SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gee (No 2)* [2016] QSC 45
PARTIES:	THE QUEEN **v** BRENDEN RICKEY GEE
FILE NO/S:	SC No 286 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2016
JUDGE:	Peter Lyons J
ORDER:	**Ruling that jury be directed in accordance with these reasons.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – VERDICT – OTHER MATTERS – FORM OF VERDICT – where the defendant is charged with two separate counts of attempted murder – where each act relied upon for the corresponding count of attempted murder may have occurred at the same time – whether it is appropriate for the defendant to be convicted of two counts of attempted murder CRIMINAL LAW – PROCEDURE – JURIES – OTHER MATTERS – FORM OF DIRECTION TO THE JURY - – where the defendant is charged with two separate counts of attempted murder – where each act relied upon for the corresponding count of attempted murder may have occurred at the same time – whether it is open for the jury to deliver a verdict on both counts if they are satisfied beyond reasonable doubt that both acts occurred at the same time *Khouzame & Saliba* (1999) 108 A Crim R 170. *R v Harris* (1969) 1 WLR 745. *R v Morrow and Flynn* [1991] 2 Qd R 309. *R v Ogawa* [2009] QCA 201. *R v Redgard* (1956) St. R. Qd 1. *R v Trifyllis* [1998] QCA 416. *Rixon v Thompson* (2009) 22 VR 323. *Slade* (1982) 7 A Crim R 43.

COUNSEL: David Meredith for the Crown
James Benjamin for the defendant

SOLICITORS: Director of Public Prosecutions for the Crown
Legal Aid for the defendant

[1] HIS HONOUR: The defendant in this case faces, amongst other things, two charges of attempted murder. One relates to the apparent insertion of a coin in the mouth of his four-month old daughter late on the 13th of August 2013. The second relates to the apparent administration of some drugs or medications found in the infant's urine on the 14th of August 2013. The primary case of the Prosecution is that the coin was inserted at about the time of an evening feed a bit before midnight on the night of the 13th of August and the medications were given to the infant either in or with a bottle feed of formula which occurred at 6 am or perhaps 6.30 am on the morning of the 14th of August.

[2] The primary case about the timing of the administration of the drugs is supported by medical evidence, including that of Dr Waugh and Professor Brown. However, another expert called by the Prosecution, Dr Hughes, expressed the view that at least one of the drugs was probably administered to the child before midnight on the 13th of August and her preferred view seemed to be that the other drug was administered at the same time. This state of the evidence resulted in the Prosecutor, in his closing address, advancing the primary case but pointing out that in light of Dr Hughes' evidence the possibility was open that both of the acts relied upon for these two charges of attempted murder occurred at the same time.

[3] It is therefore necessary to consider whether the two events, if they occurred at the same time, in fact constitute one offence and if so, what direction should be given to the jury. A number of the cases, to which I have been helpfully referred, deal with a rather different but not unrelated question, namely when a single count is preferred but the evidence potentially identifies more than one offence, so that the count might be bad for duplicity. The concern here is not whether the indictment or any count on it is duplicitous.

[4] Rather, the concern is that the defendant might twice be convicted for what really amounts to a single offence. Although not directly on point, a somewhat related problem was considered in the *R v Redgard* (1956) St.R.Qd 1. That was a case where a person was charged with rape the Code permitted an alternative verdict of unlawful and indecent assault on such a charge. The evidence of the complainant was that she was raped but that in the time very shortly before and leading up to that offence, the defendant had, against her will, removed her panties. Of that, Philp J said at 6:

> *I think that where the preliminary acts and the intercourse are so connected as to form one transaction then the jury should be directed that they should not separately regard each part of the transaction but should regard the transaction as a whole and see if it was, as a matter of practical reality, consented to.*

[5] That view of Philp J was cited with apparent approval by McPherson JA in the *R v Trifyllis* [1998] QCA 416 at [2]. McPherson JA took the passage from the judgment of Philp J to mean that acts preliminary to sexual intercourse if so connected with an ensuing rape as to form one transaction should not separately be charged. The passage was also applied by Everett J in *Slade* (1982) 7 A Crim R 43 at 44-45. His Honour there granted a defendant leave to withdraw a plea of guilty to a count of indecent assault. His Honour said at page 45:

> *In my opinion it is undesirable that the facts and circumstances of what is in reality one incident or episode should be minutely dissected in order to distil from them as many different crimes as possible and include them as separate counts in the same indictment.*

[6] The approach is also consistent with the view taken in England in the *R v Harris* (1969) 1 WLR 745. There, Edmund Davies L.J., with whom the other members of the Court agreed, said:

> *It does not seem to this court right or desirable that one and the same incident should be made the subject-matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed.*

[7] *Harris* and *Slade* were both cited with apparent approval by the Victorian Court of Appeal in *Rixon v Thompson* (2009) 22 VR 323 at 335. It seems to me that that line of authorities favours the view that unless the jury are satisfied beyond reasonable doubt that there were in fact two separate incidents, then the defendant should only be convicted once of the charge of attempted murder.

[8] A different view might appear to be open on the basis of the judgment of Connolly J in the *R v Morrow and Flynn* [1991] 2 Qd R 309. That was a case where a defendant was convicted on an indictment containing one count of unlawful assault. There were, on the evidence, no less than seven separate incidents which could have been the subject of the count. There were two parties named in the indictment and some of the incidents could be attributed to one, or the other, and some to both. The question, therefore, was whether the count was duplicitous. It was held to be so and the conviction was quashed. In giving his judgment, Connolly J considered the circumstances in which what might be regarded as more than one event, or a series of events, could be the subject of a single indictment. He gave, as an example, at page 312, a series of penetrations by the same offender in the course of one sexual attack which his Honour considered need not be the subject of separate counts so long as they are not seen to be separate and distinct in time or circumstance. His Honour then observed:

> *On an indictment for attempted murder it may be proved that the prisoner knifed the victim two or three times and then pursued him down the street knife in hand. Technically the Crown could charge each knifing and the pursuit as separate offences of attempted murder. There can however be no objection to charging the whole episode as an attempted murder and indeed one has known this to be done.*

[9] There is scope for debating whether the quoted passage is, in truth, part of the ratio or obiter, and it is unnecessary for me to reach a conclusion about that. I also note that in *R v Ogawa* [2009] QCA 201, this passage was cited by the Court at [15]. However, it was cited again on a case dealing with duplicity and not for the purpose of determining whether separate counts were appropriately included in an indictment. It was cited for a somewhat similar purpose by Kirby J in the New South Wales Court of Appeal in *Khouzame & Saliba* (1999) 108 A Crim R 170 at [83].

[10] Unassisted by authority. I would have been inclined to the view that where a person attempts to kill another and in a single course of conduct does two things, each of which, if done separately by itself, would be a relevant act to support a charge of attempted murder, then a single count and, if the jury were satisfied of it, a single conviction is the proper course. In the end, it becomes unnecessary for me to express a final view. It has been accepted – in my view, quite properly – by Mr Meredith for the Prosecution that unless the jury is satisfied that the two acts did not form part of a single course of conduct – that is to say, unless they are satisfied they did not occur at about the same time, then it is appropriate for the jury to find the defendant, if otherwise satisfied of his guilt, guilty of only one of the two counts of attempted murder.

[11] Accordingly, I propose to direct the jury, specifically in respect of the second charge of attempted murder, that they should not find the defendant guilty of this charge unless, in addition to being satisfied of the elements of the offence generally, they are also satisfied beyond reasonable doubt that the administration of drugs was not part of a single course of conduct which occurred at about the same time as the insertion of the coin. The jury, when it returns with its verdict, will be instructed that if that is the basis on which they find the defendant not guilty of the second charge of attempted murder, they should identify that by saying they find the defendant not guilty but only because they are not satisfied that the administration of drugs occurred separately from the insertion of the coin into the child's mouth. And that is a verdict which is, in any event, only open if they find the defendant guilty on the first count of attempted murder.
