

DISTRICT COURT OF QUEENSLAND

CITATION: *R v David & Anor* [2019] QDCPR 13

PARTIES: **THE QUEEN**
(Respondent)
v
MIKA JAMES DAVID
and
YOUNG ISAAC CHARLIE
(Applicants)

FILE NO/S: 653/18

DIVISION: Criminal

PROCEEDING: Pre-Trial Hearing

ORIGINATING COURT: District Court at Thursday Island

DELIVERED ON: 1 April 2019

DELIVERED AT: Cairns

HEARING DATE: 26 March 2019

JUDGE: Fantin DCJ

ORDER: **1. Refuse Mika David’s application that the indictment be quashed.**
2. Allow Mika David’s application that he be tried separately on count 1 on the indictment.
3. Refuse Young Charlie’s application that the indictment be quashed.
4. Refuse Young Charlie’s application that he be tried separately on count 3 on the indictment.

CATCHWORDS: CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – JOINT OR SEPARATE TRIAL - where three defendants jointly charged with separate offences on the same indictment – whether charges are properly joined under s 568(12) – whether the indictment should be quashed on the ground of formal defect – whether offences arise out of substantially the same or closely related facts - whether defendants should be tried separately

Legislation

Criminal Code 1899 (Qld) s 568(12), s 597B, s 590AA, s 596

Cases

R v Danes and Taylor [1965] Qd R 338

R v Barker, Alderman and Hughes [1993] 2 Qd R 673

R v Russell, Szann and Patterson (No.2) [1965] Qd R 334

R v Barlow, McQueen & White [1995] QCA 46

R v Leslie [1989] 2 Qd R 378

COUNSEL: J Trevino for the Applicant
C Georgouras for the Respondent

SOLICITORS: Legal Aid Queensland for the Applicant
Cairns Office of the Director of Public Prosecutions for the Respondent

Nature of the application

- [1] In the early hours of 19 November 2017 on Thursday Island, a number of fights broke out in the aftermath of a year 12 graduation party. A number of young people attended the party. Some, but not all, of the incidents of violence that night are collected in a single indictment, no. 653 of 2018.
- [2] Mika David, Young Charlie and Emmerson Charlie are jointly charged on indictment with the following offences:
 1. Count 1 – assault occasioning bodily harm – Emmerson Charlie and Mika David;
 2. Count 2 – assault occasioning bodily harm, in company - Emmerson Charlie only;
 3. Count 3 – grievous bodily harm – Emmerson Charlie and Young Charlie.
- [3] Mika David is charged as a co-offender on count 1 only. Young Charlie is charged as a co-offender on count 3 only. Emmerson Charlie is the common denominator. He is charged with all three counts.
- [4] Mika David and Young Charlie each apply pursuant to s 590AA of the *Criminal Code 1899* (Qld) for orders that the indictment be quashed pursuant to s 596 on the ground that the joinder of the three counts on the same indictment is not permitted by s 568(12) of the *Code*. Alternatively, they each apply pursuant to s 597B of the *Code* for a separate trial of the count relating to them.
- [5] The Crown opposes the applications.
- [6] I have decided that Mika David should be tried separately on count 1 on the indictment, and that the applications by Young Charlie should be refused. These are my reasons for those decisions.

Prosecution case

- [7] The prosecution case is that all of the offending occurred between 3am and 5:30am on the same night, 19 November 2017. The allegations are summarised below.
- [8] The party was at 3 Pilot Street. Initially there was an altercation between Aleah Kusu and Ezra Charlie,¹ followed by Sebastian Salam punching Ezra Charlie, and running away from the party (“the preceding altercations”). The Crown relies upon the preceding altercations for counts one and two (and conceivably also count 3).
- [9] Mika David chased Sebastian Salam, pushed him to the ground and punched him. Ezra Charlie and Emmerson Charlie joined in and punched and kicked Salam, causing bodily harm (**count one**). Another person intervened and the altercation ceased.
- [10] Aleah Kusu then left the party, located her boyfriend, Garo Henry, and they walked to another house at 15 Idagi Close, about 700 metres away. The house was highset. Garo Henry went next door briefly, leaving Aleah Kusu on the veranda upstairs.
- [11] Ezra Charlie and Emmerson Charlie followed Aleah Kusu from Pilot Street to the veranda at Idagi Close, where they approached her. Their mother Audrie Mosby met them there. There was an argument before Emmerson Charlie and Ezra Charlie punched Aleah Kusu to her head and face causing bodily harm (**count two**).²
- [12] Garo Henry heard Aleah Kusu screaming. He ran onto the veranda with a baseball bat and retaliated by hitting Ezra Charlie in the head with the bat, rendering him unconscious.³
- [13] Audrie Mosby took the bat from Garo Henry and struck him multiple times to his back.⁴ Garo Henry ran downstairs towards the driveway where Young Charlie grabbed him and held him while Emmerson Charlie punched him.
- [14] Garo Henry broke free and ran from the group. They followed and pushed him to the ground. Emmerson Charlie and Young Charlie punched and kicked Garo Henry a number of times to the head, causing injuries amounting to grievous bodily harm (**count three**).

Statutory provisions

- [15] Section 596 provides that an accused person may before pleading apply to the court to quash the indictment on grounds including that it is formally defective.
- [16] Section 567(2) of the *Code* provides:

“Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.”

¹ Charges against Ezra Charlie are currently before the Magistrates Court.

² Charges against Ezra Charlie are currently before the Magistrates Court.

³ Garo Henry was charged with grievous bodily harm but the charge was discontinued.

⁴ Audrie Mosby pleaded guilty and was sentenced for assault occasioning bodily harm, while armed.

[17] Section 568(12) of the *Code* provides:

“Any number of persons charged with committing different or separate offences **arising substantially out of the same facts or out of closely related facts so that a substantial part of the facts is relevant to all the charges** may be charged in the same indictment and tried together.” [emphasis added]

[18] Section 597B provides that when two 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 be heard separately from the trial of the other or others of them.

When joinder of defendants is authorised by s 568(12)

[19] Where the joinder of different offenders with different offences depends on s 568(12), the conditions prescribed in that section are to be observed. These are that the offences arise “substantially out of the same facts or out of closely related facts” where “a substantial part of the facts is relevant to” all the charges preferred by the indictment.⁵

[20] Section 567(2) is not intended to be an independent basis for the joinder of different charges against different offenders. That subsection does not enlarge the circumstances in which separate offenders can be required to answer different charges in the one indictment.⁶

[21] The word “facts” when it occurs for the third time in s 568(12) has the same meaning as when it is used on the first two occasions, so that the word does not refer to the admissible evidence in the case but to the facts out of which the offences charged arose.⁷ As Jeffriess J noted in *R v Danes and Taylor* at p. 341:

“[I]n order that the sub-section apply, the facts out of which these separate offences arise must be facts which would be described at least as relevant to the issue, evidentiary facts, or the *factum probans*; and as such have probative force. They are not facts which have no probative value and are introduced for the purpose of giving the jury a true picture, since without those facts the jury may be left with a false or misleading picture.... the test is not whether the evidence given in respect of the offences is substantially the same, but whether the offences arise substantially out of the same facts or closely related facts. Having regard to the distinction between fact and evidence, it would appear to me that the word “facts” where used in the sub-section for the third time cannot be read as “evidence”. In my view the sub-section states plainly that **any number of persons may be charged in the same indictment and tried together:**

(1) Where the offences arise substantially out of the same facts; or

(2) **Where the offences arise out of closely related facts, so that a substantial part of the facts is relevant to all the charges.**” [emphasis added]

⁵ *R v Barker, Alderman and Hughes* [1993] 2 Qd R 673 at p. 677 – 678 per Byrne J.

⁶ *Ibid.*

⁷ *R v Danes and Taylor* [1965] Qd R 338 at p. 341; 351.

- [22] In the same case, Hart J said "... the word 'facts' does not refer to the admissible evidence in the case, but to the facts out of which the offences charged arose."⁸
- [23] "The facts out of which an offence arises within the meaning of the subsection are the facts which the Crown must prove to obtain a conviction – that is, the *facta probanda* – and do not include all the evidence admissible to prove the offence."⁹
- [24] "If the issue of whether the offences arise out of closely related facts is determined in favour of the Crown, the question then is whether a substantial part of the facts is relevant to all charges. ... joinder is inappropriate unless there is at least one common *factum probans*, or a concurrence of a substantial number of circumstances even though there might not, strictly speaking, be any common *factum probans*."¹⁰

Submissions

Applicants' submissions

- [25] The applicants submit that s 568(12) provides no basis for the joinder of the three offences preferred on the indictment because the offences are separate and distinct in respect of time, place, the nature of the crime committed, and the identity of the victim involved.
- [26] It is submitted that the disconnection between the offences is most stark as between counts 1 and 3. Young Charlie was not present at 3 Pilot Street and had nothing to do with the violence allegedly perpetrated upon the complainant to count 1. Likewise, Mika David, conjointly charged in respect of count 1, was not at 15 Idagi Close and had nothing to do with the violence allegedly perpetrated upon the complainant to count 3.
- [27] The applicants concede that some of the evidence in relation to count 2¹¹ may well be admissible in respect of any trial on count 3, given the close temporal or sequential relationship that exists between the commission of the two offences. However they submit that none of that potential evidence constitutes facts out of which the charge of grievous bodily harm in count 3 actually arises. Further, given that a different complainant, different location and different physical transaction is involved in count 3 to that in count 2, it cannot be said that the alleged offences arise out of "closely related facts".
- [28] It is further submitted that whilst s 567(2) of the *Code* would permit the joinder of the three separate charges on the indictment as against Emmerson Charlie (on the basis that the charges are or form part of a series of the same or similar character), that section cannot be relied upon in aid of the joinder of separate offenders. That submission is clearly correct.

⁸ At p. 351.

⁹ *R v Russell, Szann and Patterson (No.2)* [1965] Qd R 334 at p. 337 per Gibbs J.

¹⁰ *R v Barlow, McQueen & White* [1995] QCA 46 citing *R v Leslie* [1989] 2 Qd R 378 at 382.

¹¹ That is, the evidence pertaining to what occurred on the veranda at Idagi Close.

Respondent's submissions

- [29] The Respondent submits that the offences on indictment arise out of closely related facts relevant to all of the charges, such that they are properly joined and ought be tried together.
- [30] The offences are said to flow from the same origin, were committed within a short space of time, against a small group of complainants who were known to one another, at close proximity, counts 2 and 3 were at the same address, and each offence is an offence of violence by kicks and punches resulting in actual harm of varying degrees.
- [31] The Respondent relies upon the previous altercations as the trigger for the counts on the indictment. As a result of those altercations, for the purpose of retribution, Ezra Charlie, Mika David and Emmerson Charlie followed and assaulted Sebastian Salam. Following this, Emmerson Charlie and Ezra Charlie followed and did the same to Aleah Kusu at 15 Idagi Close. They were met by their parents, Young Charlie and Audrie Mosby, and count 3 followed.
- [32] Counts 2 and 3 are comprised of evidence which is cross-admissible.
- [33] With respect to the alternative relief of separate trials, the Respondent argues that the extensive and common witness list, the remote location of the witnesses (who are on Thursday Island whereas the trial would be in Cairns), and the cost and inconvenience to the court, all militate against ordering three separate trials.
- [34] It is further submitted that given the same factual origin, contemporaneous occurrences, cross-admissibility of witnesses' evidence, efficiency and cost to the Court, and the lack of potential prejudice to either applicant, the interests of justice are best served by having all charges and defendants tried together in a single trial.
- [35] Finally, the Respondent submits that there is no prejudicial effect arising out of the joinder of charges and offenders here; a jury can be adequately directed on how they are to use the evidence before them.
- [36] Alternatively, the Respondent submits that if the Court finds that count 1 has been improperly joined, it should order a separate trial for count 1 and order that counts 2 and 3 be heard together.

Discussion

- [37] Here, the facts out of which the offences arose were certainly not the same facts. The question is: are they closely related facts, so that a substantial part of the facts is relevant to all the charges? Put another way, are the facts out of which the offence charged against one defendant arises closely related to the facts out of which the offences charged against the other defendants arise?
- [38] That is a question of degree having regard to considerations such as time, place, the nature of the offences and the circumstances in which they are alleged to have been committed. All the relevant factors must be considered.
- [39] The facts out of which the offence arises within the meaning of the subsection are the facts which the Crown must prove to obtain a conviction and do not include all the evidence admissible to prove the offence.

- [40] That involves considering the elements of each offence and any defences that may arise.
- [41] The offences in counts 1 and 2 are the same: assault occasioning bodily harm, save that count 2 has a circumstance of aggravation of being committed in company.
- [42] For counts 1 and 2, the Crown must prove that the defendant assaulted the complainant on the relevant date, that the assault was unlawful, that the defendant did the complainant bodily harm and for count 2, that the defendant was in company. It must also negative any defences that may arise, such as self defence, accident or provocation.
- [43] The offence in count 3 is grievous bodily harm. The Crown must prove that the defendant did grievous bodily harm to the complainant on the relevant date and that the doing of the grievous bodily harm was unlawful. It must negative any defences that may arise, such as self defence, defence of another or accident. Provocation is not a defence.
- [44] To assist in considering those questions, I have summarised the relevant facts relating to each offence in the table below.

	Count 1	Count 2	Count 3
Defendant	1. Emmerson Charlie 2. Mika David	Emmerson Charlie	1. Emmerson Charlie 2. Young Charlie
Date	19 November 2017 Between 3 and 5:30am	19 November 2017 Between 3 and 5:30am	19 November 2017 Between 3 and 5:30am
Place	Thursday Island Near 3 Pilot Street	Thursday Island Upstairs, 15 Idagi Close	Thursday Island Downstairs, 15 Idagi Close
Offence	Assault occasioning bodily harm	Assault occasioning bodily harm, in company	Grievous bodily harm
Victim	Sebastian Salam	Aleah Kusu	Garo Henry
Alleged facts	Emmerson Charlie and Mika David kicked and punched Sebastian Salam after Salam assaulted Emmerson's brother, Ezra Charlie.	Emmerson Charlie punched Aleah Kusu in the head. Her boyfriend, Garo Henry, retaliated by assaulting Emmerson's brother, Ezra Charlie. Garo Henry ran downstairs.	Young Charlie grabbed Garo Henry while Emmerson Charlie punched him. Henry broke free, ran but was caught. Emmerson Charlie and Young Charlie punched and kicked Garo Henry.
Presence of applicant	Young Charlie was not present.	Neither Mika David nor Young Charlie was present.	Mika David was not present.

- [45] In addition to the common features in that table, there are connections or relationships between the following people:
1. Before any of the offences occurred, there was an altercation between each of Aleah Kusu (victim in count 2) and Sebastian Salam (victim in count 1) on

the one hand, and Ezra Charlie (brother of Emmerson Charlie and son of Young Charlie) on the other hand.

2. Aleah Kusu (victim in count 2) is the girlfriend of Garo Henry (victim in count 3).
3. Garo Henry (victim in count 3) was involved in the offending in count 2.
4. Young Charlie (co-offender count 3) is the father of Emmerson Charlie (offender in counts 1, 2 and 3) and Ezra Charlie (victim of assaults and defendant to charges in the Magistrates Court).

Application by Young Charlie concerning count 3

[46] In my view, counts 2 and 3 may readily be grouped together, despite the fact that they involve different complainants. They allege consecutive offences of violence committed within a very short period of time (likely, minutes) at the same house by related defendants (one of whom is common to both counts) on related victims. The victim in count 3 was also involved in the offending in count 2. Count 3 is also related to earlier assaults on its co-offenders' brother and son, Ezra Charlie.

[47] The facts which the Crown is bound to prove to obtain a conviction of Young Charlie on count 3 are closely related to those which it is bound to prove to obtain a conviction of Emmerson Charlie on count 2. They are related in time, place, the nature of the crime, the relationship between the defendants, the relationship between the victims and the circumstances in which the offences were committed. A substantial part of the facts out of which one offence arose is relevant to the other offence.

[48] Therefore I am satisfied that count 3 charging Young Charlie as a co-offender is properly joined with count 2 under s 568(12).

[49] Turning to the issue of separate trials under s 597B, the applicant did not point to any prejudice or risk of prejudice said to arise if the counts were tried together.

[50] Ordinarily, careful directions to the jury will be an adequate means of ensuring a fair trial. This is not a case where it would be impossible or difficult to disentangle the evidence against each accused on counts 2 and 3, and where the evidence against one is highly prejudicial against the other, such that a separate trial should be ordered.

[51] Therefore it is appropriate that counts 2 and 3 be tried together.

Application by Mika David concerning count 1

[52] Whether count 1 charging Mika David is properly joined with counts 2 and 3 is not so straightforward.

[53] On its face, count 1 charging Mika David is factually quite separate from counts 2 and 3. It was committed earlier in the evening. It is unclear exactly when, but the 3 offences are alleged to have occurred within a period of two and a half hours. It does not have the same temporal immediacy as counts 2 and 3. It occurred at or near a different house, some 700 metres away. It involved a different victim. And Mika David had no involvement in the commission of counts 2 and 3.

- [54] However Mika David is charged on count 1 with Emmerson Charlie, who is a defendant on all three counts. Count 1 was preceded by altercations involving Sebastian Salam (the victim on count 1) and Aleah Kusu (the victim on count 2) on the one hand, and Ezra Charlie. The offending in count 1 is said to be in retaliation for an assault on Ezra Charlie. Ezra Charlie is also involved in counts 2 and 3 and is the brother of Emmerson Charlie and the son of Young Charlie (co-offender with Emmerson Charlie on count 3). So there are interwoven threads common to all three counts.
- [55] The facts of the preceding altercations and count 1 are admissible on counts 2 and 3. It is not suggested that the facts of counts 2 and 3 are admissible against Mika David in proof of count 1. Counts 2 and 3, which could be seen as a continuing course of conduct by Emmerson Charlie, are separated in time, place and other circumstances from the allegations in count 1. Although there may be some evidence common to all counts, there are no common elements or circumstances necessary in proof of count 1 that also exist in relation to proof of counts 2 and 3.
- [56] Balancing those competing considerations, in the end I am not satisfied that the facts out of which the offences charged in counts 2 and 3 arise are so closely related to the facts out of which the offence charged against Mika David in count 1 arises to satisfy the relevant test.
- [57] In the circumstances, I consider that joinder of Mika David in count 1 on the indictment with counts 2 and 3 is not authorised by s 568(12).
- [58] The wrongful joinder of an offender does not result in a nullity. Section 568 relates to matters of practice and a breach of it is an irregularity. In those circumstances, it is appropriate to grant the alternative relief sought by the applicant, which is that pursuant to s 597B Mika David be tried separately on count 1 on the indictment.

Orders

- [59] The orders of the court are:
1. Refuse Mika David's application that the indictment be quashed.
 2. Allow Mika David's application that he be tried separately on count 1 on the indictment.
 3. Refuse Young Charlie's application that the indictment against him be quashed.
 4. Refuse Young Charlie's application that he be tried separately on count 3.