SUPREME COURT OF QUEENSLAND

CITATION:	*R v Paddison* [2013] QSC 309 ; [2013] QSCPR 2
PARTIES:	**R** **v** **DENNIS PAUL PADDISON** (applicant)
FILE NO/S:	SC No 87 of 2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	6 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2013
JUDGE:	Philippides J
ORDER:	**1. As to para 1(e) of the application, that part of the application is adjourned.** **2. As to paras 1(f) and (g) of the application, the application for a separate trial of the applicant from his co-accused is refused.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – JOINT OR SEPARATE TRIAL – EMBARRASSMENT OR PREJUDICE – where the applicant sought an order that he be tried separately from his co-accused – where the applicant sought an order that he be tried separately on the first importation count from the second importation count and the attempted possession count – where the applicant submitted that prejudice would arise from evidence which might be admitted at a joint trial but which it was contended would not be admissible in a trial against the applicant only *Criminal Code* 1899 (Qld), s 590AA, s 597B *R v Belford & Bound* [2011] QCA 43 *R v Crawford* [1989] 2 Qd R 443 *R v Davidson* [2000] QCA 39 *R v Demirok* [1976] VR 244 *R v Georgiou, Edwards & Hefernan* [2002] 1 Qd R 203; [2002] QCA 206 *R v Lewis & Baira* [1996] QCA 405

R v Midas (SC(NSW), No 70412, 27 March 1991, unreported; BC9102181)
R v Swan [2013] QCA 217
Webb v The Queen (1994) 181 CLR 41

COUNSEL: P Morreau for the applicant
G Rice QC with M Ho for the respondent

SOLICITORS: Mackenzie Mitchell Solicitors for the applicant
Director of Public Prosecutions (Cth) for the respondent

The application

[1] The applicant, Dennis Paul Paddison, is charged with two counts of importing a commercial quantity of border controlled drugs, being count 3 (which relates to an alleged importation in May 2006) and count 8 (which relates to an alleged importation in September 2006). He is also charged with attempted possession of a commercial quantity of border controlled drugs (count 9) which concerns the drugs the subject of the second importation charge.

[2] The applicant has brought an application pursuant to s 590AA of the *Criminal Code* 1899 (Qld) ("the Code") seeking the following rulings with respect to the admissibility of evidence:

(a) That evidence from Matthew Thomas Reed ("Reed") about the distribution of drugs in Australia from the first alleged import, and later obtaining funds from such activities, by the applicant's co-accused Dale Christopher Handlen ("Handlen") and Kelsey James Nerbas ("Nerbas") along with Reed, and telephone intercepts revealing conversations about those matters, is not to be admitted in the applicant's trial.

(b) That evidence from Reed about uncharged acts of cannabis production by Handlen and the applicant in Canada is not to be admitted, or alternatively, ought to be excluded from evidence, in the applicant's trial.

(c) That evidence from Reed, and surveillance officers Mark Rowe, Giorgio Argenti, and telephone intercepts about the attendance by Reed and Nerbas at a spyware shop is not to be admitted in the applicant's trial.

(d) That evidence from Matthew Thomson of internet searches on Nerbas' computer is not to be admitted in the applicant's trial.

(e) That certain intercepted telephone calls (identified below) not involving the applicant are not to be admitted in the applicant's trial.

[3] The applicant also seeks an order that he be tried separately from Nerbas and Handlen and further that he be tried separately on count 3 from counts 8 and 9.

Admissibility of evidence

[4] As to para (a) of the application, the respondent conceded that evidence of possession of drugs and distribution following the alleged first importation is not relevant to the case against the applicant save as to the issue of a commercial quantity on count 3. That approach is accepted by the applicant.

[5] As to para (b) of the application, the respondent accepted that the evidence referred to therein was not admissible and indicated that it was not intended to lead that evidence against any defendant.

[6] As to paras (c) and (d), there was no contest that the evidence referred to therein, whilst admissible against Nerbas, was not admissible against the applicant.

[7] Given the respondent's position in respect of paras (a) to (d), the applicant does not now press those paragraphs, and no orders are required to be made in respect of them.

[8] In relation to para (e), which concerns intercepted phone calls not involving the applicant (there are three categories of calls in issue), that evidence is to be led in any event in the trial against the applicant's co-accused, Handlen, who has not objected to the evidence. It is convenient that that matter be addressed at the trial.

Separate trial from co-accused

[9] The application for a separate trial is brought pursuant to s 597B of the Code which permits separate trials to be ordered in the exercise of the court's discretion.

[10] The applicant acknowledged the oft quoted dicta in *Webb v The Queen* (1994) 181 CLR 41 at 89 that there are "strong reasons of principle and policy why persons charged with committing an offence ought to be tried together". But it was submitted that separate trials should be ordered in the present case, as there was "a very real possibility of prejudice" or "significant and unjustified prejudice": see *R v Crawford* [1989] 2 Qd R 443 at 448 and 464. In that regard, reliance was placed on the proposition that prejudice will arise where there is evidence led by reason of a joint trial that is prejudicial, which would not ordinarily be admissible against the accused, and the following observations of Fraser JA in *R v Belford & Bound* [2011] QCA 43 at [104]:

> "Cases where separate trials should be ordered include those where the evidence admissible against each accused 'is impossible or at least extremely difficult to disentangle and the evidence against one is highly prejudicial against the other', where the directions given by the trial judge to avoid prejudice require 'remarkable mental feats' that the jury could not be expected to perform, or where the prejudice may be such as to 'cause a jury even to ignore the directions of a trial judge'." (footnotes omitted).

[11] The prejudice pointed to by the applicant related to the evidence listed at para 1(a), (c), (d) of the application and the contested intercepted calls which might be admitted at a joint trial but which it was contended would not be admissible in a trial against the applicant only.[1] The applicant argued that such evidence would cause significant and unjustified prejudice to the applicant in his trial, which could not be cured by directions to the jury. In particular, it was argued that the evidence to be led against the applicant's co-accused (but not against the applicant) involved significant evidence of, as against Handlen, drug activity, and as against Nerbas, post-offence conduct from which a consciousness of guilt could be inferred.

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[1] The applicant's counsel accepted that the admissibility of the contested intercepted calls referred to in para 1(e) did not impact materially on the application for separate trial so that that application could be determined even though the admissibility of the calls in question was not determined.

Handlen's drug activities, whilst in the main occurring in respect of the first import (whilst the applicant was not in the country) involved continued contacts with the individual Shen to organise distribution from the second import whilst the applicant was in the country (which calls are not being led against the applicant). The prejudice identified was thus that the jury would impermissibly infer a guilty knowledge upon the applicant by virtue of his interaction with his co-accused; that is his association with his co-accused.

[12] It was argued that the prejudice was compounded when there existed a real risk that the jury would engage impermissibly in propensity reasoning, in the sense of using the evidence against the applicant on counts 8 and 9 (the second importation) to reason towards the applicant's guilt on count 3 (the first importation), when that evidence was not admissible upon count 3.[2]

[13] The respondent in its submissions emphasised the policy reasons behind the general rule that participants in the same crime should be tried together, referring to *R v Demirok* [1976] VR 244 where it was said at 254, in a passage adopted in *R v Swan* [2013] QCA 217 at [37]:

> "The matters of public interest which must be considered in this case, and in all such cases, may be summarised as follows. In the first place, there is the question of the administrative matters of court time spent and public expense incurred if more than one trial is to be conducted. These matters will in many cases not be of very great weight, in others they may assume real significance. Secondly, it is against the interests of justice that there should be inconsistent verdicts, and those interests require that where the accounts of accused persons differ or conflict their differences should be resolved by the same jury at the same trial. Thirdly, and allied with the first two considerations, it has always been the policy of the law to reach finality as expeditiously as possible; and no system could function if it permitted the repeated retrial of the same issues except in situations where the concept of justice so required. Fourthly, the convenience of witnesses must be considered. The lot of a witness in a criminal trial is not a happy one, and unless for good reason witnesses should not be required to give evidence of the same events at a succession of trials."

[14] As to the relevant principles, reference was made to the judgment of Hunt J in *R v Middis* (SC(NSW), No 70412, 27 March 1991, unreported; BC9102181) in terms which have been adopted in numerous subsequent cases, namely:

> "(1) where the evidence against an applicant for 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, a separate trial will usually be ordered in

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2 The question of separate trials in respect of the separate counts only arises pending a decision upon the separate trial application from the applicant's co-accused.

> relation to the charges against the applicant. The applicant must show that positive injustice would be caused to him in a joint trial."

[15] The respondent argued that the evidence against the applicant was not significantly weaker than or different to that against the co-accused. The evidence admissible against the co-accused to which the applicant referred was not highly prejudicial to the applicant because it did not implicate him or strengthen the case against him. In that regard, it was argued that, accepting that the evidence of possession and distribution of the drug from the first import was irrelevant to the case against the applicant (save for its probative value to quantify the drug which was imported), that evidence did not prejudice the applicant on any charge because the jury would readily appreciate he was in Canada at the time. Likewise, the evidence admissible against Nerbas only (of the visit by Reed and Nerbas on 14 September to inspect the container facility at Fisherman's Island and their stopping at the Spy Store) had no adverse impact on the applicant who was not involved in that conduct. At worst the evidence was a distraction in the applicant's case. Moreover, the role alleged against the applicant in respect of both importations was conceptually simple. It is that in respect of both importations that the applicant assisted by packing monitors with drugs, in conjunction with Handlen. In addition, in respect of the first importation, he is alleged to have sent money from Canada to Australia to assist with expenses. In respect of the second importation, he is alleged to have come to Australia with a view to assisting to recover the drugs. In these circumstances, the jury are not required to perform "remarkable mental feats" in order to focus on the case against the applicant.

[16] I accept the submissions made by the respondent. The mere fact that one result of joinder will be that evidence admissible against one but inadmissible against another accused will be before the jury is not a reason for ordering separate trials: *R v Davidson* [2000] QCA 39, *R v Lewis & Baira* [1996] QCA 405. Ordinarily, careful directions to the jury regarding the admissible evidence in each case will be an adequate means of ensuring a fair trial: see for example *R v Georgiou, Edwards & Heferen* [2002] 1 Qd R 203 at [37]-[46]. The evidence which is pointed to as inadmissible in the case against the applicant does not directly implicate him. This is not a case where the evidence admissible against the applicant is impossible or extremely difficult to disentangle from prejudicial evidence to be called at trial of a co-accused but inadmissible against the applicant. Nor is it a case where suitable directions will not be adequate to ensure a fair trial. The case against the applicant is not a complex one and one where there is not likely to be particular difficulty for the jury in following a trial judge's directions as to the evidence that is and is not admissible against the applicant. Nor do I consider that there existed a real risk that the jury would engage impermissibly in propensity reasoning in the manner asserted by the applicant because of the joinder of the charges brought against the applicant. Again such matters can appropriately be addressed in directions including directions to give separate consideration to each count, and that the evidence of a witness may be accepted in whole or in part.

Orders

[17] The orders of the court are as follows:

1. As to para 1(e) of the application, that part of the application is adjourned.

2. As to paras 1(f) and (g) of the application, the application for a separate trial of the applicant from his co-accused is refused.