

Evidentiary Issues arising in Joint Criminal Trials

Relevant provisions and caselaw

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Introduction: difficulties arising in joint criminal trials

- *Bannon v The Queen* (1995) 185 CLR 1 per Deane J:

The joint criminal trial of two persons charged either on the basis that both were jointly involved in criminal conduct or on the basis that one or other of them is alone guilty of the charged criminal offence has long been rightly seen as representing one of the most difficult facets of the administration of criminal justice. At the heart of the difficulties which are likely to be inherent in such a joint trial, there lies the likelihood that some evidence which is led against one or other of the accused will be prejudicial to the other accused but inadmissible in his or her trial. Ordinarily, the trial judge must endeavour to meet that circumstance with clear directions to the effect that the particular evidence is not evidence in the trial of the other accused and that the jury would be acting unlawfully, and doing a grave injustice to the other accused, if they took it into account against him or her. In such circumstances, the other accused is subjected to the risk of illegitimate prejudice and is likely to be placed in a forensic dilemma involving the need to choose between reliance on the efficacy of judicial directions and increasing the risk of emphasising the prejudicial material by seeking to counter it. Nonetheless, an intelligent juror can be expected to perceive the fairness of the approach that material, such as an ex-curial statement made in the absence of the other accused and not susceptible of being tested by cross-examination on behalf of that accused, should not be treated as evidence against him or her. The same cannot, however, be said of circumstances where, on a joint trial, the Crown leads evidence against one accused but, on the ground that it is not led or admissible against the other accused, seeks to preclude the other accused from relying upon it to support his or her denial of guilt. Indeed, particularly in the context of the criminal standard of proof, one can envisage circumstances in which an ordinary juror would be conscious of strong considerations of fairness and common sense militating against a strict observance of a trial judge's direction to the effect that the other accused was not entitled to rely on such evidence for the reason that it was not evidence in his or her trial.

Compellability

Evidence Act provision:

17 Competence and compellability: defendants in criminal proceedings

(1) This section applies only in a criminal proceeding.

(2) A defendant is not competent to give evidence as a witness for the prosecution.

(3) An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant.

(4) If a witness is an associated defendant who is being tried jointly with the defendant in the proceeding, the court is to satisfy itself (if there is a jury, in the jury's absence) that the witness is aware of the effect of subsection (3).

Note. Associated defendant is defined in the Dictionary.

Dictionary:

associated defendant, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for:

(a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose, or

(b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted.

Caselaw:

- *R v Sleiman* [2003] NSWCCA 231 at [120]:

Before his directed acquittal, [the co-accused] was an "associated defendant" for the purposes of s17(3) of the Evidence Act 1995 (the Act), being jointly tried with the appellant. As such he was not compellable. He ceased to be an associated defendant, and became compellable, once the trial against him had been completed.

- *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531:

[50] In the course of the hearing of the appeal, this Court directed the parties' attention to the fact that the reasons of Walton J recorded that the prosecution had called Mr Kirk as a witness. This Court was told that Mr Kirk's giving evidence for the prosecution was a course agreed upon by both sides.

[51] ...Section 17(2) of the *Evidence Act 1995* (NSW) was thus engaged. That subsection provides that a defendant is not competent to give evidence as a witness for the prosecution. The provision made by s17(2) could not be waived. Section 190 of the *Evidence Act* permits a court, if the parties consent, to dispense with some of the provisions of the Act, but the provisions made by Div 1 of Pt 2.1 of the Act (ss 12-20) concerning the competence and compellability of witnesses may not be waived.

[52] ...It was submitted by the second respondent that some distinction could and should be made about the competence of Mr Kirk to give evidence against the Kirk company and his competence to give evidence as a witness for the prosecution at his own trial. It is enough to say that where, as was the case here, Mr Kirk and the Kirk company were tried jointly, a distinction of the kind asserted by the second respondent cannot be drawn.

Separate Trials

- *Pham v Regina* [2006] NSWCCA 3 referring to *R v Middis*:

[10] In *R v Middis* (unreported, SCNSW, 27/3/1991) Hunt J identified three circumstances in which a separate trial will usually be ordered as being:

1. where the evidence against an applicant for a separate trial is significantly weaker than and different to that admissible against another or the other accused to be jointly tried with him, and
2. where the evidence against those other accused contains material highly prejudicial to the applicant although not admissible against him, and
3. where there is a real risk that the weaker Crown case against the applicant will be made immeasurably stronger by reason of the prejudicial material.

The applicant submits that those three circumstances are present in the current application and entitle him to a separate trial.

[11] I am prepared to accept that the Crown case against the applicant is not as strong as that against his co-accused. I am also prepared to accept that the evidence against the applicant and Nguyen is different and none of the evidence implicating Nguyen is admissible against the applicant. But none of the evidence

implicating Nguyen implicates the applicant. For example, Nguyen made a recorded interview with police but there is nothing in that which amounts to admissions by Nguyen and there is nothing said by him that has any relevance to the Crown case against the applicant. As I understand it, there is no evidence against Nguyen that could possibly operate to the prejudice of the applicant thus making the Crown case against the applicant stronger.

[12] I do not understand that there is any evidence to connect Nguyen and the applicant in any way whatsoever let alone in respect of the premises or the cannabis plants. There is no line of reasoning whereby even irrationally a jury could argue that because Nguyen is guilty so must the applicant be guilty. The cases are quite independent and there is no risk that the jury could use the evidence in the case against one accused when considering the case against the other accused even if the judge failed to warn them against such a course.

[13] Judge Sorby refused the application for a separate trial. That was a discretionary judgment. Not only has it not been shown that his Honour erred in coming to that view, in my opinion he was correct to refuse the application.

See also:

- *Annakin v R* (1988) 17 NSWLR 202
- *Ignjatic v R* (1993) 68 A Crim R 333
- *R v Baartman* (unrep., NSWCCA, 6 October 1994)
- *R v Chami* (2002) 128 A Crim R 428
- *R v Darby* (1982) 148 CLR 668

Admissions by a co-accused

- *Bannon v The Queen* (1995) 185 CLR 1 at 22:

Earlier in this judgment mention is made of a passage from the trial judge's direction to the jury in which he said: "What is said out of court and not in the presence of the co-accused is not evidence in the trial of the other accused." This is undoubtedly correct as a general proposition. Out of court statements are not evidence of the truth of what is said unless the statement falls within an exception to the rule against hearsay. One such exception admits evidence of a confessional nature against the maker. Another renders admissible a statement made by a third party, since deceased, which is against his or her pecuniary or proprietary interest.

As the law stands in this country, there is no exception to the hearsay rule which renders admissible either against or in favour of an accused hearsay evidence of a confession by a co-accused or by a third party. No Australian court, at least in any reported decision, appears to have taken the approach adopted by the Court of Appeal in England in *R v Beckford* that if the consequences of inadmissibility are that the jury does not hear an alternative version of the events giving rise to the charge, the conviction of an accused may be unsafe and unsatisfactory and accordingly set aside. It should be noted that in *Beckford* the co-accused did not give evidence and the prosecution was unable to give evidence of the confession because the trial judge held that it was not given voluntarily.

- *R v Suteski* (2002) 56 NSWLR 182

[88] Counsel for the appellant, at trial, drew attention to the safeguards contained in s 65(3), (4) and (5) which permit evidence of this kind to be given, in the circumstances to which they apply, only where the party against whom it is tendered, has cross-examined the unavailable witness, or has had a reasonable opportunity of doing so.

[89] In substance the submission presented at trial, and pursued on appeal, is that s 65(2) should be construed, or read down, so as to reflect a policy evident in these subsections. His Honour held that s 65(3)-(5) dealt with a particular situation, namely where the unavailable person has previously given evidence in court proceedings, that had been dealt with by s 409 of the Crimes Act 1900. His Honour held that s 65(2) dealt with a separate situation, and should be construed upon its own terms.

[90] At first blush, it may seem unusual that there should be a difference between the position of a potential witness now unavailable, who had given evidence on an earlier occasion, and one whose earlier account had not been given on oath. Similarly it may seem unusual that, had Sakisi gone to trial with the appellant, then his ERISP, if tendered, could only have been received as evidence in the case against him.

[91] Notwithstanding these considerations, if the ERISP answers the requirements of the section, the philosophy of which is to allow the use of specified categories of hearsay evidence, then, subject to the safeguards of notice and possible exclusion under s 135 or s 137 of the Act, I see no obstacle to its tender. In particular I see no reason to read into s 65(2) qualifications which appear in relation to other subsections, but which have been omitted from it.

- *Taber v The Queen* (2007) 170 A Crim R 427:

[38] In my opinion, there is no sufficient reason for reading down s 65 so that it would apply only to prosecution witnesses: the words are clear and in their terms extend to the evidence of a co-accused. If evidence is admitted under s 65, it does not have to satisfy the requirements for admissibility as an admission, which is dealt with in s 82(2). There was no submission before us that the requirement that the witness be not available was not satisfied, or that the evidence should not be admitted by reason of the notice provisions in s 67.

See also:

- *Manufekai v The Queen* (2006) 196 FLR 460
- *R v Lowrie* [2000] 2 Qd R 529

The co-conspirators rule

- *Ahern v The Queen* (1988) 165 CLR 87 at 94-5:

[T]he question arises whether there are circumstances in which evidence of the acts and declarations of other participants, outside the presence of the individual, may be led against him, not as separate facts from which, when combined with other facts, an inference of combination may be drawn, but as evidence of his own participation. Evidence of the acts or declarations of others led for this purpose will be led to prove the truth of the assertion or implied assertion contained in those acts or declarations. It would be excluded as hearsay or its equivalent were it not admissible upon some other basis.

That basis is provided in an appropriate case by the rule which states that when two or more persons are bound together in the pursuit of an unlawful object, anything said, done or written by one in furtherance of the common purpose is admissible in evidence against the others. The combination implies an authority in each to act or speak on behalf of the others: *Tripodi*. Thus anything said or done by one conspirator in pursuit of the common object may be treated as having been said or done on behalf of another conspirator. That being so, once participation in the conspiracy is established, such evidence may prove the nature and extent of the participation. The principle lying behind the rule is one of agency and the closest analogy is with partners in a partnership business. Indeed, conspirators have been described as partners in crime. The principle of agency has a particular application in cases of conspiracy where preconcert is the essence of the crime.

The implied authority on the part of one conspirator to act or speak on behalf of another will only arise if the latter is part of the combination. Evidence of the acts or declarations of the former may, however, be led to prove that very fact. That is where the dilemma lies in cases of conspiracy because, to assume the participation of the latter in order to admit the evidence on the basis of implied authority is to assume the very fact which is sought to be proved by that evidence. If there were no prerequisite to the admission of such evidence "hearsay would lift itself by its own bootstraps to the level of competent evidence": *Glasser v. United States*.

See also:

- *Conway v The Queen* (2000) 98 FCR 204
- *Davidovic v The Queen* (1990) 51 A Crim R 197
- *R v Chai* (1992) 27 NSWLR 153
- *R v Masters* (1992) 26 NSWLR 450
- *Tripodi v The Queen* (1961) 104 CLR 1

The position under the Evidence Act

87 Admissions made with authority

(1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that: ...

(a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made, or

(b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority, or

(c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party.

(2) For the purposes of this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove:

(a) that the person had authority to make statements on behalf of another person in relation to a matter, or

(b) that the person was an employee of another person or had authority otherwise to act for another person, or

(c) the scope of the person's employment or authority.

Caselaw:

- *Landini v New South Wales* [2007] NSWSC 259
- *R v Brownlee* (1999) 105 A Crim R 214
- *R v Watt* [2000] NSWCCA 37

Comments on failure to give evidence by co-accused

Evidence Act provision:

20 Comment on failure to give evidence

(1) This section applies only in a criminal proceeding for an indictable offence.

(2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

(3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was:

(a) the defendant's spouse or de facto partner, or

(b) a parent or child of the defendant.

(4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto partner, parent or child failed to give evidence because:

(a) the defendant was guilty of the offence concerned, or

(b) the spouse, de facto partner, parent or child believed that the defendant was guilty of the offence concerned.

(5) If:

(a) 2 or more persons are being tried together for an indictable offence, and

(b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto partner, or a parent or child, of any of those persons to give evidence, the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

Caselaw:

- *Azzopardi v The Queen* (2001) 205 CLR 50:

[54] The effect of the sub-section is that the judge, the accused and any co-accused may comment on the fact that the accused did not give evidence, but the judge may not, by that comment, "suggest" that the accused failed to give evidence because he or she was guilty, or believed that he or she was guilty, of the offence charged. It is very improbable that the accused would ever wish to make such a suggestion. That a co-accused may do so is hardly surprising. If only one of two accused persons gives evidence at their joint trial, it is inevitable that the accused who has given evidence will want to urge the jury to contrast that with the course taken by the other accused. It is well-nigh inevitable that in urging that the evidence given by the accused demonstrates innocence, the suggestion will be made, explicitly or implicitly, that the co-accused stayed silent because, unlike the accused who did give evidence, he or she was guilty.

- *Regina v Skaf, Ghanem & Hajeid* [2004] NSWCCA 74:

[184] In this Court Ghanem and Hajeid submit that [aspects of a summing up] involved an impermissible comment upon their failure to testify...

[185] It was submitted that these directions breached fundamental accusatorial principles (*RPS v The Queen* (2000) 199 CLR 620, *Azzopardi v The Queen* (2001) 205 CLR 50, *Dyers v The Queen* (2002) 210 CLR 285). They invited the jury to conclude that certain events did not occur and to reason towards that conclusion by an impermissible manner.

[186] The "events" were that Tayyab Sheikh and Mohammed Skaf were at the park and that Sheikh's nickname was Sammy. There was no evidence of this and the judge was admittedly entitled to tell as much to the jury in emphatic terms. It would also have been open to Skaf to have gone further and suggested that his co-accused had not given evidence because they believed that they were guilty of the offence concerned (cf s20(2)). Skaf's counsel was foreshadowing that he

would weigh in strongly in his address unless the judge gave an adequate protective direction.

- *R v Villar; R v Zugecic* [2004] NSWCCA 302

Miscellaneous circumstances: other relevant provisions

Section 65(4):

65 Exception: criminal proceedings if maker not available

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:

(a) was made under a duty to make that representation or to make representations of that kind, or

(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or

(c) was made in circumstances that make it highly probable that the representation is reliable, or

(d) was:

(i) against the interests of the person who made it at the time it was made, and

(ii) made in circumstances that make it likely that the representation is reliable.

(3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

(a) cross-examined the person who made the representation about it, or

(b) had a reasonable opportunity to cross-examine the person who made the representation about it.

(4) If there is more than one defendant in the criminal proceeding, evidence of a previous representation that:

(a) is given in an Australian or overseas proceeding, and

(b) is admitted into evidence in the criminal proceeding because of subsection (3), cannot be used against a defendant who did not cross-examine, and did not have a reasonable opportunity to cross-examine, the person about the representation...

Section 104(6):

104 Further protections: cross-examination as to credibility

(1) This section applies only to credibility evidence in a criminal proceeding and so applies in addition to section 103.

(2) A defendant must not be cross-examined about a matter that is relevant to the assessment of the defendant's credibility, unless the court gives leave.

(3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:

(a) is biased or has a motive to be untruthful, or

(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates, or

(c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor under subsection (2) unless evidence adduced by the defendant has been admitted that:

(a) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and

(b) is relevant solely or mainly to the witness's credibility.

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:

- (a) the events in relation to which the defendant is being prosecuted, or
- (b) the investigation of the offence for which the defendant is being prosecuted.

(6) Leave is not to be given for cross-examination by another defendant unless:

- (a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine, and
- (b) that evidence has been admitted.

Caselaw:

- *R v Fernando* [1999] NSWCCA 66:

[283] This appellant gave evidence, the thrust of which we outlined earlier. At the conclusion of his evidence in chief, argument ensued as to the entitlement of counsel for the co-accused to cross-examine him. His Honour ruled that counsel for the co-accused was so entitled, but that should he seek to ask a question relevant only to credit leave would be required. The appellant was then cross-examined and a series of questions were put to him, unproductively, consistent with the account of events Brendan Fernando had given to the police. It is submitted that this cross-examination should not have been allowed.

[284] The argument advanced hinged primarily upon s 104 of the Evidence Act which under sub-s (1) applies only to criminal proceedings. For present purposes we set out sub-ss (2) and (6):...

[285] It was submitted that sub-s (6) restricted the grant of leave in the absence of evidence from the appellant which was adverse to the co-accused.

[286] We consider that the evidence that Vester Fernando gave was adverse to the evidence of the co-accused, being inconsistent with the version which that co-accused had given to the police, in which he presented himself as a lesser player in what had occurred and in which he sought to attribute primary responsibility for the criminal activity to the co-accused.

[287] Be that as it may, s 104(6) is to be considered in the setting of a section which is concerned with restriction of cross-examination of an accused person directed to the issue of credibility.

[288] His Honour ruled, in our view correctly, that leave would be required if the

co-accused wanted to cross-examine this appellant about an issue of credibility. However the occasion for seeking leave to cross-examine on credibility did not arise.

[289] The position at common law was that where two accused were jointly tried one accused could cross-examine the other, even if that other accused had not given evidence tending to incriminate his co-accused. In *Murdoch v Taylor* [1965] AC 574 at 585 Lord Morris of Borthy-y-Gest stated the position thus:

“It may be noted that if A and B are jointly charged with the same offence and if A chooses to give evidence which is purely in defence of himself and is not evidence against B he may be asked questions in cross-examination by B notwithstanding that such questions would tend to criminate him (A) as to the offence charged. In similar circumstances B would be likewise placed.”

(See also *R v Hilton* [1971] 1 QB 421 where the above dicta of Lord Morris were applied in the Court of Appeal. See also *Cross on Evidence*, 4th Australian ed. at 13,105.)

[290] Consistent with the statement of principle in *Murdoch v Taylor* the co-accused was entitled to cross-examine the appellant in the manner in which he did.

[291] Accordingly this ground of appeal fails.

Section 108B(6):

108B Further protections: previous representations of an accused who is not a witness

(1) This section applies only in a criminal proceeding and so applies in addition to section 108A.

(2) If the person referred to in that section is a defendant, the credibility evidence is not admissible unless the court gives leave.

(3) Despite subsection (2), leave is not required if the evidence is about whether the defendant:

(a) is biased or has a motive to be untruthful, or

(b) is, or was, unable to be aware of or recall matters to which his or her previous representation relates, or

(c) has made a prior inconsistent statement.

(4) The prosecution must not be given leave under subsection (2) unless evidence adduced by the defendant has been admitted that:

(a) tends to prove that a witness called by the prosecution has a tendency to be untruthful, and

(b) is relevant solely or mainly to the witness's credibility.

(5) A reference in subsection (4) to evidence does not include a reference to evidence of conduct in relation to:

(a) the events in relation to which the defendant is being prosecuted, or

(b) the investigation of the offence for which the defendant is being prosecuted.

(6) Another defendant must not be given leave under subsection (2) unless the previous representation of the defendant that has been admitted includes evidence adverse to the defendant seeking leave.

Sections 111 and 112:

111 Evidence about character of co-accused

(1) The hearsay rule and the tendency rule do not apply to evidence of a defendant's character if:

(a) the evidence is evidence of an opinion about the defendant adduced by another defendant, and

(b) the person whose opinion it is has specialised knowledge based on the person's training, study or experience, and

(c) the opinion is wholly or substantially based on that knowledge.

(2) If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted.

112 Leave required to cross-examine about character of accused or co-accused

A defendant must not be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.

Caselaw:

- *R v Lowery & King* [1972] VR 939

Miscellaneous circumstances: case law

Can an accused introduce or cross-examine in evidence excluded on the application of a co-accused?

- *R v Gibb & McKenzie* (1982) 7 A Crim R 385
- *Lobban v The Queen* [1995] 2 All ER 602

Does the rule in *Brown v Dunn* apply when one accused gives evidence against another?

- *R v Fenlon* (1980) 71 Cr App R 307

Can an “accomplice warning” / s 165 warning be given in relation to a witness who is also a co-accused?

- *R v Diez-Orozco* [2003] NSWSC 1050
- *R v Johnston* [2004] NSWCCA 58
- *Webb v The Queen* (1994) 181 CLR 41