applicant to be a violent man who stands over people and has served a gaol sentence for menacing people; further that he was a member of a motorcycle gang and has possession of guns.
- **Singh** at [42] where a co-accused proposed to adduce evidence of the applicant's tendency to violence (including threats to kill others if they did not abide by his wishes) and of his criminal record involving violence.
- **White (No 1)** at [43] where R A Hulme J left the door open for a further application in the event that the co-accused did adduce evidence of duress.
- **Spence & Mitchell** (page 27) at [21] and [31] – [35].
- **Tolliday** at [21].
- **Iari & Panozza** at [5] Nettle J appears to have taken a contrary view on this issue stating that the fact that an accused alleges that he was coerced or otherwise influenced by another accused will generally be a reason for adhering to the joint trial. It may depend upon who is putting forward the application.

Where inadmissible ERISPS back up other witnesses:

- **Pham** at [32] - [33] where the statements of Phong supported the impugned witnesses of Tran and Lam
- **Lockett** at [30] where the co-accused statements supported the version given by his sister

- **Tolliday** where the statements by the co-accused supported the circumstantial case against the applicant.

Where there is evidence of bad character (tendency) against a co-accused:

- **Alexander & Mackenzie**
- **Tolliday**

Where there is a combination of factors

- **Gibb & Mackenzie** at [166].
- **CE** at [15].

WHAT MATTERS WILL NOT ORDINARILY RESULT IN SEPARATE TRIALS:

Where there is bad character of an accused or good character of a co-accused:

- **Patsalis** at [43].
- **CE** at [14] where Grove, having referred to Patsalis, noted that this is a common feature of joint trials and is well capable of being dealt with by a trial judge.
- **Crowther-Wilkinson** at [6] – [8] where Hidden J was troubled that a co-accused would be calling evidence of good character and therefore the jury would infer that he had a criminal record. In that case Hidden J did not order a separate trial but did say that the application would have merit if:

'the circumstances are such that the jury might reason that the applicant has a criminal history such as to make it more likely that he is guilty of the crime charged'.

- **McKellar (No.1)** at [22] where R A Hulme J said that:

'the raising of character by other accused is not, either on its own, or in combination with the primary concern raised on the application, sufficient to order a separate trial. Joint trials commonly encounter such an issue and judicial directions to juries are a sufficient response.'

- **Ditroia & Tucci** (page 25) at [258] where the fact that an accused was prevented from giving evidence out of fear of cross examination concerning his prior convictions was not sufficient to excuse that, the Court stating that the public interest in the jury hearing the cases of the co-accused together outweighed his private interests.

Where tactical considerations may result in an unjust verdict:

- **Chami & Shiek** at [44] – [45] although in the minority Sully J launched an impassioned plea to stop such applications where driven, as they were in *'perhaps literally all'* cases *'by cold, hard, strategic calculations and tactical calculations in connection with the presentation, with the maximum tactical and strategic advantage of the trial which it is proposed should be severed.'* Bell J agreed with Ipp AJA in granting the application.

Cut Throat Defences:

A typical cut-throat defence is usually where two (or more) persons are charged with committing a crime against someone else and each accused seeks exculpation by blaming the other accused.²⁹

In **Pham** Adams J pointed out that juries display considerable scepticism and are often easily able to put aside any obviously self-serving material.

In **Ignjatic** at p.339 Hunt J said that since **Darby** and **Guimond** the mere existence of a cut-throat defence is *'no longer'* a basis for supporting a joint trial but it does not mean that such a situation is a reason for rejecting a joint trial and that obviously there will be cases in which cut-throat defence are raised where there should be separate trial, but these will not arise frequently.³⁰

²⁹ As described by RA Hulme J in **Hawi & Ors (No.3)** [2011] NSWSC 1649 at [48]

³⁰ see also **Demirok** at 254; **Fernando**; and **Grondkowski**

Out of court statements by co-accused which do not amount to a cut throat defence:

Generally material contained in police interviews of co-accused will not result in a separate trial, unless the applicant can demonstrate a real risk of positive injustice flowing from that material.

In **McKellar (No.1)** the court was faced with two co-accused giving versions which implicated the others but exculpated themselves. The other two co-accused had not given statements. The Crown was not of the view that the versions were reliable in any event and did not seek to rely on them. R A Hulme J said that this is a matter that could be dealt with by the usual directions.

It is suggested that had the Crown taken another view about the material, or had it supported the evidence of other witnesses to be called in the Crown case, the result of this application may well have been different.

In **Middis**, Hunt J acceded to an application by White for a separate trial even though there were strong reasons for maintaining a joint trial, as the co-accused's police interviews went to supporting the inferences otherwise already available on the other evidence against him.

CAN DIRECTIONS SAVE A JOINT TRIAL – DO JURIES FOLLOW

DIRECTIONS:

As has been discussed, where prejudicial but inadmissible material comes before a jury in respect of a co-accused it is incumbent on the trial judge to clearly direct the jury as to what evidence can be used against each accused and if necessary to warn them about the effect of the prejudicial material. For example, the following directions are often given in such cases to protect an accused from prejudice:

- A direction as to separate consideration of the cases concerning each accused;
- A direction that the evidence of an accused's recorded police interview is not available for consideration in a co-accused's case; and
- A direction as to the impermissible use of evidence of bad character of an accused, that is, the jury must not engage in propensity reasoning.³¹

The oft quoted panacea for protective directions is from McHugh J in **Gilbert**:

'The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was now rejected or disregarded, no one – accused, trial judge or member of the public - could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it were rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any authoritarian state. Put bluntly, unless we act on the assumption that criminal trials act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials'.³²

³¹ As was suggested by R A Hulme J in **White & Ors (No.1)**

³² at [31]

However Gleeson CJ and Gummow J said in the same case:

'the system of criminal justice as administered by appellate courts, requires the assumption that, as a general rule, juries understand and follow, the directions given to them by trial judges. It does not involve the assumption that their decision making is unaffected by matters of possible prejudice'.³³

Sometimes directions are perfectly capable of guarding against prejudice, but not always. It will be a matter for judgment as to when the prejudice is such that no direction, no matter how emphatic or repeated, simply can act as properly protective of an accused.

³³ at [13]

OTHER JURISDICTIONS:

Whilst the principles concerning separate trials are well settled in NSW, it is apparent that the legislative provisions which mandate such applications and the common law principles surrounding them are shared quite closely with other jurisdictions, particularly the non-Code jurisdictions in Australia.

This part of the paper deals with the mirror legislative provisions in Victoria, South Australia and England & Wales. Cases from Western Australia also may assist some practitioners with the different factual situations that either will result in a separate trial or not.

Victoria:

The provisions of s.193 Criminal Procedure Act 2009 are remarkably similar to that of NSW:

(2) If an indictment names more than one accused, the court may order that charges against a specified accused be tried separately.

(3) The court may make an order under subsection ... (2) if the court considers that—

(a) the case of an accused may be prejudiced because the accused is charged with more than one offence in the same indictment; or

(b) a trial with the co-accused would prejudice the fair trial of the accused; or

(c) for any other reason it is appropriate to do so.

In **Gibb and McKenzie** the appellants were jointly charged with one count of murder, with M and C present as aiders and abettors. Although the trial judge did not err by initially refusing an application for separate trials, the evidence that came

out throughout the trial, particularly the evidence and cross-examination of M and C that implicated Gibb, resulted in a miscarriage of justice. Specifically, *'the totality of factors...meant that no group of jurors could have been expected to perform the remarkable mental feats required of them in this trial'*. For example, at 165:

'Maree Maher was clearly to be treated as an accomplice. Thus the jury needed to be warned of the danger of acting upon her evidence without corroboration. In the case against Gibb there was a good deal less evidence available to be used as corroboration of Maree than in the case against McKenzie where his statement to the police out of court and indeed his statement from the dock substantially corroborated her evidence. Thus the jury might in considering the case against McKenzie have concluded that Maree's evidence was reliable, because corroborated, and if so it would be impossible to expect that the jury, when considering the case against Gibb, could approach Maree's evidence unaffected by the view of that evidence formed as a result of a consideration of it in the case in which it was corroborated. It is an inevitable feature of a joint trial that some deductions or impressions of the jury in one case must affect their consideration of the other. It is a consequence that must be accepted for the reasons which lead to the ordering of a joint trial. Were this not so, a jury might, theoretically, do the very thing sought to be avoided, that is, return inconsistent verdicts.'

At 163:

'Joint trials of course raise difficulties, some of which cannot be foreseen at the outset. It is for this reason that a CCA must retain the power relied upon in Demirok. But that power will not generally be exercised merely because evidence which has been properly admitted in the case of one accused is inadmissible in the case of another and prejudicial to that other....'

At 166:

'...while none of the matters to which we have referred might standing alone necessarily be regarded as producing the result that there was a miscarriage of justice, we have come to the conclusion after prolonged consideration that a combination of all of them means that there was. It was probably not possible to determine in advance that a joint trial would or might have that effect, for it depended to a considerable degree on the course of the trial...but the course the trial took and in particular the evidence to which we have referred was so prejudicial to Gibb, and prejudicial to him in a way that would not have been possible if he had been tried separately, that we are called upon to weigh that prejudice against the matters of public interest referred to in Demirok.'

In **Alexander and McKenzie** the two co-accused were charged and convicted with sexual offences against a 10 year old student of Alexander. Over objection by counsel for both accused, the crown led evidence of a similar fact nature from other students of Alexander. The trial judge ruled this evidence was admissible only against Alexander and for the purpose of proving that it was likely that Alexander had spoken to the complainant in a similar fashion and, thus, of proving the nature of the relationship which existed between them. Upon the admission of this evidence, counsel for McKenzie applied for a separate trial but the application was refused. The trial judge directed the jury that this evidence could not be used against McKenzie and could only be used in a limited way against Alexander. However, it comprised the greatest part of the evidence given at the trial.

On appeal, Court held that a miscarriage of justice occurred in the trial of McKenzie by allowing her to continue to be jointly tried with Alexander, in light of this evidence. The similar fact evidence was irrelevant to the case against McKenzie, highly prejudicial to her defence, and was of a nature that could not have been cured by judicial direction

At [24]:

'To my mind, this was one of those rare cases where — once the judge had decided to admit the evidence of similar facts to be given by the five girls other than the complainant — it should have been obvious that the trial of McKenzie would be prejudiced in a manner which could not be cured by judicial direction. That evidence, which was admitted only against Alexander, was — both as to volume and content — clearly going to "swamp" any case which McKenzie was going to make, and was so laden with hearsay and irrelevant material (to the case against McKenzie), suggesting that McKenzie had a predilection to "threesomes sex", that any case which she was intending to make would be irrevocably compromised.

In **Ditroia and Tucci** the two co-accused were charged and convicted with possession of heroin. On appeal, Tucci contended that a separate trial should have

been granted as he was prevented from giving evidence at trial, as to do so would open him up to cross-examination by his co-accused as to his history of prior convictions. The Court dismissed the appeal, holding that the trial judge gave acute consideration to the circumstances of Tucci, and appropriately weighed the public interest of the trial with the private interest of the co-accused.

At 258:

'The learned Judge was acutely conscious of the prospect of Tucci's prior convictions coming to the notice of the jury if he should give evidence on oath and of the need to give special directions to the jury in such an event, as well also of the usual directions as to inadmissible evidence against a particular accused in the case of joint trials...[I]n the end the Judge considered that the public interest in the proper administration of justice was paramount to the private interest of Tucci. Involved in such considerations was the desirability that the one jury should see and hear the two accused and so make one assessment of the true facts. By their so doing a real risk of inconsistent verdicts would be avoided – the avoidance of such verdicts being highly desirable in the interests of the public confidence in the administration of criminal justice.'

In **Finn & Anor** the two co-accused were charged with various drug offences related to the trafficking of quantities of methylamphetamine. The initial application for separate trials was founded on the basis that, as the two co-accused were brothers, a jury would not be able to compartmentalise and consider the admissible evidence against each separately, with the evidence against one unavoidably tainting the evidence against the other.

The court viewed this basis as unpersuasive and insufficient to fall within the exceptional categories of circumstances that would render a joint trial undesirable. The Court agreed with the submissions of the Crown at the directions hearing:

At [21]:

'the jury may very well take the view that 'it is Wayne Finn that is the drug trafficker and it may well assist Matthew Finn in his argument that he was unaware and had no knowledge of the manufacture and trafficking occurring at the

Springvale premises'. Juries are commonly told that evidence which is admissible against one accused cannot be taken into account in considering the case against a co-accused. There is no reason to consider that they would disregard such a direction in the circumstances of this case.'

The appeal was dismissed.

In **Spence & Mitchell** the co-accused were jointly charged with murder. In his initial interview with the police, Spence made 'no comment' responses to questioning. Similarly, when interviewed by police, Mitchell also made 'no comment' responses or denials. However, Mitchell subsequently made admissions as to his involvement in the offence, but asserted that he had been acting under duress from Spence.

The prosecution anticipated leading evidence from various witnesses, two of whom could support the assertion of Spence that he was acting under duress, but whose evidence was inadmissible in the case against Mitchell. The defence for Mitchell argued that (at [21]):

'a joint trial would run the high risk that the critical parts of the evidence of Mr Muja and WR, which Mr Spence disputes, would be bolstered by the utterances made by Mr Mitchell in his police interviews, which utterances are admissible in the trial of Mr Mitchell but inadmissible in the trial of Mr Spence. He submitted it would be impossible for the jury to disregard the potentially corroborative effect of the utterances of Mr Mitchell when considering the evidence of Mr Muja and WR in Mr Spence's case in circumstances where, in a joint trial, they will be required to consider those utterances when considering the evidence of those same witnesses in the case against Mr Mitchell.'

Citing *Gibb & McKenzie*, Croucher J agreed, and held that the high risk that a jury would not be able to perform the mental feats required to satisfactorily discharge their duty in accordance with directions outweighed the considerations supporting a joint trial.

As to these considerations, the Crown submitted that the additional length of holding separate trials, the inconvenience placed upon witnesses, the risk of inconsistent verdicts, and the need for expeditious resolution all out weighed the risk of unfair prejudice against Spence in a joint trial.

However, for Croucher J, these factors did not outweigh the danger posed by continuing with a joint trial. (see [31] – [35] .

South Australia

Under section 278(2) Criminal Law Consolidation Act 1935:

(2) Where before trial, or at any stage of a trial, the court is of the opinion that an accused person may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same information or that, for any other reason, it is desirable to direct that an accused person should be tried separately for any one or more offences charged in an information the court may order a separate trial of any count or counts of the information.

In **Glover** the appellant and a co-accused named Kroschel were convicted of the sexual assault of a girl. Both gave police interviews in which they admitted to engaging in sexual activity with the alleged victim, but both claimed that she had consented. In addition, Kroschel gave a signed statement to the police that tended to incriminate both himself and the appellant. At trial, counsel for the appellant applied for a separate trial, arguing that Kroschel's statement was inadmissible against him but of such a prejudicial character that there could not be a fair trial if proceedings were to be heard jointly. The trial judge viewed that it was ultimately in the interests of justice that they be tried together, with any unfair prejudice able to be cured via appropriate directions.

Also, consider the consideration given not only to the accused offenders, but also to victims per King CJ at 312:

'The learned judge attached importance in this case to the consideration that the alleged victim, a seventeen year old girl, would have had to give evidence on two occasions, if the accused were tried separately. It is an important consideration. The courts must be sensitive, not only to the interests of accused persons, but also to the interests of alleged victims. Alleged victims of sexual crimes should not be

called upon to give evidence more often than is absolutely necessary to avoid a miscarriage of justice.'

In **Collie, Kranz and Lovegrove** the appellants were charged jointly for murder. At trial, the trial judge allowed into evidence certain evidence that was only admissible against another co-accused, David Carter, but which had a highly prejudicial effect on the appellants. The trial judge refused separate trial applications from each appellant. The Court of Appeal ultimately found that the refusal of the trial judge to grant the applications resulted in a miscarriage of justice.

However, the question to be asked on appeal is not whether the trial judge erred in the exercise of their discretion, but whether a miscarriage of justice resulted from that error, per King CJ at 310:

"Nevertheless, the critical question in the end is whether an injustice has been caused by the joint trial. It sometimes happens that a joint trial held in consequence of an entirely justified refusal of the trial judge to accede to an application for separate trials may be seen, when all the evidence is in, to have resulted in injustice. R v Gibb and McKenzie and Demirok were such cases. The critical issue on an appeal is not whether the exercise of the discretion of the trial judge miscarried on the material before him at the time when he made his decision, but whether the joint trial has produced a miscarriage of justice in the sense of depriving the appellant of a fair trial'.

If inadmissible evidence against one co-accused is to be viewed as the source of the unfair prejudice, it seems as if it must be considered in light of the admissible evidence as a whole.

In **Holden** the appellant and a co-accused, W, were charged with murder, with W additionally charged with being an accessory after the fact. When W was interviewed by police, he disclosed information highly prejudicial against Holden, although inadmissible in the case against him. The Crown case against the appellant rested largely on *'inferences to be drawn from the nature and severity of his attack*

upon the deceased, [and as such] the prejudicial statements by Walters were calculated to emphasise the ferocity of the attack in a manner inadmissible as against the appellant' (at 38). However, whilst the information contained in the interview was highly prejudicial, there was other evidence which independently confirmed some of the prejudicial material, most of which was in any event insignificant against the background of what was admitted and proved to have occurred on the night in question.

The trial judge refused separate trial application. The appeal was dismissed.

As per Perry J at 44:

'Where the application for a separate trial is put forward on the basis of the likely prejudicial effect of out-of-court statements of a co-accused, it is for the trial judge to balance the effect of the prejudicial statements on the minds of the jury against the likely effectiveness of the usual warnings, but the prima facie rule is not easily displaced. This court must take into account not only the weight and content of the alleged inadmissible and prejudicial material, but the adequacy of the warnings given to the jury as to its use.'

Here, the directions of the trial judge, in conjunction with the admissible evidence supporting the Crown's case, were sufficient to cure any unfair prejudice against Holden.

Where there is a *marked* quantitative imbalance in the prosecution cases against co-accused, it is in the interests of justice that separate trials are held. However, the impugned evidence must be placed in context of the evidence entire.

In **Burns** five co-accused were jointly charged with being knowingly concerned in the importation of a prohibited drug. The evidence against each was different, with the evidence corresponding in some places, whilst being markedly different in others.

As against Collins (at [22]):

'I am not satisfied that the interests of justice require that there be a separate trial for Collins. The evidence said to be inadmissible against him may be properly described as not directly implicating him but still part of "the whole picture" properly presented. The prosecutor says that on any separate trial of Collins the evidence of the first shipment would be admissible. That material would relate to the circumstance surrounding the commission of the offence charged and properly before the jury. Assuming that submission is correct, that material does not seem to be "so prejudicial" against Collins that a separate trial is "imperative".

It is part of the factual circumstances surrounding the shipment that contained the material the subject of the present charge. I reject the submission that the prosecution's case at a joint trial contains highly prejudicial evidence against Collins. There is no proper basis made out to depart from the general rule. Directions can be given as to the admissibility and proper use of evidence against particular accused, including the limitations applicable to evidence sought to be admissible against Collins by any proper application of the Tripodi principle. That matter is dealt with further in conjunction with the response to submissions put on behalf of Burns and later adopted by counsel for Collins.'

Although Prior J denied the separate trial applications for each of the co-accused, he emphasised the need to identify the unfair prejudice that would arise, not merely the per se existence of different prosecution cases.

Western Australia:

Prior to 2004, questions relating to separations of trial were dealt with under s.624 Criminal Code (WA) which broadly stated that:

'when two persons are charged in the same indictment the court may direct that the trial of one of them shall be had separately from the trial of the other.'

In **Tolliday** the Western Australian Supreme Court dealt with an application for separate trials based solely on the prejudicial nature of the record of interview of one of the accused, in as much as it seriously implicated the applicant. That case involved a murder of a woman. Tolliday said in his police interview that Oblak (the

applicant) had stated he had intended to kill the deceased, that the applicant had attacked the deceased, that the applicant had told Tolliday that he had stabbed the deceased four times and that the applicant had concealed the body of the deceased with the assistance of Tolliday. There was evidence that at the time of her death the deceased was pregnant to the applicant and this was a source of angst to the applicant. Tolliday was his best friend. On the day of her murder the deceased told her brother that she was going to meet up with the applicant. There was evidence to establish that the applicant and Tolliday were travelling together on the night of the murder. Tolliday told his mother that he and the applicant were going to the cinema at Innaloo and she dropped them at the train station, apparently for that purpose.

The Crown relied on two 'Edwards' type lies on the part of the applicant arising from his police interview. First that on the night in question he had met with the deceased at the Innaloo cinema (when she in fact failed to make it there) and secondly that he was alone and not with Tolliday when he met with the deceased.

The case against the applicant was circumstantial, resting on motive, opportunity and the Edwards lies.

The principle evidence against Tolliday was his admissions in three police interviews, during which he detailed the matters alleged against the applicant above. The court found the account to be '*detailed, emotional and disturbing*'.³⁴

In determining the issue the Court referred to the usual resistance of courts to separating trials such as this, relying on **Demirok, Symms** and **Middis**.

In acceding to the application for separate trials Le Miere J said:

³⁴ At [17]

'The State submits that a strong direction would be required so far as Tolliday's admissions are concerned. I have considered the nature and extent of the directions that might be given to the jury. In my view, they would not be sufficient to prevent an injustice being caused to [the applicant] in a joint trial.

The case against [the applicant] is circumstantial. There is no direct evidence of what happened to the deceased between leaving the ...train station and her body being found in the bushland area that is admissible against [the applicant]. There is real danger that notwithstanding any direction from the trial judge to the contrary the jury would be unable to avoid using, if only subconsciously, the out of court statements by Tolliday to fill in the gaps in the State's circumstantial case against [the applicant]. The video tapes are extensive [lasting over three hours].

In addition, Tolliday makes a number of statements reflecting the bad character of [the applicant]. They include that [he] has inflicted violence or 'done damage' on people in the past. They include statements by Tolliday that he did what he did [assisted with burial of the body] because he was scared of [the applicant].³⁵

In posing kind of question referred in **Pham** (but not articulated as such in this case) Le Miere thought that, absent the prejudicial material, a jury may consistently find Tolliday guilty on his own admissions and find the applicant not guilty on the basis that the circumstantial evidence presented against him was not sufficient.

England and Wales:

The genesis of the curiously vague language in s.21 Criminal Procedure Act traces its history directly to the present legislative embodiment contained in section 5(3) Indictments Act 1915, which states in a rather familiar way:

'Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more

³⁵ at [20] – [21]

offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

However, it will be readily understood that s.5(3) has a much longer common law history.

In **Gibbons and Proctor** the appellants were charged and convicted of the murder of Gibbons' daughter, with the cause of death being neglect and starvation at the hands of both. A separate trial application was made before the beginning of the trial, as each sought to blame the other (cut throat). Further, throughout the trial, evidence was admitted that was admissible against one, but not the other. Although counsel argued that it would be impossible to separate the evidence against the two, the trial judge refused the application and directed the jury appropriately. The subsequent appeals were dismissed. The Court said:

*'The rule is, that it is a matter for the discretion of the judge at the trial whether two people jointly indicted should be tried together or separately. But the judge must exercise his discretion judicially. If he has done so this Court will not interfere, but that is subject to qualification. If it appeared to this Court that a miscarriage of justice had resulted from the prisoners being tried together it would quash the conviction. Here it is clear that Roche J. exercised his discretion; he separated the defences carefully, pointing out what was evidence against one prisoner, and not against the other. It is not enough to say that counsel could have defended them more easily if they had been tried separately. There is no ground for thinking that there was any miscarriage of justice. There may have been many things made clear to the jury which would not have been made clear if the prosecution had been embarrassed by having to deal with the two cases separately. The whole story was before the jury of what went on in the house where the two appellants lived together. There is no ground for thinking that either of them was improperly prejudiced by their being tried together.'*³⁶

In **Barnes and Richards** the appellants were charged and convicted, with three other persons, for murder. At trial, two co-accused made a number of statements, the earlier ones referring to themselves, while the later ones inculpatory of the

³⁶ at p.136

appellants. Although the judge directed the jury that the evidence they gave was evidence only against themselves, he failed to mention the need for corroboration to the jury. The appellants appealed on the basis that there should have been separate trials. The appeals were dismissed, as the appellants failed to show the basis from which separate trials were necessary.

At 231:

'With regard to the law upon that point, there is no longer any room for doubt or difference. The question whether there should be separate trials is a question for the discretion of the judge....Much stress was laid yesterday by counsel for the appellants upon a passage in a case in this court which it was said that, where the defence of one prisoner incriminates another prisoner, there ought to be separate trials. However...it is quite obvious that what is meant is that, where it appears that the essential part, or an essential part, of one prisoner's defence is, or amounts to, an attack upon another prisoner, then a separate trial should take place.

[Here] it is quite obvious...that what those witnesses were concerned with was to excuse themselves, and not to attack others. The mere fact that, in the course of excusing themselves, they made observations which might have the effect of throwing blame upon others who were in the dock is no sufficient reason why trials should be separated."

In **Grondkowski and Malinowski** the appellants were jointly charged, tried, and convicted of murder. Each accused sought to place the blame for the murder on the other (cut throat). However, as there was evidence to support the inference of common intention to rob and kill, the trial judge viewed a joint trial as appropriate. The subsequent appeals were dismissed.

At 560:

'Prima facie, it appears to the court that where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused as of the prosecution that they should be. [examples were listed].

At 561:

[referring to Barnes and Richards] In our opinion, that case is not to be read as

laying it down that wherever it appears that one prisoner is going to lay the blame on the other, or another, there must be separate trials. The law is, and always has been, that this is a matter of discretion for the judge at the trial....the judge must consider the interests of justice as well as the interests of the prisoners.

In our opinion, the court in Barnes and Richards' case are not to be taken as meaning more than that an attack by one prisoner on another is a matter which the court should take into account in considering whether to grant a separate trial, not that in those circumstances it is bound to.'

SOME CASE STUDIES:

VU PHAM:

Vu Pham (the appellant) was convicted of the murder of the man Ly. Two co-offenders, Phong (Pham's brother) and Minh were also convicted. The Crown case was that Ly was shot in the presence of the appellant by Tran, and this was witnessed by another man named Lam. Tran and Minh took Ly from a car onto an oval where he was killed.

None of the offenders including the appellant gave evidence in the trial. The Crown relied on admissions made by Phong in his record of interview. Those admissions also included information of a highly prejudicial nature about the appellant.

Tran, the shooter, pleaded guilty and gave evidence against the appellant and his co-offenders. His evidence was said to be crucial. Another witness, Dang, who was not charged, significantly supported Tran's version. Dang said he invited Ly to Phong's house, where Minh and Tran were already present. He heard Tran and Phong talk about a gun. He saw Phong push Ly into a car. Minh, Tran and Lam also got in. Dang remained at Phong's place. An hour or so Phong returned with Minh and Lam. They were laughing and talking about shooting someone dead.

Tran gave evidence that some time before the appellant asked him to kill Ly, explaining that he was a threat to the appellant and his family. He refused but they met again at Phong's direction and that the two brothers ordered him to kill Ly when the car arrived at the oval. Tran's evidence was said to have been punctuated by many lies and inconsistencies. He initially told police that it was Phong who shot Ly. He appeared to be heavily involved in the planning and execution of the plot.

Adams J was of the opinion that Tran had a powerful motive to implicate the appellant and that he could not be relied upon in any matter in dispute unless his evidence was supported by other witnesses.

Lam also gave evidence. He was not charged, although Adams J noted that he could hardly be said to be a *'disinterested witness'*. He said that Ly picked him up on the way to Phong's house, where they were both forced into a car by Tran and Minh. They then drove to the appellant's house, where the appellant got into the car, telling Phong that *'I can't avoid it. We have to do'* and whilst they were driving *'we have to do what we have to do'*. When they got to the oval the appellant said to Phong *'Just do it here'*. Lam said that Ly, Minh and Tran got out of the car and walked away. He heard four loud bangs and Minh and Tran ran back to the car. Lam initially denied any knowledge of the murder when he was first spoken to by police but said he knew that he was a drug dealer. It was some four years later that he made his statement implicating the appellant.

Adams J noted the appellant's defence was that he was present in the car, but only as an *'honest broker'* relating to repayment of a drug debt and that he never contemplated Ly's murder.

Adams J was of the opinion that, absent Phong's statements to police, the case against the appellant was *'far from strong.'*

In his recorded interview Phong told police that he and his brother had sold drugs with Ly for some time but this arrangement broke down and that Ly stole clients from his brother and passed himself off as still being in partnership with him, to hide the fact of his intrusion into sales. He said that he and his brother were seen by the 5T gang as competitors and that the appellant had been attacked by members of that gang. He also said that shortly before the killing the appellant had found out

about Ly's activities in stealing clients and that this impacted financially on the appellant.

Phong told police that for the safety of himself and his brother it would be best if Ly was killed and made admissions (about himself but not necessarily the appellant) planning the murder. However, he also told police that when the time came he protested that Ly should not be killed. Adams J was sanguine about this expression of innocence. Phong maintained that the appellant did not want Ly killed.

Adams J described Phong's account as '*dramatic and memorable*' and '*compelling*'. As it contained admissions the Crown relied heavily on Phong's recorded interview against him. None of it was admissible against the appellant. The jury were directed that they had to be satisfied that the admissions were reliable. As such, they had to carefully evaluate it and compare it to the evidence of Lam and Tran. If reliable, it was powerful evidence against Phong. It also had the prospect of significantly corroborating the evidence of Lam and Tran in material aspects.

The fact that Phong significantly implicated the appellant in the background to offence, even though he stated clearly that the appellant had nothing to do with the murder was highly persuasive, according to Adams J. Nor could the '*emphatic directions*' given that Phong's confession played no part in the case against the appellant, as a matter of common sense, guard against the risk that the jury could not dismiss it from their minds, notwithstanding that this direction was given or alluded to perhaps six or seven times in the summing up.

The danger was highlighted by a later jury question as to the role of Phong's interview. The Crown Prosecutor had told the jury that they could use the interview as support for the evidence of Lam and Tran.

The trial judge then gave another clear and unambiguous direction to the effect that Phong's statement was relevant only to his case and had to be disregarded in respect of the other cases. Adams J posed the question as to whether this direction was sufficient or whether the risk remained that the appellant was so unduly prejudiced that he could not receive a fair trial.

Ultimately Adams J came to the conclusion that:

'it is very likely – if not certain – that the jury would have found it virtually impossible, in their consideration of the appellant's case, to disregard the prejudicial statements made by Phong that supported the evidence of Tran and Lam incriminating the appellant and disclosed his character, motive and involvement in the events surrounding the murder'.³⁷

It is suggested that the crucial aspect of the prejudicial evidence was that, quite apart from any motive of Phong to implicate the appellant, rather the opposite, the material brought out so much of background of the appellant such as to make any possible direction ineffective against the obvious prejudicial impact of it.

HAZAIRIN ISKANDER:

Hazairin Iskander (the applicant) was jointly charged with his son Andrew Iskander over the death of a man Saemin, who was suspected of have been having an affair with their wife/mother.

Prior to the commencement of the trial the applicant sought a separate trial from his son Andrew. The basis of the application arose from the admissions said to have been made by Andrew Iskander to various persons, the details of which prejudicially implicated him.

³⁷ at [39]

The case against the applicant was said to be a circumstantial one. It was not to be disputed that the acts causing the death of Saemin were committed by him and Andrew (hitting with a hammer and stabbing with a knife). Nor was it to be disputed that he had an intention to kill, or at least cause grievous bodily harm, at the time he committed the acts. Rather, the applicant's defence was a limited one. He was to rely on the partial defence of provocation, disputing that he formed the intention until such time as Saemin said various things to him at the time of the attack such as *'you can't look after your woman'*, and called him a *'poofter'* and a *'betima'* which is an insulting word in the Malay language in which Saemin partly spoke.

The applicant had offered to plead guilty to manslaughter in front of the jury. This offer was rejected by the Crown.

The Crown, in the case against Andrew only, sought to rely on evidence from a man named Maiva, which had allegedly spoken to Andrew at the MSPC Long Bay Gaol. In that conversation Andrew had told him that *'he and his father were going to knock this guy'* because his mum was having an affair with him. It was said that Andrew talked about a plan they had to kidnap Saemin, put him in the boot of his car and take him to Woolloomooloo and kill him.

He said that Andrew told him that the applicant had hit him with his car. He and the applicant got out of the car and Andrew hit him with a hammer and the applicant stabbed him with a knife. He also said that Andrew told him that when they got home after the killing that the applicant had told him to arrange an alibi and to dispose of some evidence. A friend declined to offer an alibi.

The Crown also relied on the evidence of a man named Lau, a school friend of Andrew's who said that early in the morning following the killing that Andrew called him, told him that he and his father had killed a man who had been *'messing*

around' with his mother. Lau said that Andrew asked him to provide an alibi for him and he refused. He went on to say that Andrew had said that he and his father had attacked him and that the applicant had *'finished him off with a couple more stabs'*.

As has been stated, the case against the applicant was circumstantial. He had participated in a record of interview in which he made no admissions of having formed any intention to kill Saemin. He did agree however that he hit the deceased once or twice with the hammer and perhaps kicked him once on the ground. The applicant admitted to no more than a plan of a few hours duration to bash Saemin at the behest of a stranger. His case remained that he had no real intention to cause serious harm until such time as he was provoked.

His Honour found that the prejudicial material contained in the two witnesses statement was of such magnitude that directions could not cure the prejudice to the applicant, reasoning in part that in a case relying on joint criminal enterprise the jury could well accept that Andrew always had the requisite intention to commit the crime and as such, it would be difficult for the jury to put the admissions aside to conclude that the applicant did not have such an intention at the relevant time. He thought that this be a positive injustice to the applicant in a joint trial. The trials were separated.

HARPREET SINGH:

Harpreet Singh (the applicant) was jointly charged with the murder of his friend Ranjodt Singh (Ranjodt), together with Gurpreet Singh (Gurpreet) and Harpreet KaurBhullar (Bhullar). Gurpreet and Bhullar lived together as man and wife. Ranjodt's body was found by the side of a road near Griffith. He had been stabbed many times, his throat was slashed and he was set on fire, most likely when he was

still alive. The three accused were the last to see Ranjodt alive. Each of them made statements to police investigating his murder to the effect that they had all been at a party at the Gurpreet/Bhullar residence. Ranjodt had been drinking and, it was said, left the premises in an agitated state saying he was going to drive to Albury.

CCTV footage of the Griffith township turned up footage of Gurpreet's car at a carwash in the early hours of the morning. The footage was not clear and the Crown commissioned a report from Professor Henneberg to the effect that one of the men in the footage washing the car was the applicant. Witnesses came forward and described a car similar to that of Gurpreet and carrying three people driving in the vicinity of where Ranjodt's body was later found. The Crown could not point to any specific conduct of the three accused but said that they must have jointly formed an intention to kill him and undertaken this task together. Nothing of any forensic value was obtained from the car or the Gurpreet/Bhullar flat.

Other witnesses in the brief of evidence spoke of the violent tendencies of the applicant and it was known that he had a criminal record for violence. The Crown did not intend to lead this evidence against the applicant as tendency evidence.

The case against the applicant was therefore circumstantial. The Crown intended to lead the same circumstantial evidence against Gurpreet and Bhullar but also against them of admissions of complicity in the murder that Bhullar had made to her sister but in terms that directly implicated the applicant in the physical acts causing Ranjodt's death. Gurpreet was present during this conversation.

Bhullar also told her sister that they had complied with the applicant's demands because he would kill them if they did not assist him. Bhullar's sister made a statement to police confirming the conversation with Bhullar in Gurpreet's presence.

Counsel for Bhullar had indicated that a claim of duress would be raised in the trial. The Crown did not concede that the claim by Bhullar would be sufficient to properly discharge her evidentiary onus. She had also indicated that she would be relying on the material in the brief that went to the applicant's tendency to violence and the contents of his criminal record.

A further complication arose in the evidence because at the committal hearing Bhullar's sister had sought to resile from her statement that implicated Bhullar. The Crown indicated that the sister would be cross examined under s.38 Evidence Act as to the content of her statement and the jury would be invited to find it to reliable as to what was said by Bhullar. There was also the fact that Gurpreet and Bhullar has sought to flee Australia shortly after the conversation with the sister but were apprehended at the Airport. This said the Crown added to the reliability of the statements of Bhullar's sister, notwithstanding her attitude to the giving of that evidence.

The applicant's counsel advised of his intention to not cross examine Bhullar's sister or challenge the criminal record on the basis that it was not admissible against him and to ask any questions about it would be to further prejudice the applicant.

In this manner, the case was similar to that of **Pham**, in that the jury would be invited, on one hand to assess the evidence of Bhullar's sister as to its reliability as an admission of Bhullar, but to completely disregard its content as to the case against the applicant:

'There is a very significant difference between an attempt to entirely disregard prejudicial material that might possibly be true on the one hand and, on the other hand, the attempt to entirely disregard material that has been carefully evaluated after intensive debate and relied upon as true against a co-offender'.³⁸

³⁸ **Pham** at [32]

Fullerton J was of the view that even the most emphatic and repeated directions from the trial judge could not guard against the risk that the jury would misuse the inadmissible material, or at least be able to separate the issues they would be required to resolve in the case against the co-accused and that tendered to prove the guilt of the applicant.

The trials were separated.

WHITE & ORS (NO.1):

Rodney White (the applicant) was charged together with Todd Serone and Jessica Birkinleigh with the murder of Saaid Zaiter. Serone was charged as accessory after the fact alleging he had assisted with the disposal of Zaiter's body.

On the morning of the trial counsel for White made an application for separate trial, based in part on what counsel for Serone had told him about how he intended to present his case.

Zaiter was a drug dealer in the Gold Coast area. The applicant was an associate of his who had purchased drugs from him, although that supply had stopped because of an alleged \$25,000 drug debt to Zaiter. In December 2008 Zaiter had a number of phone conversations with the applicant who had arranged some people from Melbourne to purchase three kilograms of speed from him for a substantial sum of money.

Zaiter was summoned to the applicant's property on the pretence that the people from Melbourne had arrived. There he was assaulted by one Ricky Lee Humphreys, who later pleaded guilty to manslaughter. Zaiter's hands were tied with cable ties

and tape put over his mouth. The applicant was then driven away from his house and told an associate that he had just bashed someone who he thought was dead.

The applicant then made arrangements to get rid of the body and Zaiter's car. He rang Serone and asked him to get a tow truck to take the car away. He later met up with Serone and others and took drugs from the car and set it on fire. The applicant then gave Serone some money and told him to obtain a hire car. A blue sedan was hired and the men returned to the applicant's house and collected Zaiter's body and drove it to a remote location, ultimately pushing it over a cliff.

When he was arrested the applicant was in possession of three blocks of speed that he had been cutting with powder to produce greater quantities.

Serone gave a statement to police but said he had not seen the applicant or Zaiter at the relevant times. He was interviewed some months later and told police that he had been contacted by the applicant and asked to move a vehicle that was parked at White's premises. He said that at the applicant's direction he took the vehicle to a remote spot and then left the scene quickly. He said that when he made his earlier statement he did not tell police what he knew because he was frightened as he had learned Zaiter had disappeared and that his car had been found burnt out and that the applicant was involved. He said he was afraid he would be bashed by members of Zaiter's family.

The application was based on two grounds. One being prejudicial material being lead against Serone which affected the applicant and two being his understanding of how Serone was to conduct his defence.

In respect of the material in Serone's case this consisted of material in his interview to the effect that the applicant had a substantial cocaine habit and that he was '*with the Mick Gatto family in Melbourne*'; that he had seen the applicant at Bandito

parties from time to time; that he was scared of the applicant because he was with the Melbourne mafia; that the applicant was Mick Gatto's nephew. Counsel for Serone had indicated that he wished that material to remain for the consideration of the jury.

In respect of the manner of how Serone was to conduct his defence, his counsel had informed counsel for the applicant that his case would be that the applicant had, during the relevant activities, told Serone that he would be killed if he did not assist the applicant.

Finally, the applicant apprehended that there would be some evidence that he had confessed to Serone that he had killed Zaiter. This last evidence was contained in a statement by a man named Waters who had given a statement to the effect that he and Serone had disposed of Zaiter's car and that some time later that Serone had told him that the applicant had killed Zaiter and that he, Serone, had assisted with the disposal of the body. The Crown relied on this material in its case against Serone as accessory after the fact and agreed that it was not admissible against the applicant.

The Crown submitted that the problematic evidence could all be dealt with by way of directions and it was speculative as to whether Serone would give the evidence referred to above about the applicant's alleged threats to kill him if he didn't assist, leaving open the prospect of a further defence application in the event that the evidence was adduced.

The judgment did not set out any details of the applicant's proposed defence.

R A Hulme J in determining the application set out a large extract from **Symms**, which he said he had found helpful.³⁹ His Honour was of the view that directions would be sufficient to avoid the prejudice feared by the applicant and that it was speculative as to whether Serone would seek during the trial to exculpate himself by blaming the applicant.

The application was refused.

SAMUEL LOCKETT:

Samuel Lockett (the applicant) was charged together with Barnes, Brown and Tuivaga with the shooting murder of a man named Ruiz-Sanchez.

In September 2010 Brown obtained a gun from Ruiz-Sanchez. This was not paid for despite various demands. On the day of the shooting the 4 men and another Trawin-Hafield (who pleaded guilty to manslaughter) were present at an address in Smithfield. They all drove to Jasmine Psaroudis' address in Mt Pritchard. She was Brown's sister and lived next door to Ruiz-Sanchez. On the way the applicant obtained a gun from a Trevor Hair.

Ruiz-Sanchez was home with witnesses Ashley Riddell and Rhiannon Knaggs. The accused approached the house and Brown yelled out to him to come out and face him. When he came out of the house he was punched by either the applicant or Tawin-Hadfield. The others joined in. The Crown case was that it was during this assault that the applicant struck Ruz-Sanchez on the head with a gun, which discharged causing a fatal head wound. All of the accused then ran to their car and drove off.

³⁹ Being [68] – [76], as he also did in other applications before His Honour in **Hawi** and **McKellar (No.1)**.

Knaggs described '*the blond guy*' hitting Ruiz-Sanchez with what she thought was a pole. She heard a bang and saw a wound to his head. Riddell also said that she saw the male with sandy blonde hair hit the deceased with a pole then heard a loud bang and saw he had been shot in the head. The Crown case was that the applicant was the blonde guy. Psaroudis said that she saw the applicant hitting the deceased over the head with a wooden thing at last 5 times and she saw him with a long silver metal tube 30 cm long with a wooden handle. She saw the applicant hit the deceased a number of times over the head with this thing, which then bounced and she heard a loud bang.

Brown gave an ERISP in which he said that he saw the applicant hit the deceased a number of times with the gun before it discharged. He said he saw the applicant get the gun from Hair. Barnes gave an ERISP in which he described the metal gun.

The applicant gave an ERISP in which he said that either Brown or Barnes had the gun in their hands and he went to take it off them and it discharged. He also said that he saw Brown retrieve a metal pole object from the house at Mt Pritchard. He had no idea it was a gun.

The applicant argued that the combined effects of the ERISP's of Brown and Barnes would be to introduce evidence that the applicant knew the object with which he was striking the deceased was a gun. The independent witnesses did not describe a gun in his hands but rather a pole or tube with a wooden handle. What was said by the co-accused would strengthen the Crown case. Brown's version was a '*colourful description*' of what had happened.

Price J was of the view that the admissions made by Brown and Barnes contained in their ERISP's did strengthen the case against the applicant. He also said that the applicant knew about the gun prior to the incident, and knew that he was striking

the deceased with a gun. This was highly prejudicial and not available in the Crown case against him. As such, the Crown case was made significantly stronger by reason of the prejudicial material. Price J was of the view that even emphatic and repeated directions to the jury could not cure the prejudice.

The trials were separated.

PETER KEARNS:

Peter Kearns (the applicant) and Christopher Paton were jointly charged with the shooting murder of Sam Rizvic in Wagga Wagga.

The application was made to Button J, the trial judge about a month before the trial listing date.

The Crown case was that in the early hours of a morning in July 2011 the applicant and Mr Paton drove from Tumut to Wagga. There, pursuant to a joint enterprise, Rizvic was shot in the head and neck causing his death. The motive was said to be ill feeling on the part of the applicant as a result of a romantic relationship between Rizvic and the applicant's ex-wife. There was also a suggestion that the applicant believed Rizvic was involved in the sexual assault of children.

The case consisted of evidence from a Ms T, a person with whom the applicant had briefly had a relationship, which went to the events of the night of the murder and its aftermath. Her evidence was expected to be attacked not least because she had initially told police that she knew nothing about. The applicant's phone records suggested that his phone was in Wagga on the night. A car similar to his was seen in the vicinity of Rizvic's flat; there was no photo ID of the applicant, but 2 witnesses identified photos of Paton as being near the scene. Paton's palm print was also

found near the scene. There was also some CCTV footage which was said to show Paton in a petrol station across the road from Rizvic's premises.

The Crown also relied on the evidence of a prison informer to the effect that the applicant had confessed to him, together with another unnamed man, of the shooting and a plan to kill Paton which had been abandoned and sought to hire him to kill Ms T. The prison informer did not refer to Paton's name at all. The prisoner informer's evidence was expected to be subject to strong criticism by counsel for the applicant accompanied by strong warnings from the Bench.

The Crown also relied on evidence from Paton's aunty that he had confessed his involvement in the shooting to her. He said that he was at the scene but did not do it. He said that the applicant and Ms T were there to see Rizvic but that he absented himself at the time of the deadly violence. That evidence was said by Senior Counsel for Paton to be firmly in dispute.

The applicant took part in an interview in which he denied ever being in Wagga at the relevant time and the Crown indicated that it would allege this was a lie as consciousness of guilt.

The applicant based his application on the proposed evidence by Paton's aunty. It was said that the evidence of a prison informer is one thing but the evidence of a close relative is quite another. He apprehended that this could be an important piece of evidence against Paton, especially as it was disputed and would need to be explored at trial. It was anticipated that it would be dramatic and have human interest attaching to it.

Button J agreed, stating that the evidence from a family member may well be seen as '*dramatic, emotive and impressive*'. He was of the view that the evidence

against the applicant was weaker (however he recognised that this factor of more recent years was not regarded as being overly determinative).

The trials were separated.

ETHAN MCKELLAR & ORS (NO.1):

Ethan McKellar (the applicant) was jointly charged with the murder of a local drug dealer in Wagga, along with his brother Bevan McKellar and two other men, Luke Elwood and Douglas Dennis.

The application was made on the morning of the trial before R A Hulme J.

The Crown case was that the four men went to the drug dealer's premises in order to rob him of cannabis or money. They took a machete and at least one other knife with them. The deceased was assaulted at the front door and then chased one of the men. His son also came out and became involved in the melee, during which the deceased was fatally stabbed in the chest.

The Crown put its case as a joint criminal enterprise and as such there was no requirement to prove who in fact stabbed the deceased. It may have been Ethan McKellar or it may have been Bevan McKellar according to the Crown. The son of the deceased gave a number of interviews to the police and in the last one he nominated the stabber as Ethan McKellar.

The application was made on the basis that there was considerable material contained in the interviews of Elwood and Dennis to the effect that they saw Ethan McKellar stab the victim. However, the Crown said that it would not be saying to the jury that these were reliable accounts as they were made a few days after the events and in circumstances where the two could have gotten their heads together. Also,

the Crown pointed out that the men entirely exculpated themselves saying that they made the relevant observations whilst they were running away, which was inconsistent with other witnesses.

The other basis of the application was that the co-accused (Elwood and Dennis only) would be raising good character and that Ethan McKellar was unable to do that and so the jury would contrast his character with the good character of the others.

R A Hulme J quoted from **Symss**. He contrasted the matter with that of **Pham** because there the Crown was strongly relying on the inadmissible evidence in support of its case against the brother of the accused, noting that that material had a powerful tendency to establish the honesty and accuracy of impugned testimony of other witnesses. In the present case the Crown would be inviting the jury to set aside the versions of Elwood and Dennis as self serving and unreliable.

His Honour also considered whether the versions of the co-accused could bolster the version of the son of the deceased that it was Ethan McKellar who was the stabber but as again the Crown was not relying on that version, R A Hulme J thought that directions could cure any prejudice to the applicant, as they could deal with the issue of character of the various accused.

The application was refused.

On a 5F appeal the Court of Criminal Appeal found that R A Hulme J had overstated the Crown Prosecutor's position in finding that he would be inviting the jury to reject the versions of the co-accused. Rather, the Crown merely stated that he would not be relying on those versions. However, the point that was being made was to distinguish this case from Pham, and that conclusion remained valid.

As to how things in the trial may proceed the Court said this:

'The assessment made at the beginning of the trial will be open for reassessment as the trial proceeds. Decisions will be made as to the admissibility of evidence, the content of final addresses and the way in which the judge leaves the case to the jury. If developments demonstrate that the initial assessment was based on an erroneous expectation of the trial process, the applicant will be able to raise a fresh objection. If convicted he may have a ground of appeal based on what will then be known events, rather than predictions. This Court will not readily intervene to stop the trial going ahead, unless a clear case of irremediable prejudice is made out. No such threshold has been reached'.⁴⁰

The appeal was dismissed.

⁴⁰ at [27]

SOME PRACTICAL CONSIDERATIONS:

- Any application for a separate trial should be made well in advance of the trial date. An application brought on the day of trial will necessarily have the effect of wasting State resources in preparing the matter for trial and is less likely to engender sympathy from the Bench.⁴¹
- Care should be taken to fully analyse the evidence to see if it can be put into one of the categories above which do which are recognised as likely to cause a real risk of positive injustice to the applicant.
- Bearing in mind it is the applicant who bears the onus of separating a trial and there will be in all cases a presumption that the trials should be heard together, submissions should be comprehensive and set out exactly what evidence it is that is relied upon and the impact of that evidence.
- If unsuccessful in the application an appeal under s.5F Criminal Appeal Act will not preclude a similar ground of appeal upon conviction as the whole of the evidence will then be able to assessed at that point.
- If unsuccessful initially care should be taken to review how the evidence is proceeding throughout the trial and renew the application at a later time if necessary.⁴²

⁴¹ In **Baartman** Gleeson CJ said that he deplored the lateness of the stage in which the application was brought before the trial judge, some few days before the listing date.

⁴² As was suggested in **White (No.1)** and **McKellar**

ACKNOWLEDGMENTS:

The author gratefully acknowledges the diligent assistance of Mr Marco Olea, Research Intern at the NSW Public Defenders Office. Amongst his other assistance Mr Olea was responsible for a number of the case summaries provided in this paper.

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