SUPREME COURT OF QUEENSLAND

CITATION:	*R v Parker* [2006] QSC 109
PARTIES:	**THE QUEEN** (respondent) **v** **KEVIN JAMES PARKER** (applicant)
FILE NO:	Indictment No 804/05
DIVISION:	Trial
PROCEEDING:	Pre-Trial Hearing
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	17 May 2006
DELIVERED AT:	Brisbane
HEARING DATE:	12 May 2006
JUDGE:	Mackenzie J
ORDER:	Pursuant to s 590AA of the *Criminal Code* 1899, it is ruled that: 1. Count 3 is properly joined with counts 1 and 2; 2. There is no reason to sever the indictment by granting a separate trial of count 3; 3. There are no grounds for quashing the indictment under s 596; 4. The evidence of the proposed witness Sergeant Feeney as to the meaning of "Charlie" is admissible; 5. There is no reason to exclude the document containing the word "Charlie" or evidence of Sgt Feeney on discretionary grounds; 6. I decline to rule on the admissibility of evidence concerning the "tick list" in the absence of sufficient context of the kind referred to in paragraphs [15] - [19] in which to make a ruling; 7. That the document referring to bags and amounts of money be excluded from evidence in the exercise of the discretion to exclude evidence the prejudicial value of which outweighs its probative value.
CATCHWORDS:	CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER OF COUNTS – where counts 1 and 2 relate to possession of cocaine and possession of

things used in connection with possessing cocaine – where cocaine is a schedule 1 drug pursuant to *Drugs Misuse Act* - where count 3 relates to possession of prasterone, a schedule 2A drug pursuant to *Drugs Misuse Act* – where all drugs and other items found on same applicant's premises within a short time frame – where applicant submitted that the joinder could not be justified by s 567 of *Criminal Code* because counts 1 and 3 relate to different categories of drugs – whether counts are properly joined – whether inclusion of count 3 on indictment was calculated to prejudice or embarrass the applicant in his defence to the charge

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – where Crown seeking to lead evidence of experienced police officer to establish that the word "Charlie" is used as a synonym for the drug cocaine – where Crown also seeking to lead evidence of police officer to prove that certain lists and hand written documents found at the applicant's premises are documents relating to the sale of drugs – whether documents found at premises are admissible – whether evidence of police officer is admissible

Criminal Code 1899 (Qld), s567
Drugs Misuse Act 1986 (Qld)

Festa v The Queen (2001) 185 ALR 394
Max Cooper & Sons Pty Ltd v Sydney City Council (1980) 29 ALR 77
R v Jacobs (1998) Qd R 96

COUNSEL: N Macgroarty for the applicant
M Byrne for the respondent

SOLICITORS: Nyst Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MACKENZIE J:** The counts on the indictment are, in summary, the following:

1. Possession of the dangerous drug cocaine exceeding 2 grams;
2. Possession of a Medicare card and the $50 note for use in connection with possessing a dangerous drug;
3. Possession of the dangerous drug prasterone.

[2] The applicant applies under s 590AA of the *Code* for a separate trial on count 3 and the exclusion of certain evidence. The relevant facts were that on 16 September 2004 police executed a search warrant at the accused's premises. He said he lived there alone, although he often had friends visiting. During the subsequent search a white ceramic plate was found on a shelf under the bar in the entertainment area. On the plate was a line of cocaine. A Medicare card in the applicant's name and a $50 note rolled into a cylindrical shape held together by a bent ring top were also there. A

digital camera beside the plate had photographs of the accused and another man seated behind the bar.

[3] Also on the shelf under the bar there was a clipseal plastic bag containing cocaine, under which were two folded handwritten documents shown in photos 35 and 41. He said that the writing in photograph 35 which referred to bags and sums of money was not his. Photograph 41 referred to the formation of a company and was conceded by the prosecution to be of no relevance to the charge of possession. The applicant denied the powder was his and said he did not know what it was. He admitted that the Medicare card and the plate were his. He said he was not sure about the $50 note.

[4] The drug which is the subject of count 3 is a steroid and was found in the bedroom on top of a duchess. The bedroom was the only one apparently in use. The documents shown in photographs 34 and 42 were found in the drawers of the duchess. Photograph 34 shows, on one side, what appears to be "half Charlie for 3500". The other side has names and figures on it. Photograph 42 shows names with figures next to them on it.

[5] It is within that framework that the matters raised by the applicant are to be determined. The application was amended by leave to include reference to s 567 of the *Code*, with respect to the separate trial issue.

Separate trial of count 3

The prosecution relies on s 567 to justify joinder. Section 567 allows charges for more than one indictable offence to be joined in the same indictment against the same person if those charges:

(a) are founded on the same facts;
(b) are or form part of a series of offences of the same or a similar character; or
(c) are a series of offences committed in the prosecution of a single purpose.

[6] However, it was submitted by Mr Macgroarty for the applicant that the charges were not founded on the same facts. Nor were the offences a series of offences committed in the prosecution of a single purpose. It was submitted by Mr Macgroarty and accepted by the Crown Prosecutor that the evidence on count 3 was not admissible on either of the other counts. Mr Macgroarty submitted that the question remaining was whether the charges formed part of a series of offences of the same or similar character. The argument in the written submissions concerning similar fact evidence was not developed before me, except to the extent that it was part of the submissions on behalf of the applicant that joinder of count 3 with counts 1 and 2 demonstrated that the accused had a propensity or disposition to commit drug offences or that he was the kind of person likely to commit the crimes charged in counts 1 and 2.

[7] It was fundamental to this argument that cocaine was a schedule 1 drug. The drug in count 3 is a schedule 2A drug and was an anabolic steroid. As such, it was a drug that might be used for body building purposes. It was submitted that cocaine was a "recreational" drug. Because counts 1 and 3 related to different categories of drugs joinder was not justifiable.

[8] The essence of each of the offences is possession of a drug or objects with a connection to dangerous drugs. All of the drugs and other items were found in the same premises within a short timeframe during the course of the execution of a search warrant. In my view, the charges are founded on the same facts for the purposes of s

567 and the joinder is therefore permissible. The evidentiary fact that each of the items was found in a residence which, on the prosecution case, was the applicant's residence provides, in a case of possession of drugs, a sufficient basis for that conclusion. Indeed, arguably, the possession might have been capable of being charged in the one count, although there might be practical complications in sentencing, particularly if different bases of liability or purposes of possession were to be alleged in respect of different drugs (cf *R v Jacobs* (1998) Qd R 96).

[9] The suggested distinction between different kinds of dangerous drugs, such as classification into recreational, commercial or other categories as a basis for objecting to joinder was not supported by reference to any authority. It is not a valid criterion for determining the question, in my view. Where the basis of joinder that the offences are founded on the same facts is relied on, the fact that evidence that one kind of drug is found in possession does not assist in proving that another kind of drug was also in possession is not fatal. The joinder is therefore proper. It is not necessary to consider whether other bases of joinder are available.

[10] With regard to s 596, the indictment is not formally defective. To the extent that the matter was argued on the basis that inclusion of count 3 in the indictment was calculated to prejudice or embarrass the applicant in his defence to the charge, the only reason advanced for that proposition was that the existence of a combination of a schedule 1 drug, cocaine, with an anabolic steroid might give rise to the perception in the eyes of the jury that the accused was a person who would use any drug that was available to him. In my view, simply to state the proposition demonstrates that it has no substance. There are no grounds for quashing the indictment.

"Charlie"

[11] The ground that Sergeant Feeney, an experienced State Drug Investigation Unit Officer, was not qualified to give evidence that the word "Charlie" is used in the drug community as a reference to the illicit drug cocaine and that persons commonly involved in the illicit drug market commonly keep "tick books" to record sale of drugs on credit was not pursued. However, it was submitted that the evidence that the word "Charlie" is used as a synonym for cocaine should be excluded because "inspection of the document does not lead to the irresistible conclusion that the word 'Charlie' as it appears on the document is a reference to the illicit drug cocaine". The note was found in the same premises as the cocaine. What the Crown submits is an amount of money is written on the note. If the defence under s 129(1)(c) of the *Drugs Misuse Act* is raised, the evidence is plainly material to establishing a circumstantial case that the applicant is not entitled to the benefit of the defence. It was submitted that there is a danger that the jury would attach more weight to Sergeant Feeney's evidence than it deserved and cause undue prejudice to the applicant at trial. It was submitted that any unfair prejudice could not be overcome or cured by a warning or direction (*Festa v The Queen* (2001) 185 ALR 394).

[12] It was also submitted that a distinction should be drawn between the use of code words in telephone intercepts where the accused person is a party to the conversation to describe drugs, quantities and prices and the present case, where the document is found at the premises without any evidence of connection with the accused except that it was found among belongings that are allegedly his. It may be assumed that in cases where such a conversation is occurring, the fact that the accused person is using the words is a more direct connection with knowledge of the meaning of the word

than in the present case. However, where the prosecution case relies upon the presence of a piece of paper with the word on it among the belongings which the Crown alleges are the accused's, the distinction sought to be drawn is not decisive or cogent.

[13] Finally, it was submitted that the meaning of the word "Charlie" was a matter for the jury. It was submitted that the evidence of Sergeant Feeney was not such that, in its absence, the jury could not make a proper adjudication on the material presented; it was a matter within the ordinary capacity of jurors to decide for themselves. It was submitted, in the alternative, that the subject matter of the proposed evidence does not relate to a recognised branch of learning or knowledge. While the word "Charlie" with reference to cocaine may not be unfamiliar to judges who regularly deal with drug matters I am not persuaded that it has passed into the knowledge or language of the average juror so as to make expert evidence about its meaning inadmissible.

[14] The specialised language used by those in the drug scene is akin to a technical term or term of art. This is a recognised category of case in which the meaning of the terms may be explained by a witness familiar, by reason of experience, with the technical terms used in it. In *Max Cooper & Sons Pty Ltd v Sydney City Council* (1980) 29 ALR 77 at 85 Lord Diplock, delivering the opinion of the Privy Council, said the following which succinctly states the principle:

> "The crucial expression in this paragraph is 'pay loadings'. It is a technical term, or term of art, used in the building industry. It is not an expression that is used in ordinary speech; without extrinsic evidence from a witness experienced in the building industry and familiar with the technical terms used in it, a judge could only speculate as to the meaning of 'pay loadings'. That the ordinary meaning in which a technical expression is used in a particular industry is not a question of construction but is a question of fact to be decided upon expert evidence, has been undoubted law since it was laid down by Baron Parke in *Shore v Wilson* (1842) 9 Cl and Fin 355."

The "tick list"

[15] The admissibility of evidence of a detective experienced in drug investigations to establish that a list of numbers found at the accused's premises is of a kind often found in possession of drug offenders and that it relates to credit sales is more problematical. It raises different issues from that concerned with specialised use of language by an identifiable subgroup of the population. It will be perfectly obvious to a juror that there are numbers and names on the document. The important additional step, so far as the Crown is concerned, is to prove what the figures and names mean. It would probably occur to the average juror, without that assistance, that it may represent a list of payments made or moneys owed for something. The expert evidence would be relevant to that question in that it would explain that such a list is sometimes used by people who deal in drugs to record credit sales.

[16] It is probably safe to assume that such specialised knowledge ultimately derives from a synthesis of information obtained from direct experience by covert police operatives and information given by suspects or others to individual investigating police officers, perhaps but not necessarily including the witness whose evidence will explain a possible interpretation of the list. At some point, collation of that

information will evolve into a body of knowledge about the practices of some in the drug scene. At what point it ceases to be objectionable hearsay and becomes expert evidence is insufficiently ascertainable on the evidence before me. It may also be assumed that keeping such a list is not a universal practice, but the question that then becomes relevant is what use may be made of the body of knowledge if a list that may be a "tick list" is found in conjunction with drugs. Is it permissible to allow evidence of this kind to be given when it is open to the Crown to invite the jury to consider, in context, that it may be a list relating to commercial transactions in drugs?

[17] It may also be observed that, on a charge of possession of dangerous drugs, there are two paths to conviction. One is by proving actual possession. The other is by proving deemed possession under the circumstances in s 129(1)(c). The former is ordinarily punishable more severely than the latter although both are offences of possession. Another escalation of seriousness occurs, in a case where actual possession is proved, if it is also proved that the possession was for commercial purposes rather than for personal use. Whether evidence is admissible on a trial may depend on the issues to be litigated at trial; in other words whether the prosecution sets out to prove the former as its primary position with the latter being its secondary position or whether it relies on the latter only. The likely issues in the trial were not exposed in the present application save that it seems probable that the prosecution intends to conduct its case on the basis of actual possession.

[18] If there were a plea of guilty to possession, and the basis of sentencing were not agreed, the proper basis of sentencing would then be a matter to be determined by hearing evidence as to whether the possession was deemed or actual and, then, commercial or non-commercial. Whether the range of evidence admissible on sentence would be identical to that admissible at trial may depend on fine judgments as to the potential for particular parts of the evidence to be unfairly prejudicial if presented to the jury although clearly relevant to an issue of guilt.

[19] In the present case, the evidence does not extend to establishing that the writing is the accused's. Where a charge is one of possession and the document sought to be admitted tends to prove commerciality, a question of discretionary exclusion may arise if the linkage of the document to the accused is no more than that such a document, not proved to be in his handwriting, is found in his home. In the circumstances, the questions of admissibility and admission of the evidence about "tick lists" cannot be meaningfully determined by me on the present application in the absence of sufficient exposure of the issues to be litigated.

Document referring to bags and prices

[20] A document containing the following notation "Bag 3 $1,700, Bag 4 $2,200, Bag 5 $2,200 total $6,100" was found under the bag of white powder located in the bar. There is no evidence that the document is in the applicant's handwriting; he denies it is his. It also has considerable prejudicial affect in that it suggests that there were more bags than the one found at the premises. In the circumstances, while minds might differ on the subject it seems to me that, in this case, the prejudicial value outweighs the probative value of the evidence against the accused and it should therefore be excluded.

Rulings

[21] The rulings are as follows:

1. Count 3 is properly joined with counts 1 and 2;
2. There is no reason to sever the indictment by granting a separate trial of count 3;
3. There are no grounds for quashing the indictment under s 596;
4. The evidence of the proposed witness Sgt Feeney as to the meaning of "Charlie" is admissible;
5. There is no reason to exclude the document containing the word "Charlie" or evidence of Sergeant Feeney on discretionary grounds;
6. I decline to rule on the admissibility of evidence concerning the "tick list" in the absence of sufficient context of the kind referred to in paragraphs [15] - [19] in which to make a ruling;
7. That the document referring to bags and amounts of money be excluded from evidence in the exercise of the discretion to exclude evidence the prejudicial value of which outweighs its probative value.