

SUPREME COURT OF QUEENSLAND

CITATION: *R v Bargaquast & Holmes* [2004] QSC 481

PARTIES: **R**
v
BARGENQUAST, Adam Troy
(applicant)
HOLMES, Mark William
(applicant)

FILE NO/S: SC No 451 of 2004
SC No 456 of 2004

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 21 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 12 November 2004

JUDGE: Philippides J

ORDERS: **1. Order that the applicant Bargaquast be tried separately from the other accused on the indictment**
2. The application for a separate trial in respect of the applicant Holmes is refused

CATCHWORDS: CRIMINAL LAW – PRACTICE AND PROCEDURE – JOINT OFFENDERS – Murder – application for separate trials – where statements of co-accused inadmissible against applicants implicating them in commission of the offence – whether risk of positive injustice – whether evidence admissible against applicants significantly weaker than and different from that admissible against co-accused, whether real risk that the weaker prosecution case would be made stronger by reason of prejudicial material admissible in the case of the co-accused

Criminal Code 1899 (Qld), s 567, 568, 597

Darby v The Queen (1981-82) 148 CLR 668
Farrell v Cotton (1990) A Crim R 311
Gilbert v The Queen (2000) 74 ALJR 676
Piller Kramer Kramer & Edwards (1995) 86 A Crim R 249
R v Aboud & Stanley [2003] QCA 499
R v Crawford [1989] 2 Qd R 443
R v Davidson [2000] QCA 39

R v Georgiou & Ors [2002] QCA 206
R v Lewis & Baira [1996] QCA 405
R v Witchard & Ors; ex parte A-G (Qld) [2004] QCA 429
Webb v The Queen (1994) 181 CLR 41

COUNSEL: J Hunter for the applicant Bargaquast
 D J Walsh for the applicant Holmes
 T A Fuller for the respondent

SOLICITORS: Bernard Bradley & Associates for the applicant Bargaquast
 A W Bale & Sons for the applicant Holmes
 Director of Public Prosecutions (Queensland) for the
 respondent

PHILIPPIDES J:

The application

- [1] The applicants, Adam Troy Bargaquast and Mark William Holmes, are two of five co-accused jointly charged with the murder of Kerrie Palmer on or about 27 January 2003 on the Sunshine Coast. They are also charged with a number of offences committed in the lead up to Palmer's murder.
- [2] They seek to be tried separately from their co-accused, Jon David Farthing, Wade Anthony Davis and Audy Perley Desaubin, who gave varying accounts of their involvement to police, which inculpated the applicants in the commission of the offences. The two applicants declined to be interviewed by police. The applicants submit that they are significantly prejudiced in their trials by the nature of those accounts and that such prejudice cannot be cured by proper direction to the jury so that they will be unable to receive a fair trial.

Applicable principles

- [3] There is no issue that the charges and the accused are properly joined pursuant to s 567 and 568 of the *Criminal Code*. The sole issue is whether under s 597B of the *Criminal Code*, separate trials should be ordered with respect to the applicants.
- [4] Generally, there are strong reasons of principle and public policy as to why alleged co-offenders should be tried together: *Webb v The Queen* (1994) 181 CLR 41. Prima facie persons alleged to be involved in a common purpose or enterprise should be tried together. It is recognised that it is desirable to have all of the persons alleged to be concerned in the one crime dealt with in the one trial unless positive injustice would be caused by a joint trial: *R v Aboud & Stanley* [2003] QCA 499, *Farrell v Cotton* (1990) 48 A Crim R 311. 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 & Hefernan* [2002] QCA 206 at [37]-[46].
- [5] However, there may be some cases in which 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 so as to warrant an

order for separate trials: *R v Davidson* [2000] QCA 39 at [13], *Gilbert v The Queen* (2000) 74 ALJR 676.

- [6] The categories of cases where it is appropriate to order separate trials are not closed. Typically cases where separate trials are ordered are ones where evidence in one case is significantly weaker than and different to that admissible in the other, where there is a real risk that the weaker prosecution case will be made immeasurably stronger by reason of prejudicial material in the case of the other accused and where the degree of prejudice from evidence admissible only in the case of one accused to the case of the other is so great as to make it unfair to try the accused together: *Darby v The Queen* (1981-82) 148 CLR 668, *Piller Kramer Kramer & Edwards* (1995) 86 A Crim R 249, *R v Aboud & Stanley* [2003] QCA 499.

The Crown case against the applicants

- [7] An assessment of the Crown case on the evidence against the applicants independent of the inadmissible evidence of the three co-accused who gave interviews is necessary to determine the relative strengths of the cases against each accused. There is no dispute as to the accuracy, as summarized in the Crown's written submissions, of the Crown case against the applicants.
- [8] The Crown alleges that in early January 2003, Holmes wished to purchase some cannabis and gave Farthing some money (\$3,500) for that purpose. Farthing gave the money to Palmer and engaged him to purchase the cannabis on behalf of Holmes. However, Palmer failed to supply the cannabis and absconded with Holmes' money.
- [9] In the weeks leading up to 27 January 2003, efforts were made to locate Palmer. Holmes, Bargaquast and Davis attended Farthing's home on occasions, indicating that they were looking for Palmer. Those efforts included two unidentified males threatening the intended supplier of the drug, Stacey, and the assault of two associates of Palmer, Darren Venables and Mitarsha O'Neil. Venables was assaulted by unknown assailants placing a cord around his neck and assaulting him with a bat whilst demanding to know Palmer's whereabouts. There is evidence that Holmes, Bargaquast, Farthing and Davis all participated in the assault on O'Neil and that it was directed at locating Palmer. The assault on O'Neil is alleged to have involved Bargaquast placing a noose around her neck and threats being made to her life. O'Neill identified Holmes as involved and also identified a heavily tattooed man called Adam. For the purposes of this application, it is accepted that her evidence is capable of identifying Bargaquast as a participant in the incident.
- [10] Holmes obtained from a person called Fenn details of Palmer's address at Coral Tree Court at Noosa. On 27 January 2003, Holmes contacted Farthing, who with his wife Shanelle Conroy, was dining at the home of Allan Deacon. Three men said to be Bargaquast, Holmes and Davis arrived and informed Farthing that they had an address for Palmer. (It is accepted that there is evidence identifying Bargaquast as being one of those present). There is evidence from Conroy that the three men then left in a four wheel drive at about 9.40 pm, taking Farthing with them, apparently because he was best able to identify Palmer. Desaubin was contacted by the group and met up with them at Noosa Junction, before travelling to Coral Tree Court.

- [11] Some time after 10.00 pm Palmer was seen paying for a taxi at Coral Tree Court. His attention was drawn to an approaching group of males and he fled, attempting to avoid his pursuers by hiding in nearby yards. Upwards of seven males are alleged to have been involved in the episode and possibly three vehicles. During the course of the evening members of the group confronted residents in 2 houses in the street and demanded to know Palmers whereabouts. Members of the group were seen to search nearby yards. A chase through the backyards at Coral Tree Court ensued.
- [12] Palmer was eventually located hiding in a garden and was assaulted. He was then placed in the rear of a four wheel drive. (Desaubin had left the group by this stage). The registration number of the four wheel drive was recorded and the vehicle identified as a Pajero four wheel drive belonging to Davis' father. DNA evidence of Davis was located in that vehicle, as was DNA evidence from blood stains of Palmer and of Farthing.
- [13] Varying descriptions of the numerous assailants were made, including that they were disguised. Except for Holmes, no positive identification was made of any of the assailants at Coral Tree Court. Holmes was identified as being present at Coral Tree Court by two witnesses and there is evidence of the name "Stretch" being used, which it is accepted was a nickname for Holmes. The evidence as to Bargaquast being present is circumstantial.
- [14] There is also evidence from Fenn that Holmes contacted her and obtained from her the telephone number for the house where Palmer was staying. The occupants of that house also received a call from a male, who warned them not to call the police.
- [15] The Crown asserts that Palmer was driven to Mountain Creek and further assaulted there. The Crown relies on evidence that at about 11.00 pm vehicles consistent with those of Davis and Desaubin (a Pajero and a white convertible) were seen in the area together and seen to drive into the Mooloolah National Park at Dalkara St, Mountain Creek. Both vehicles returned about 15 or 20 minutes later. An examination of an area in Dalkara St, revealed the presence of a piece of besser-block, which DNA evidence indicates bears traces of Palmer's blood. The Crown asserts that Desaubin was contacted by Holmes and rejoined the group at Mountain Creek. (Holmes' and Desaubin's mobile telephone records confirm contact with one another and the approximate locations and timing of the contact).
- [16] The Crown case is that the group, including the applicants, then travelled to a building site at Eagle Place, Buderim, which belonged to an associate of Desaubin and that Palmer was placed in the garage of the premises. DNA of Palmer and of Farthing was found in the garage at Buderim. At about 2.00 am Davis left to clean his father's vehicle and obtain fuel.
- [17] The Crown asserts that Palmer's body was put in Desaubin's vehicle and that his body was dumped at Eudlo. An area at Neill Rd, Eudlo was searched by police. The Crown case relies on police evidence that leaves were found stained with Palmer's blood. Also located was a coke bottle with Bargaquast's DNA. In addition, Palmer's blood was found in the boot of Desaubin's vehicle.
- [18] There is evidence that in the early hours of the morning, 2 males were collected from near Desaubin's address by taxi and that Bargaquast was present alone at a nearby service station, where he purchased 4 cans of coke, which he mentioned

were “for the boys”. In addition, Bargaquast’s housemate heard him arrive home at 4.30 am in the company of at least one other male. He then heard the shower being used twice and also the washing machine being used.

- [19] The Crown asserts that the following day, Farthing returned to Deacon’s house, in the company of Holmes and Bargaquast and borrowed Deacon’s motor vehicle, because Farthing was having difficulty with his own. Bargaquast’s DNA was found in that vehicle on a soft drink bottle and a cigarette butt.
- [20] There is evidence that Holmes contacted his de facto using Bargaquast’s mobile telephone and claimed that Palmer had got away.
- [21] Farthing had previously disclosed to his de facto what had occurred, as a result of which she decided to move into a motel. Farthing attended the motel that night in the company of the two applicants.
- [22] Holmes made a statement to Farthing’s wife, Conroy, while at the motel room, acknowledging his involvement. Although Bargaquast was present, he was asleep and not a participant in the conversation. In addition, Holmes spoke to Conroy and informed her of the story to be supplied to police, alleging that Palmer had interfered with her son.
- [23] Palmer’s body was located in a shallow grave at Ocean Drive, Mudjimba on 30 January. Scientific evidence establishes that Palmer was at Eudlo before being buried at Mudjimba. The body was found wrapped in a blanket tied with rope and covered in hydrated lime. The Crown asserts that a blanket similar to that located wrapped around Palmer’s body was missing from Deacon’s car, although no identification has been carried out. There is evidence that on 28 January, two “nervous and scruffy” men purchased hydrated lime from a produce store, but they were not identified. Post mortem examination revealed that Palmer died as a result of head injuries (sub-dural haematoma and diffuse axonal injury) and chest injuries (fractured ribs).

The admissions by the co-accused

- [24] As I have mentioned Desaubin, Farthing and Davis made admissions implicating the applicants, which is inadmissible against the applicants. The general effect of these admissions, which are largely consistent, is that Palmer was taken in Davis’ four wheel drive from Coral Tree Court to an area of bushland at Mooloolah and then to Buderim. At Buderim Palmer’s body was transferred to Desaubin’s vehicle, which was driven to a remote area at Eudlo. The body was left there. The following day Palmer’s body was taken to Mudjimba and buried in the sand.

Admissions by Davis

- [25] During a search of his home, Davis made admissions to police officers of being involved in the incident, but did not name anyone else involved. He acknowledged that he was at Coral Tree Court. He claimed that he had dropped Palmer off, with two others, near a roundabout at Mountain Creek and that Palmer left his vehicle alive.
- [26] He later participated in a formal record of interview, in which he admitted that he had met with Bargaquast, Holmes and Farthing and had discussed the fact that Palmer owed \$3000 and was suspected of inappropriately touching Farthing’s child. Davis acknowledged that the group travelled to Noosa, where they located

Palmer, that Palmer ran off and was apprehended and placed in his vehicle and that Palmer suffered facial injuries when he was tackled after running away. He claimed that no member of the group struck Palmer or was in possession of any weapons. Davis said that he drove to the Buderim address, where he left Palmer in the company of the others. He then cleaned his car and went home and claimed to have no knowledge of what occurred after that.

Admissions by Desaubin

- [27] As to Desaubin, in the course of the recorded telephone conversations between him and a person called Trapani, the owner of the Buderim property, Desaubin confirmed that something had occurred at the house, but denied any involvement, suggesting that Holmes may have been involved.
- [28] In his recorded interview with police, Desaubin admitted meeting with Holmes, Bargaquast, Davis and a fourth man whom he only knew as John (a reference to Farthing) at Noosa. He said that "Stretch" (Holmes) approached him and told him that he was pursuing a debtor over some money, offering him \$1,000 to "intimidate" him with his "physical presence" and to provide "back up". He agreed. He got into his Saab, following Holmes, Bargaquast and Davis, who were travelling in a white four wheel drive, to the Coral Tree address. Once there he waited at the four wheel drive. He confirmed that Palmer ran off when located and that a chase ensued, but said that he did not participate in it. He said he spoke with a couple in a unit about Palmer's whereabouts before deciding to leave and that Bargaquast was involved in the chase. He left, because things were getting out of hand and went to a nightclub in Noosa.
- [29] He admitted meeting up with the group later that evening at Mountain Creek, following a series of telephone calls from Holmes. When he met the group at Mountain Creek, he realised that they were in trouble because they had "bashed the bloke". He described them as "aggressive" and "psychotic". He thought Holmes had a gun, so he agreed to help. It was indicated to him that Palmer was tied up and still alive. He led them to a building site at Buderim, where Palmer was taken into a garage. Davis left to clean his four wheel drive. He said that the others talked him into using his vehicle to move the body, which was placed in the boot of his Saab.
- [30] He admitted that he then drove the remaining 3 members of the group, Holmes, Bargaquast and Farthing, to Eudlo, where Palmer was removed from the car and taken into the bush by the other three. Desaubin waited by the vehicle for about 15 minutes until they returned, without Palmer. They then left in Desaubin's vehicle. Desaubin stated that during the journey back Holmes made admissions to assaulting Palmer and to dropping a besser block on his head. Desaubin dropped two passengers back at the Shell Service Station near his home. He also stated that he was contacted the following day by Holmes and asked to assist in moving and burying Palmer's body.

Admissions by Farthing

- [31] Farthing gave a number of interviews, providing two accounts.
- [32] Farthing admitted going to Coral Tree Court with Holmes, Bargaquast (whom he described as having facial tattoos and as "very very shifty") and Davis. He said that he felt "scared of these guys" and "obligated". He confirmed that Palmer was assaulted and nominated the roles that each played. He indicated that Bargaquast

was disguised. He said that Palmer was placed in the back of the four wheel drive and that at that stage he was conscious, able to walk, and only had a fat lip. As they drove off Bargaquast was holding Palmer, to stop him getting away. He admitted that the group travelled to parkland at Mountain Creek, where Palmer was assaulted. When Palmer said he could get the money, he was tied up and put back into the car. The group then travelled to the Buderim address, where Palmer was placed in the garage. Farthing claimed he then changed clothes and walked off, leaving the group at the house and that Holmes contacted him later and told him that Palmer had got away.

- [33] In a second interview, Farthing admitted remaining at the Buderim property and then travelling to Eudlo with the group in Desaubin's vehicle with Palmer in the boot. He said that the next night, he returned to Eudlo in Deacon's vehicle with Holmes and Bargaquast. Although he claimed not to know whether Palmer was dead, he brought two shovels with him on that occasion. An attempt was made to dig a grave, however, the ground was too hard, and at Holmes' suggestion, the body was moved to Mudjimba, where it was buried. He said that whilst at Mountain Creek, Holmes dropped a rock on Palmer's head. He said that the clothes that he was wearing at the time were washed by Bargaquast.
- [34] Farthing also gave an account to his de facto upon his return on 28 January 2003 in terms similar to his final account to police, nominating the role each played in the offences.

The prosecution submissions

- [35] The prosecution submitted that it was appropriate that the trial of all five accused to be heard at the same time by the same jury to avoid inconsistent verdicts: *Webb v The Queen* (1994) 181 CLR 41. It was submitted that the evidence admissible against each accused was readily identifiable and could be dealt with by appropriate directions. It was asserted that the prosecution case, divorced from the evidence inadmissible against the applicants, involves a significant body of evidence pointing to a strong circumstantial case against each of the applicants, which did not revolve around the identification or lack of identification at Coral Tree Court.
- [36] The crown placed particular reliance on the following evidence against the applicant Bargaquast which it says establishes:
- His motive for locating Palmer,
 - His involvement in the assault on O'Neil,
 - His arrival at Deacon's house on the night in question in the company of the others involved in the assault on O'Neil,
 - His association with Davis and his four wheel drive vehicle,
 - His departure from Deacon's with the group,
 - The arrival of a group of males in Coral Tree Court in a four wheel drive and the timing of that arrival,
 - The linking of Holmes and Desaubin by telephone records,
 - The linking of Palmer to the Buderim address and to Desaubin's car,
 - The linking of Desaubin to the Buderim address,
 - Bargaquast's DNA on a coke bottle at Eudlo,
 - Bargaquast being present at a Shell Service Station near Desaubin's house in the early hours of the morning purchasing cans of soft drink "for the guys",

- Bargenquast being with Farthing and Holmes the following day in Deacon's vehicle,
- Bargenquast being with Farthing and Holmes in the motel room of Farthing's de facto's.

[37] The crown also asserted that the evidence against the applicant Holmes establishes:

- His motive for locating Palmer,
- His involvement in the assault on O'Neil,
- His being supplied by Fenn with Palmer's address,
- His arrival at Deacon's on the night in question in the company of others involved in the assault on O'Neil,
- His association with Davis and his four wheel drive vehicle,
- His departure from Deacon's house with the group,
- The arrival of a group of males in Coral Tree Court in a four wheel drive and the timing of that arrival,
- Telephone records showing that his mobile telephone was used in the Noosa area that night,
- The linking of Holmes to Desaubin by telephone records,
- Descriptions and purported identifications of Holmes at Coral Tree Court,
- Holmes' telephone conversation with Fenn to obtain the telephone number of a resident of Coral Tree Court,
- Holmes' telephone call with the resident of Coral Tree Court warning against assisting the police,
- The linking of Palmer to the Buderim address and to Desaubin's car,
- The linking of Desaubin to the Buderim address,
- Holmes' admission to his de facto of involvement,
- Holmes' admission to Farthing's de facto of involvement and the fabrication of a story to police,
- His presence with Farthing the following day.

[38] It was said that there was strong circumstantial evidence that the applicants were part of a group of males, who committed the assault on Palmer in Coral Tree Court and then left with him in their vehicle. The Crown case relied heavily on the evidence of association between the five accused, including evidence of association with the other co-accused in respect of the incident involving O'Neill, evidence of their presence at Deacon's house, and other previous association where they as a group, collectively evidenced their intention to locate Palmer. The relevance of the association evidence of Farthing, Bargenquast, Holmes and Davis in respect of the assault on O'Neill and at Deacon's house goes to the strength of the circumstantial case as to who was present at Coral Tree Court.

[39] The association evidence relied upon also extends to association evidence with Davis' vehicle, which vehicle is identified as present at Coral Tree Court on the night of the assault on Palmer and in the case of Bargenquast, association evidence with Holmes, who is identified as present on the occasion of the abduction of Palmer from Coral Tree Court and who is identified as part of the group which left Deacon's house shortly before the incident as Coral Tree Court. The prosecution also relies upon scientific evidence linking others in the group to Palmer, for example Desaubin is said to be linked to Palmer through the evidence of Palmer's blood in the boot of his car, and of Palmer's blood at the Buderim

property belonging to Desaubin's associate. There is also the evidence linking members of the group (through evidence of vehicles similar to Davis' and Desaubin's) at a relevant time at Mountain Creek, Eudlo, where Palmer's DNA was found. The Crown also relies on evidence linking Bargenquast, Holmes and Farthing on the following morning with Deacon's vehicle, although there is nothing other than the blanket which was found wrapped around his body and which is yet to be identified, linking of that vehicle to the movement of Palmer's body.

- [40] The prosecution submitted that, while the inculpatory aspect of Davis' statements concerned the applicant's presence at Coral Tree Court and Palmer being left with them at Mountain Creek, there is a strong circumstantial case against Bargenquast and direct evidence against Holmes as to their presence at Coral Tree Court. The salient features of Desaubin's statements are the identification of the group including the applicants at Coral Tree Court, at Mountain Creek and the linking of Farthing and the applicants to the dumping of Palmer's body at Eudlo. But in respect of that, the Crown pointed to the independent forensic evidence linking Desaubin's vehicle to Palmer and Palmer and Bargenquast to Eudlo. As to Farthing's statements, they confirm who comprised the group and the nature of the assault on Palmer, the moving of the body from Buderim to Eudlo, although he provides greater detail than either Davis or Desaubin as to what occurred at Eudlo) and the transfer to and burial at Mudjimba. However, the crown submitted that its case does not rest on the precise manner of Palmer's death.

Submissions on behalf of Bargenquast

- [41] Counsel for Bargenquast did not so much rest his submissions on the proposition that the evidence admissible against each accused could not be clearly identified. Rather, it was contended that this case falls into that category, where positive injustice would be occasioned, by reason of Bargenquast being tried conjointly with the other co-accused, Desaubin, Farthing and Davis.
- [42] In particular it was said that the evidence against Bargenquast was significantly weaker than that against those three co-accused who have admitted to being at Coral Tree Court and being party to the plan to abduct Palmer. It was submitted that, even with strong judicial directions, there was a real risk that a jury could succumb to the temptation of relying on the inadmissible inculpatory evidence of the accounts of Desaubin, Farthing and Davis, in order to fill the gaps in the circumstantial case against Bargenquast that he was present at Coral Tree Court, Mountain Creek, Buderim, Eudlo or Mudjimba. An example of this is given in respect of the use of evidence of Bargenquast's DNA in Deacon's car to link him to Palmer, the point being that it is Farthing's inadmissible evidence, which fills in the gap that that car was used in connection with Palmer's body.
- [43] Counsel submitted that the prejudice is compounded here because it is not only one but three of his co-accused who implicate him and who do so in largely similar terms. Counsel also submitted that this case is to be distinguished from the type of case where, although there is prejudicial evidence inadmissible against one accused but not another, the complainant is also available to give direct evidence, as was the case in *R v Witchard & Ors; ex parte A-G (Qld)* [2004] QCA 429 (cf *R v Crawford* [1989] 2 Qd R 443).

- [44] Counsel submitted that ultimately the issue in the case is whether it was possible for a jury to conclude beyond reasonable doubt that after leaving Deacon's home, Bargaquast went with the others to Coral Tree Court and there either killed or aided another to kill Palmer or became a party to a common unlawful purpose that had murder as a probable consequence and that he continued with them or alternatively whether any innocent hypotheses was raised on the evidence against him. Counsel contended that there were innocent hypotheses raised, but that there was a real risk that they would not be properly considered by a jury, because of the inadmissible evidence of the three co-accused.
- [45] Counsel disputed the contention that there was a strong circumstantial case against his client, submitting that there was a long leap between the proposition that, Bargaquast had an interest in locating Palmer, had been present when there was a discussion about locating Palmer, and had left Deacon's house with the others, and the conclusion that he was present and involved in the violence done to Palmer. As to the blanket found wrapped around Palmer, counsel emphasised that there was as yet no evidence identifying it as being the blanket that went missing from Deacon's vehicle,

Submission on behalf of Holmes

- [46] In addition to adopting the submissions made by Bargaquast's counsel, counsel for Holmes submitted that there were two further features in respect of the case against Holmes which warrant an order for a separate trial. It is said that there are significant difficulties with the identification evidence of Soanes and Zandona, which weakens their evidence and that there was a real danger that the inadmissible accounts of the co-accused might be utilised in an impermissible manner to corroborate the weak identification evidence of Holmes's presence at Coral Tree Court and also the evidence of the use of Holmes' mobile in that vicinity.

Should separate trials be ordered?

Bargaquast

- [47] I accept that the case against Bargaquast is significantly weaker than and different to that admissible against the other co-accused, who provided statements and that the inadmissible accounts of those co-accused contains material which is highly prejudicial to Bargaquast. There is in my view a real risk that the weaker prosecution case against him would be made immeasurably stronger by reason of that prejudicial and inadmissible material and that positive injustice would be occasioned to him if tried with his co-accused who provided statements. In particular, I accept the submissions of counsel that, even with strong judicial directions, there was a real risk that a jury could be influenced by the inadmissible inculpatory evidence of the accounts of Desaubin, Farthing and Davis, in filling in the gaps in the circumstantial case against Bargaquast that he was present at Coral Tree Court, Mountain Creek, Buderim, Eudlo or Mudjimba.

Holmes

- [48] Holmes' position differs from that of Bargaquast in a number of respects. Firstly, there is direct evidence from two witnesses identifying him as being present at Coral Tree Court. Although some attack is made as to the strength of the identification evidence, there are also other significant matters in the case against

Holmes, going to his presence at Coral Tree Court. There is the evidence of Fenn that she supplied Holmes with Palmer's address and the evidence of the name "Stretch" being used at the location. There is also the evidence that Fenn supplied Holmes with Palmers' telephone home number when it was sought by him and the evidence of the telephone records of Holmes' mobile phone indicating the vicinity and timing of calls. In addition, the phone records show contact between Holmes and Desaubin. Also of significance is the evidence of the admissions made by Holmes to his de facto and Farthing's de facto as to his participation, which are consistent with the inadmissible accounts given by Davis and Desaubin. In my view, these matters significantly distinguish Holmes' position from that of Bargenquast in important respects.

[49] I do not consider that there is a risk that the case against Holmes will be made immeasurably stronger by reason of the prejudicial material so that an order for separate trial should be ordered. As regards Holmes I consider that the risks flowing from a joint trial can be adequately addressed by careful directions to the jury as to the use of the evidence.

Orders:

[50] The orders are:

1. The applicant Bargenquast be tried separately from the other accused on the indictment.
2. The application for a separate trial in respect of the applicant Holmes is refused.