SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cullinane* [2010] QCA 358
PARTIES:	**R** **v** **CULLINANE, Gareth John** (appellant)
FILE NO/S:	CA No 171 of 2009 SC No 841 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	26 November 2010
JUDGES:	Muir and Chesterman JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – GENERAL MATTERS – JOINT TRIAL OF SEVERAL PERSONS – appellant found guilty of murder after a trial – co-accused found guilty of manslaughter – pre-trial judge refused appellant's application for a separate trial – appellant submitted he should have been tried separately to avoid the prejudice of placing before the jury statements made by the co-accused that were inadmissible against the appellant – whether pre-trial judge erred in refusing to grant the appellant a separate trial – whether refusal resulted in a miscarriage of justice *Criminal Code* 1899 (Qld), s 590AA, s 597B *Ali v The Queen* (2005) 79 ALJR 662; (2005) 214 ALR 1; [2005] HCA 8, cited *Dupas v The Queen* (2010) 84 ALJR 488; [2010] HCA 20, applied *R v Aboud; R v Stanley* [2003] QCA 499, considered *R v Davidson* [2000] QCA 39, applied *R v Roughan & Jones* (2007) 179 A Crim R 389; [2007] QCA 443, cited

Webb v The Queen (1994) 181 CLR 41; [1994] HCA 30, considered

COUNSEL: L K Ackerman for the appellant
R G Martin SC for the respondent

SOLICITORS: Robertson O'Gorman for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA: Introduction**

The appellant was found guilty after an 11 day trial of having murdered Adrian James Nolan on 12 July 2007. His co-accused, Michael Joseph McLean, was found guilty of manslaughter. The appellant pleaded guilty to the offence of improperly interfering with a dead human body at the commencement of the trial. He appealed against his murder conviction on the grounds that the judge who heard his application for a trial separate from that of his co-accused erred in refusing the application and the refusal resulted in a miscarriage of justice.

Ground of appeal

[2] The thrust of the argument advanced in support of the ground of appeal is that the appellant should have been tried separately from his co-accused to avoid the prejudice which necessarily flowed from placing before the jury statements inadmissible against the appellant made by his co-accused concerning a plan to kill the deceased which: were derogatory of the appellant, asserted that the appellant had subjected his co-accused to threats, and which provided a motive for the killing.

The evidence before the jury

[3] The facts before the jury, as stated by counsel for the appellant in his outline of argument, were as follows. The appellant and McLean were friendly with the deceased. Some weeks prior to 12 July 2007 the deceased had inherited several hundred thousand dollars. He promptly squandered much of that money. The appellant and McLean had been recipients of the deceased's largess. The appellant had been given by the deceased possession of a utility and a motor cycle. By 12 July 2007, the deceased was pressing the appellant for the return of the motor cycle and for some payments towards the purchase of the utility. The appellant was unable to return the motor cycle as he had pawned it at Cash Converters. The appellant resented the deceased because of his good fortune and because the deceased had been involved in the alleged sodomising of the appellant by the deceased's brother.

[4] On 12 July 2007 the appellant drove to a pre-arranged location and waited for McLean and the deceased. McLean directed the deceased to that location. The three men drove off in the deceased's vehicle with the deceased driving, McLean in the front and the appellant on the back seat, behind the deceased. The appellant placed twine around the deceased's neck and applied force, killing him quickly. After McLean brought the car to a halt the deceased was tied and taped and placed in the boot of his car.

[5] The evidence discloses that the body was later taken from the boot and placed on the front seat of the car before it was pushed off the road at Mount Tamborine in an attempt to push it over a cliff. The attempt miscarried as the vehicle lodged in trees a few metres from the side of the road. The vehicle was irretrievable by the appellant and McLean and was left where it came to rest.

The appellant's police interviews

[6] The appellant, who was located by police in the company of McLean on 15 July, gave lengthy interviews to the police on that day and was further interviewed on 18 and 19 July 2007.

[7] The first of the interviews was conducted in a police car on route from Black Duck Valley to the Logan Police Station. When one of the interviewing officers told the appellant that police officers were there to speak to him in relation to the murder of the deceased, the appellant said, "Murder. We got a phone call on Friday arvo … he's been found in his car. [McLean] got the phone call". In the course of the interview the appellant informed police officers that the deceased had bought him a motor bike which he had "hocked". There was discussion about a utility and after some time the appellant volunteered that McLean had choked the deceased "from behind his driver's seat" with baling twine when the deceased, McLean and the appellant were in a car on Chambers Flat Road: the deceased driving, McLean in the rear seat and the appellant in the front passenger seat.

[8] The appellant said, of the killing, "I had something to do with it" and revealed that the deceased's wallet and cash were underneath his [the appellant's] mattress. The appellant said that when McLean was choking the deceased he was telling the appellant that he had a gun, to stay still and not do anything stupid. According to the appellant, he didn't go along with the murder but "sort of helped [McLean] try and clean up a bit". He vehemently affirmed that he didn't kill the deceased. The appellant said that he thought that the deceased was going to get the bike back out of hock, either to sell it or to give it to a mate.

[9] He said that he hoped that McLean would take some responsibility and admit to what he had done and that he had dragged the appellant into it. McLean had told him to "deny, deny, deny". Gloves and other materials which were possibly incriminating were burnt in the appellant's backyard. He admitted that a glove found at Tamborine could be one of a pair with a glove burnt in the backyard. He wore gloves when dealing with the deceased and the deceased's car after McLean had shouted at him.

[10] The next interview occurred on the same day at the Logan Central Police Station, commencing at 12.39 pm. In that interview the appellant affirmed that McLean had strangled the deceased and in order to exert more force, had put one of his feet up on the back of the front seat, breaking a pocket behind the seat as he did so. He described the attempt to dispose of the car and body over a cliff at Tamborine in some detail.

[11] The appellant was read parts of a statement given by one Robert Wilcox, a friend or close acquaintance. It was put to him that Wilcox had said that McLean and the appellant had spoken during the week preceding the killing about getting money out of the deceased. The appellant admitted that Wilcox "sat in on every conversation". The appellant volunteered, "No … Nothing to do with the murder or anything like that at the start …". He was read another passage in which Wilcox said of McLean and the appellant that they appeared to be jealous of the deceased's money and were planning to get money out of him. The appellant accepted this was reasonably accurate. He said they were talking initially about stealing the deceased's bum bag which usually had "heaps of money" in it.

[12] The interviewer said that Wilcox had stated that at about 8 pm or 9 pm on 12 July 2007, the appellant came into his house and told him "something like, 'I killed him, I pulled too hard on the cord'". The appellant responded, "I said [McLean] killed him". After being referred to more of Wilcox's version of what had happened, the appellant said he had told Wilcox "… man it's done, it's done … please don't get all stressed out over it, but [McLean] pulled the cord a little bit too tight. … he's just sticking up for [McLean]". The appellant said that McLean was choking the deceased when the appellant was talking to a police officer over the telephone and that the killing was an accident.

[13] He also said that he and McLean were planning "basically just a robbery … it wasn't meant to be like this and it, it all fucked up".

[14] In another interview at the Logan Central Police Station on 15 June commencing at 6.20 pm, the appellant changed his version of events. He admitted that he did kill the deceased. He said that he wanted him dead. He then proceeded to give an account of having been raped by the deceased's brother with the deceased's assistance "a couple of weeks ago". The appellant said, "I put a rope around his neck and I choked him because I wanted him dead". As he was killing the defendant he said that he exclaimed, "fucking rape me, you cunt".

[15] The appellant said that he had told McLean what he was proposing to do and he spoke at length of the mental effect that the rape had had on him.

[16] In another interview on 15 July at the police station commencing at 7.12 pm, the appellant said that he asked McLean to take tape with him to tie the deceased up. He said that he was just going to "give him a touch up … and scare him a bit", but that he went too far. He again admitted choking the deceased and explained how he did it. Asked how hard he pulled, he said, "it's all a blur but … from what I can … remember, fairly … hard". Asked if he put his foot on the back of the "chair" he said that he was pretty sure that he did because "the flap was broken …". He affirmed again that as he was doing it he said, "rape me, you cunt". Later he said that in choking the deceased he just kept pulling back, that he got "Right back into the corner of the seat". Asked what he was thinking at the time of the incident he said, "What happened at the unit … I just wanted him dead". He then said, "At the time I never ever thought of killing him … But soon as it, soon as it … was happening it was just, I, I can't even say I consciously knew that I wanted him dead …". A little later he said, "I wanted to hurt him. I wanted to hurt him for holding me down, for letting his brother do it … I never sat back and [INDISTINCT] I'm going to kill him, never said that. It was, I was just constantly thinking about wanting to hurt him …".

[17] Much later in the interview he was taken back over the circumstances of the killing and admitted that he pulled the rope back "fast and hard" and quite forcefully and that he had put either his foot or knee into the back of the front seat in order to gain more leverage.

Relevant principles and statutory provisions

[18] Section 597B of the *Criminal Code* 1899 (Qld) provides:

> "**597B Separate trials**
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> When 2 or more persons are charged in the same indictment, whether with the same offence or with different offences, the

> court may, at any time during the trial, on the application of any of the accused persons, direct that the trial of the accused persons or any of them shall be had separately from the trial of the other or others of them, and for that purpose may, if a jury has been sworn, discharge the jury from giving a verdict as to any of the accused persons."

[19] In *R v Davidson*,[1] de Jersey CJ and Davies J said:

> "Generally there are strong reasons of principle and public policy why joint offences should be tried jointly (*Webb v R* (1994) 181 CLR 41 at 88, 89, 56) and the mere fact that one result of joinder will be that evidence admissible against one but inadmissible against the other accused will be before the jury is not a reason for ordering separate trials. (*R v Harbach* (1973) 6 SASR 427 at 432; *R v Lewis and Baira* CA No 252, No 253 and No 290 of 1996, 18 October 1996.)"

[20] Keane JA in *R v Roughan & Jones*[2] observed that, "The 'strong reasons' for a joint trial are strengthened rather than weakened where each of two accused deploy the 'cut-throat' defence". His Honour then quoted the following passage from the reasons of Callinan and Heydon JJ, with whom Gleeson CJ agreed, in *Ali v The Queen*:[3]

> "Section 597B of the *Criminal Code* (Q) confers a discretion on the trial judge, at any time during the trial of two or more persons, as here, charged in the same indictment, that the persons charged be tried separately. The events leading up to the murder and dismemberment of the infant, and the guilt or innocence of the appellant and the co-accused, were closely interconnected. Their relationship, their similar motives, their almost equal opportunity to commit the crimes, and their capacity, either separately or jointly to commit them, all argued very strongly in favour of a joint trial. There were no special or other features of the case requiring that they be tried separately. That one might seek to incriminate the other, as each accused here did, could provide no justification for a direction that the appellant and his co-accused be tried separately (*R v Palmer* [1969] 2 NSWR 13). A joint trial of the appellant and the co-accused served to give the jury the means of obtaining a conspectus of the respective roles of each of them in the crimes with which they were charged."

[21] To these references may be added the following passage from the reasons of Toohey J in *Webb v The Queen*:[4]

> "The first of these other matters is the failure of the trial judge to order separate trials for the appellants. The justification, indeed the alleged necessity, for separate trials lies in the fact that in three records of interview with Webb, which could be expected to be and

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1 [2000] QCA 39 at [12].
2 [2007] QCA 443 at [50].
3 (2005) 79 ALJR 662 at [58].
4 (1994) 181 CLR 41 at 88-89.

> were adduced in evidence by the prosecution, Webb made assertions that Hay had engaged in a violent and sadistic attack on the deceased. And, it was said, although the trial judge warned the jury that this evidence was not admissible against Hay, such a direction could not cure the overwhelming prejudice inevitably caused to Hay.
>
> King C.J. dealt with this ground by pointing out that there are 'strong reasons of principle and policy why persons charged with committing an offence jointly ought to be tried together. That is particularly so where each seeks to cast the blame on the other'. What King C.J. referred to as 'strong reasons of principle and policy' were discussed by his Honour in *Reg. v. Collie*. I respectfully agree with that discussion which emphasizes that when accused are charged with committing a crime jointly, prima facie there should be a joint trial. There are administrative factors pointing in that direction but, more importantly, consideration by the same jury at the same trial is likely to avoid inconsistent verdicts, particularly when each accused tries to cast the blame on the other or others. There are of course dangers for an accused in a joint trial by reason of the admission of evidence which would not be admitted at the trial of one accused. That risk must be obviated by express and careful directions to the jury as to the use they may make of the evidence so far as it concerns each accused.
>
> In the end the critical question before an appellate court in these circumstances is whether, by reason of the joint trial, there has been a substantial miscarriage of justice or, put another way, whether improper prejudice has been created against an accused." (footnotes omitted)

Mason CJ and McHugh J agreed with Toohey J's reasons on the aspect of the appeal addressed in the above passage.

[22] In *R v Aboud; R v Stanley*,[5] McKenzie J, with whom the other members of the Court agreed, instanced some circumstances which may influence the ordering of separate trials:[6]

> "The categories of cases where it is appropriate to order separate trials are not closed. When making the decision at trial, typically, cases where separate trials are allowed are ones where one case is significantly weaker than 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. There is nothing to suggest that the learned trial judge misapprehended his function in that regard."

The appellant's submissions

[23] No complaint is made of the directions given by the trial judge excluding from consideration by the jury in the case against the appellant, statements made by

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5 [2003] QCA 499.

6 [2003] QCA 499 at [35].

McLean. It was submitted, however, that no directions which the primary judge could have given would have been adequate to redress the prejudice which would flow necessarily from McLean's statements in records of interview being placed before the jury.

[24] In the course of his interviews, McLean had told police variously that:

- the appellant wanted McLean to take the deceased to Chambers Flat Road "so that he could do what he done";
- the appellant had initially wanted to kill the deceased but by means of giving him "a hot shot";
- the appellant had wanted him to tie up the deceased;
- when the deceased had started to run out of money he had asked the appellant to return the motor cycle. That first happened about two to three weeks before the killing;
- the appellant had pawned the motor cycle at Browns Plains Cash Converters but kept telling the deceased that it was in a repair shop;
- the deceased continued to demand the return of the bike;
- the appellant, being aware that it would be difficult for him if the deceased ran out of money, decided to kill the deceased;
- the appellant requested McLean to be present in the passenger's seat of the car when the killing occurred;
- the appellant wanted to make the killing look as if the deceased had been coming to pick him up, to collect some video games, to get money and to collect the motor cycle from the appellant and that there had been a robbery;
- the appellant had threatened McLean;
- the appellant had made him tie the deceased's hands and had threatened him throughout the incident.

[25] It was submitted also that the critical question for the jury was whether the appellant had an intention to kill or do grievous bodily harm to the deceased and that the appellant had not "overtly admitted to such a plan in his interview".

Consideration

[26] The strong considerations referred to in the authorities for the joint trial of joint offenders are not counter-balanced in this case to any significant degree by other factors. By the time of trial, it was apparent that there would be no cut-throat defence. That was also apparent at the time of the hearing of the application for separate trials under s 590AA of the *Criminal Code*. The appellant had confessed to being the killer. Nor were there any particularly significant discrepancies between the substance of his final account of events in his interviews and that of McLean, except that McLean claimed to have been coerced by the appellant and placed more emphasis than the appellant on aspects of pre-meditation on the part of the appellant.

[27] The admissions in the interviews made the prosecution case against the appellant very strong. As counsel for the appellant submitted, the point in issue, insofar as there was an issue, was whether when garrotting the deceased the appellant intended to cause him grievous bodily harm or to kill him. The record of interview provided

ample grounds for the jury to conclude that there was an intention to kill and that the killing was carried out in the execution of a pre-conceived plan. The appellant, on his version of events, seemed somewhat obsessed with having been sodomised. He made it plain that as a result of this incident he harboured strong animosity against the deceased and was seeking revenge. He stated that when pulling on the twine around the deceased's neck he was thinking of the attack on him by the deceased and the deceased's brother. He made the exclamation, mentioned earlier, which informed his victim of the motive for his actions.

[28] It was apparent from what the appellant said about using the back of the front seat to assist the application of force to the deceased's neck, that his actions went well beyond an attempt to frighten or merely punish the deceased. Tellingly, there was no indication of concern, distress or remorse immediately after it was discovered that the appellant had died. It was also unlikely that the appellant had in mind leaving the deceased, a much bigger man who, he admitted, caused him to experience fear as he commenced his attack, physically capable of exacting his revenge.

[29] This was not a case in which there was, or was ever likely to be, particular difficulty for the jury in following the trial judge's directions concerning the inadmissibility of out of court statements by one co-accused against the other. The facts were relatively straightforward. The co-accused, predictably enough, did not give evidence themselves or call other witnesses in their respective defences. The principle stated in the authorities referred to above do not suggest that it was necessary, or even desirable, for there to be separate trials.

[30] In *Dupas v The Queen*[7] the High Court of Australia again reaffirmed that, at least in the absence of exceptional circumstances, the criminal law proceeds on the basis that juries are capable of following and will follow the directions of the trial judge. The Court said:[8]

> "What, however, is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations. That capacity is critical to ensuring that criminal proceedings are fair to an accused."

[31] In the context of the appellant having sought a stay of proceedings against him on a charge of murder on the ground that pre-trial publicity gave rise to irremediable prejudice the Court observed:[9]

> "The apprehended defect in the appellant's trial, namely unfair consequences of prejudice or prejudgment arising out of extensive adverse pre-trial publicity, was capable of being relieved against [by] the trial judge, in the conduct of the trial, by thorough and appropriate directions to the jury."

[32] There was no challenge to the clear and conventional directions given by the trial judge. For the above reasons the appellant has failed to show that the exercise of the discretion of the judge, who declined to order separate trials consequent on a hearing under s 590AA of the *Criminal Code*, miscarried.

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7 [2010] HCA 20.

8 [2010] HCA 20 at [29].

9 [2010] HCA 20 at [38].

Conclusion

[33] There is no substance in the grounds of appeal and I would order that the appeal be dismissed.

[34] **CHESTERMAN JA:** I agree that the appeal should be dismissed for the reasons given by Muir JA.

[35] **PHILIPPIDES J:** I agree with the order proposed by Muir JA for the reasons outlined in his reasons for judgment.