SUPREME COURT OF QUEENSLAND

CITATION:	*R v Belford & Bound* [2009] QSC 344
PARTIES:	**R** **v** **RAYMOND JOHN BOUND** (applicant) and **LOCHLAN-LEE BRETT BELFORD**
FILE NO:	234 of 2009
DIVISION:	Trial Division
PROCEEDING:	Pre-trial hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	2 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2009
JUDGE:	Applegarth J
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – JOINT OR SEPARATE TRIAL – GENERALLY – where the applicant is jointly charged with murder – where co-accused made statements to police about violent acts by the applicant to the deceased on the night he died – where co-accused made statements to the police that the applicant was dishonest, fought with others and dealt in drugs – whether the prosecution case against the applicant is a weaker case which would be made immeasurably stronger by the inadmissible evidence – whether risk of prejudice from statements that are inadmissible against the applicant can be obviated by directions to the jury *Criminal Code* (Qld), s 597B *Ali v The Queen* (2005) 214 ALR 1, cited *Baartman*, unreported, New South Wales Court of Criminal Appeal, 6 October 1994, cited *Gilbert v The Queen* (2000) 201 CLR 414, cited *Jones v R* (2009) 254 ALR 626, considered *R v Davidson* [2000] QCA 39, cited *R v Gibb & McKenzie* [1983] 2 VR 155, applied *R v Piller* (1995) 86 A Crim R 249, applied

R v Roughan and Jones (2007) 179 A Crim R 389; [2007] QCA 443, applied
Webb v The Queen (1994) 181 CLR 41, applied
Winning v R [2002] WASCA 44, cited

COUNSEL: D R Lynch for the applicant
V A Loury for the respondent
M A Green for the co-defendant Belford

SOLICITORS: Walker Pender solicitors for the applicant
Department of Public Prosecutions (Qld) for the respondent
Legal Aid Queensland for the co-defendant Belford

[1] The applicant, Raymond John Bound ("Bound") applies for a direction or ruling that his trial be heard separately from his co-accused, Lochlan-Lee Brett Belford ("Belford").[1] Bound and Belford are charged that on 6 January 2008 they murdered Wayne Leslie Williams ("the deceased") in Belford's room at the Rising Sun Hotel at Rosewood. The Crown case is that either Belford or Bound killed the deceased, or they did so in combination, with an intent to kill or cause at least grievous bodily harm. If either of them killed the deceased, then the other is alleged to be criminally responsible under s 7(1)(b) or (c) in having aided with knowledge of the killer's intent.

[2] Bound submits that a joint trial would be unfair and result in positive injustice to him because:

(a) the evidence against him is significantly weaker than and different to that admissible against his co-accused;

(b) the evidence against his co-accused contains material highly prejudicial to Bound which is not admissible against him;

(c) a real risk exists that the case against him will be overborne by the prejudicial material.

Bound points to prejudicial material contained in Belford's statements to the police in which Belford gives an account of violence inflicted by Bound on the deceased and to other statements by Belford which describe Bound as dishonest, a participant in fights and a dealer in drugs.

[3] The prosecution opposes the application and submits:

(a) whilst Belford's statements to police are not admissible against Bound, most of the available evidence is admissible against both Bound and Belford;

(b) far from the case against Bound being a weak one, there is a significant body of evidence that proves that Bound was involved in the assault on the deceased;

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[1] The application is made pursuant to s 590AA of the *Criminal Code* in respect of a trial listed to commence on 7 December 2009.

(c) the evidence that is inadmissible against Bound can be easily isolated and directions made concerning its admissibility and use.

[4] Belford abandoned his own application for a separate trial, did not support or oppose Bound's application and, by his Counsel, addressed aspects of the evidence, and the scope to exclude parts of it without prejudicing his right to a fair trial.

Relevant Principles

[5] The principles governing the discretion to order separate trials under s 597B of the *Criminal Code* are not in contention. Generally there are strong reasons of principle and public policy why joint offences should be tried jointly, 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.[2] In *Webb v The Queen*[3] Toohey J (with whom Mason CJ and McHugh J agreed) stated:

> "King CJ 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 CJ 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 could 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."

[6] In *R v Davidson*[4] de Jersey CJ and Davies JA, following *Gilbert v The Queen*,[5] referred to the assumption that as a general rule juries understand and follow the directions they are given by trial judges, and stated:

> "Accepting as we do that there may be some cases in which it is appropriate to order separate trials, even in a case involving joint offences, where 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, and accepting also that there may be cases in which prejudice may cause a jury even to ignore the directions of a trial judge, we do not think that this is such a case."

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2 *R v Davidson* [2000] QCA 39 at [12]; *R v Roughan & Jones* (2007) 179 A Crim R 389 at 398 – 399 [49].

3 (1994) 181 CLR 41 at 88-89 (citations omitted).

4 Supra at [13].

5 (2000) 201 CLR 414.

[7] More recently, the Court of Appeal in *R v Roughan & Jones*[6] restated that generally there are strong reasons of principle and public policy why joint offences should be tried jointly, 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. The "strong reasons" for a joint trial were said to be strengthened rather than weakened where each of the accused deploy the "cut throat" defence.[7] Keane JA, with whom Muir JA and McMurdo J agreed, quoted the following passage from the judgment of Callinan and Heydon JJ, with whom Gleeson CJ agreed, in *Ali v The Queen*:[8]

> "Section 597B of the Criminal Code (Qld) 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**.[9] **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.**" (emphasis added)

[8] On the hearing of this application Counsel for Bound cited a passage from the judgment of Deane J in *Webb v The Queen*[10] that:

> "... general comments by appellate judges about the desirability of placing the whole picture before the jury should not be misconstrued as an implicit endorsement of the notion that a consideration favouring a joint trial is that it will enable evidence which is inadmissible against a particular accused to be placed before the jury charged with the determination of the guilt or innocence of that accused."

I do not understand the passages that I have quoted from *Ali* and other appellate decisions as endorsing such a notion. Deane J later stated that he did not subscribe to the view "that the reasons which favour the joint trial of persons who are charged with committing an offence jointly are particularly strong in cases where such persons seek to cast the blame on one another".[11] Counsel for Bound accepted that *R v Roughan & Jones* adopts a different view, and I respectfully follow it.

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6 Supra at 398 – 399 [49] – [50].
7 Ibid at 399 [50].
8 (2005) 214 ALR 1 at 12 [58].
9 *R v Palmer* [1969] 2 NSWR 13 (citation footnoted in the original).
10 Supra at 79.
11 Ibid at 80.

[9] Counsel for Bound also relied upon the observations of Deane J in *Webb v The Queen*[12] that the desirability of avoiding "inconsistent verdicts" should not subvert the requirement of proof beyond reasonable doubt:

> "If, for example, each of two defendants seeks to exculpate himself or herself from guilt of a crime, which both or one of them undoubtedly committed, by casting the entire blame on the other, it is difficult to see any particular relevance of the need for consistent verdicts apart from the superficial and mistaken notion that there would be something 'inconsistent' about an acquittal of both. Indeed, where there is a joint trial in such a case, it is desirable that the trial judge stress to the jury that, while the jury may think it apparent that the crime was committed by at least one of the accused, there would be nothing inconsistent in their finding that the guilt of neither had been proved beyond reasonable doubt."

The authorities that I have cited do not subvert the requirement of proof beyond reasonable doubt in the case of each defendant. They favour joint trials due to the desirability of what Deane J described as "placing the whole picture before the jury".[13]

[10] These and other considerations which favour joint offences being tried jointly are weighed against the risk that evidence that would not be admitted at the trial of one accused may prejudice the fair trial of that accused. This will be the case where the evidence admissible against each accused "is impossible or at least difficult to disentangle and the evidence against one is highly prejudicial against the other".[14] It also will be the case where the directions given by the trial judge in order to avoid prejudice require "remarkable mental feats" that the jury could not be expected to perform,[15] or where the prejudice may be such as to "cause a jury even to ignore the directions of a trial judge".[16]

[11] Reliance is placed by Bound on the decision of Dowd J in *R v Piller*[17] in which the following principles are stated:

> "1. where the evidence against an applicant for separate trial is significantly weaker than and different to that admissible against another or the other accused to be jointly tried with him; and
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> 2. where the evidence against those other accused contains material highly prejudicial to the applicant although not admissible against him; and

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12 Ibid at 80.
13 Ibid at 79.
14 *R v Davidson* (supra) at [13].
15 *Winning v R* [2002] WASCA 44 at [42] cited in *R v Roughan & Jones* (supra) at [56].
16 *R v Davidson* (supra) at [13].
17 (1995) 86 A Crim R 249 at 257 which applied the statement of principle of the New South Wales Court of Criminal Appeal in *Baartman*, unreported, Court of Criminal Appeal, 6 October 1994.

> 3. where there is a real risk that the weaker Crown case against the applicant will be made immeasurably stronger by reason of the prejudicial material,
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> a separate trial will usually be ordered in relation to the charges against the applicant. The applicant must show that positive injustice would be caused to him in a joint trial."

Application of Relevant Principles

[12] Bound's reliance on these principles necessitates consideration of the prosecution case against each, including whether, as Bound contends, the evidence against him is "significantly weaker than and different to that admissible against" Belford.

Background facts

[13] The deceased was known to both accused. In early 2007 Belford moved into premises at Flinders View where his father, Brett Belford, was living with his partner at the time, Vivian Bound. The applicant, Raymond John Bound, had separated from his wife, Vivian Bound. He returned from Victoria and lived in a granny flat at the back of Ms Bound's house. Brett Belford stopped living at those premises after a dispute. However, his son continued to live there for a time.

[14] Ms Bound, who knew the deceased, offered him accommodation in her home as a boarder. Belford and the deceased became friends, and engaged in sexual activities together. Belford obtained employment at an abattoir for a number of months in late 2007, and shortly afterwards the deceased also obtained a job there. Belford told police that he grew tired of the deceased calling him "his boy" and bragging about being with him. He said he felt like the deceased was stalking him. In late 2007 Belford moved out of the home at Flinders View, and also left his job at the abattoir. He obtained a job as a kitchen hand at the Rising Sun Hotel in Rosewood, and lived upstairs in the hotel. Not long afterwards the deceased applied for and obtained a job in the kitchen at the hotel. Belford told police that he was unhappy about this.

[15] On Saturday, 5 January 2008 Belford was told by a friend that the deceased had AIDS. Whether or not the deceased in fact had AIDS is not apparent from the material to which I have had reference, and it is irrelevant for present purposes. Relevantly, Belford told police that after he was told that the deceased had AIDS he "went off" and was angry because he thought the deceased had given him AIDS and not told him. He told police that he knew that Bound was after the deceased for money and, after returning to the Rising Sun Hotel, telephoned Bound and told him about the deceased working and living at the hotel and about "the AIDS thing". Belford claims that he asked Bound if he could come out and "help me teach Wayne a lesson" and that Bound agreed to do so.

[16] In late 2007 Bound was in conflict with the deceased. Bound told police that on Boxing Day he found syringes in the house, and after a confrontation, police were called. When police arrived at the house on 26 December 2006 Bound said words to the effect "Get him out of my house, I don't want him living in my house. If you don't get him out, you'll be back around". Police separately interviewed the deceased and Bound. The deceased said that Bound had demanded money that he owed him, and had punched him in the face, following which the deceased locked himself in his room and phoned police. The deceased told police:

> "I'm going to be honest with you, the reason I owe him money is because one time I sold drugs for him and I lost the money. I just want to be left alone."

In a separate interview Bound told police that the deceased owed him $500 and that he wanted him out of the house.

[17] On 28 December 2007 Bound approached police in an excited state about money that the deceased was said to owe and said that "something needs to be done about it". He said that the deceased had left owing money for rent and the telephone and that if the police did not stop him "I'm going to find the shit and bash him". Bound was placed under arrest. He accused the deceased of having drugs and selling drugs. He claimed that the deceased owed him "about $500 to $900 for rent and a phone bill". The deceased still had a key to the house. Bound said to the police:

> "You get the key and get that fag to give me my money, I am a Vietnam veteran, I've killed before and have no problems killing again, I will kill him no problems if I don't get my money."

[18] The police visited the deceased who told them that Bound had asked him to sell "speed" for him at his work, that he had at first said yes as he needed the extra cash but he could not do it in the end. He acknowledged owing Bound $300, but said it was for rent and nothing more. The deceased also told police that he owed Bound money because Bound had asked him to sell an "8 Ball of speed". The deceased told police that he had sold it all, but did not pay Bound the money because "I am a new dealer. A lot of people wanted to trial it first".

Events on the night of 6 January 2008

[19] On the night of 6 January 2008 an occupant of the room adjacent to Belford's room at the Rising Sun Hotel heard three loud thumps and a male person faintly moaning. He heard further loud thumps and shortly after saw Belford go for a shower. Another resident was awoken by the sounds of someone groaning and thumping sounds. Police were called and arrived at 12.17 am on Monday, 7 January 2008. Belford was located seated on the balcony outside the residential rooms. When police entered Belford's room they found Bound sitting on the bed next to the body of the deceased. The deceased's body was covered by a doona.

[20] An autopsy found multiple injuries to the deceased including extensive bruising, abrasions and lacerations. Four of the lacerations were deep, parallel lacerations to the right forehead, consistent with repeated application of a moderate degree of force by a blunt object or heavily shod foot. The autopsy reported that the deceased suffered "multiple blunt force trauma to his body, particularly to his head and thorax region". An anatomical cause of death could not be established. It was possible that the deceased suffered "a concussive-type injury which can lead to apnoea and death" and an element of neck compression could not be excluded, given the bruising to the neck. The cause of death was attributed to the combination of head and neck injuries.

Subsequent events

[21] Belford told police that on the Sunday night Bound had arrived at the hotel, and he took him up to his room, whereupon Bound took out a machete that had been hidden down the front of his overalls. Belford had zip ties that he intended to use as handcuffs. Bound hid in his bathroom, and he then called the deceased into his

room, where he was attacked. He says that he put the deceased in a headlock, but the deceased was making a lot of noise. He says that Bound started punching the deceased in the back and about the head and then started smacking into him with the machete. Belford picked up a sharpening steel (a metal bar used to sharpen knives) and hit the deceased in the head twice. The deceased denied having AIDS, but Belford responded that he was a liar. Belford says that Bound began jumping and stomping on the deceased's head. The deceased bit Belford on the finger, and Belford responded by punching him in the head.

[22] Belford says that he was worried about the noise that had been caused and went outside of the room. He encountered a resident who had heard a cry for help and he told him not to say anything to anyone. Belford says that he returned to the room, and saw the deceased covered in blood. A slight pulse was found but when Belford checked again later there was no pulse. Belford says that Bound said to him "You took it too far", to which he responded "I didn't do it mate. We're both in it too mate". He says that he was surprised when he came back into the room because it appeared that Bound had "kicked the shit out of Wayne and when I'd left Wayne was still talking".

[23] Bound initially told police that he had not been present for any assault on the deceased. He initially told police that Belford had telephoned him on the Sunday night distraught, that he drove to the hotel and went upstairs to Belford's room where he found the deceased with blood all over him. He said that the machete in the room had been stolen from his house by either Belford or the deceased. He denied striking or hitting the deceased at all. He later changed that account and admitted that he was present when the deceased was assaulted.

[24] A forensic examination was undertaken at the Ipswich Watchhouse of each defendant, and at about 1 pm on Monday, 7 January 2008 Bound requested a second interview in which he said he wanted to change his version and that he was present in the room when the deceased entered it. Police recorded a brief confirmation of what Bound told them at the watchhouse, namely that he took part in the assault, however, it was Belford who had "gone overboard" and that Bound had warned him to stop hitting the deceased because he was going to kill him. Bound did not participate in a formal record of interview.

[25] A covert police officer was placed into a cell with Bound on the afternoon of 7 January 2008. These conversations were recorded but the quality of the recording is poor. The covert police officer says that during his conversations with Bound, Bound said that Belford called him and that he had hid in Belford's toilet until the deceased arrived in the room. He said "I'm fucked because they got my boots and his blood is all over them". He said that the police were going to find his boot prints on the deceased's back, and indicated an area from the top of the left shoulder down to the hip. According to the police, Bound went on to say that Belford "just kept hitting him and I was trying to get him off". He says that the deceased kept trying to get up and "that's when I was kicking him to keep him down".

[26] Bound's boots were forensically examined and found to have the deceased's blood on them. Bound and Belford were each found to have abrasions and bruising to their hands.

Is the case against Bound significantly weaker than and different to that admissible against Bedford?

[27] The prosecution correctly submits that there is a significant body of evidence that is admissible against Bound that he was involved in the assault on the deceased. It may be summarised as follows:

(a) Threats made to assault, bash or kill the deceased;

(b) The motive of an unpaid debt, including evidence of an unpaid drug debt;

(c) Bound's presence at the scene of the crime;

(d) The presence of a weapon, namely a machete, taken from Bound's house, at the scene of the crime;

(e) The presence of the deceased's blood on the top of Bound's boots;

(f) Injuries to Bound's hands;

(g) Admissions, both recorded and unrecorded, that Bound had assaulted the deceased.

[28] Counsel for Bound acknowledged that the case against him could not be described as weak, but submitted that it was significantly different to the case against Bedford.[18]

Is the evidence highly prejudicial?

[29] The "real issue" in Bound's case was submitted to be proof of his participation in the assault as a basis to establish that he was either the killer or aided the killer so as to be responsible under s 7. The issue of Bound's participation was addressed in Belford's statements to the police. These statements are not admissible against Bound, but are submitted to be gravely prejudicial to him because they attribute significant violence to him.

[30] Upon the hearing of the application Counsel for Bound accepted that the disadvantage of having a co-accused give an out of court statement of what the accused is alleged to have done is commonly encountered in cases of this kind, and ordinarily the fact that one accused casts blame on the other does not lead to a separate trial being granted. Still, the issue of Bound's participation was said to have been canvassed in detail, and to his prejudice. However it was not submitted that the inadmissible evidence was not able to be isolated.

[31] I do not consider that the existence of the evidence that is inadmissible against Bound consisting of Belford's statements about Bound's alleged acts towards the deceased in the hotel room, and which carry the risk of prejudice, provides a sufficient justification to order separate trials. I have not been persuaded that the risk to a fair trial of the case against Bound cannot be "obviated by express and careful directions to the jury as to the use they can make of the evidence so far as it concerns each accused".[19]

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18 Transcript 23 October 2009, 1-5.

19 *Webb v The Queen* (supra) at 89.

[32] The case against Bound is not of the category discussed in *Piller*, namely a significantly weaker case where there is a real risk that the weaker case "will be made immeasurably stronger" by reason of this prejudicial material.

[33] Counsel for Bound points to other parts of Belford's statements that cast Bound in a poor light, and submits that this additional material cannot be adequately addressed by directions to the jury to disregard it in considering the evidence against Bound. I am conscious of the need to not compartmentalise the evidence that is inadmissible against Bound, and that regard should be had to its possible prejudicial effect as a whole, despite directions to the jury, on its consideration of the issue of whether Bound participated in the assault on the deceased. However, it is convenient to separately describe aspects of the evidence.

Evidence of lies and manipulation

[34] The first evidence pointed to is paragraph 6 of Belford's statement dated 7 January 2008 which relates to the start of 2007 when Belford moved into the home occupied by his father and Vivian Bound:

> "Not long after I moved in, Raymond BOUND moved back to the house and lived in the granny flat down the back of the house. He had been living in Melbourne and was Vivian's ex husband and he said that he was dying and he had cancer and that he needed to come back and live there and we were to help him out and look after him. I later found out all this was lies just so he could get back to the house and live there."

[35] The evidence of Bound lying about having cancer is not evidence that the prosecution intends to rely upon, and the prosecution was prepared to exclude this paragraph, subject to Belford wishing to rely upon it.[20] It is not something that seemingly is put forward by Belford as explaining his later actions.[21] Counsel for Belford acknowledged that he could not submit that its exclusion would lead to such prejudice to his client as to lead to an unfair trial,[22] but submitted that it formed part of the relationship between the two, and might have some small degree of relevance in determining whether, for example, Belford could have been deceived by Bound's actions or expressions.

[36] I am not persuaded that the probative value of the statement, either for proof of the relationship or otherwise, would be compromised by the exclusion of paragraph 6. However, the evidence of Bound lying about having cancer, whilst discreditable, is not highly prejudicial. It does not suggest a propensity to commit acts of violence. There is no real risk that the jury will reason in this way, or that its prejudicial impact in this or any other way cannot be addressed by suitable directions. It has a potential relevance to the nature of the relationship between Bound and Belford, and Belford's preparedness or otherwise to aid him.

[37] Similar conclusions apply to paragraph 21 of the statement which relates to steps taken by Bound to procure the deceased being sacked from his job after Bound told

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20 Transcript 1-20.

21 cf the reliance placed by Jones in *R v Roughan & Jones* (supra) on evidence that Roughan was charged with stabbing a friend, being evidence relied on by Jones to explain his failure to intervene to prevent the assault or to denounce Roughan promptly to the police.

22 Transcript 1-22 lines 20-35.

the deceased's employer that the deceased was on ecstasy and other drugs. This evidence was said to show that Bound was manipulative. To the extent that it might indicate that Bound lied about the deceased's drug use in order to have him sacked, or had a tendency to lie in order to get his way, or to manipulate people to obtain his objectives, the evidence is to Bound's discredit. However, it does not suggest a propensity to commit acts of violence, and its prejudicial impact can be the subject of suitable directions.

Evidence of Fights

[38] Paragraph 7 of Belford's statement refers to a "big fight" between his father and Bound in which his father "bashed Ray fairly bad", following which Belford's father and Vivian Bound split up and his father "got kicked from the house". Nothing in the statement suggests that Bound was the aggressor in the fight. If anything, Belford's father seems to have been the aggressor. Incidentally, Vivian Bound's evidence is that it was Brett Belford who went "crazy", started smashing things in the house, leading her to call police who arrested Brett Belford, following which he never returned to the house. In a recorded police interview Belford says that his father "had a little bit of trouble with Ray" and got "kicked out of the house". The evidence from Belford of a fight between his father and Bound is not highly prejudicial since Bound is not said to have been the aggressor.

[39] Paragraph 25 of the same statement contains an account of Bound "causing shit, fighting with people and arguing all the time", being the reason that Belford moved out of the house in which Bound lived. The reference to fighting is not clearly a reference to physical fights however the jury might so interpret it. It suggests an aggressive character, but not necessarily a person with the propensity to commit acts of the kind of violence alleged against the deceased. No reference is made to injury to individuals or the intervention of the police. Whilst potentially prejudicial, the risk of prejudice is capable of being adequately addressed by directions concerning the use of this evidence.

[40] Counsel for Belford did not suggest that reliance was to be placed on this evidence as evidence of a propensity to commit murder. If, however, Belford intends to rely upon it for such a purpose a number of issues will arise for consideration. The first is whether the evidence shows a propensity to violence or a propensity to violence of a particular kind.[23] The evidence must be relevant in the sense that it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings.[24] Evidence which does not show such a propensity does not present the same difficulties as evidence that is adduced by an accused about the propensities of a co-accused.

[41] As presently indicated, the evidence in question is relied upon by way of background in explaining Belford's reason for moving out of home before Christmas 2007, and not as propensity evidence against a co-accused. If, however, the evidence is admissible in Belford's favour as propensity evidence about his co-accused, then further consideration of the issue will be required, and it may present difficulties for the conduct of a joint trial. These include the matters referred to by Hayne J in *Jones v R*[25] and whether directions on propensity will

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23 *Jones v R* (2009) 254 ALR 626 at 632 [22].

24 Ibid.

25 Ibid at 635 [37].

require the jury to perform "remarkable mental feats".[26] However, I presently consider that the evidence of Bound's involvement in fights is not highly prejudicial, and can be the subject of suitable directions.

Drugs

[42] Evidence will be called in the prosecution case concerning Bound's dealing in drugs, and specifically that the deceased owed Bound money for drugs that the deceased had been dealing for him. This will be in the form of statements made at Bound's home on 26 December 2007, when in separate statements, the deceased alleged, and Bound denied, that the deceased owed Bound money for drugs. Bound said that the deceased owed him money for rent and the telephone.

[43] Paragraph 19 of Belford's statement of 7 January 2008 contains an assertion that the deceased had told people that Bound had been getting drugs for him. The admissibility of that paragraph as evidence that Bound dealt in drugs was not addressed at the hearing, nor was its admissibility for any other purpose.

[44] In a recorded interview on 7 January 2008 (lines 264–266) Belford told police that "Ray reckoned that [Wayne] owed him thousands of dollars for another situation that the police have already looked into" and later said "I know Wayne was dealing drugs or something but I'm not too sure, but it could be on police file here or something" (lines 681-682). These references do not clearly refer to Bound dealing in drugs, but in combination with other evidence might be taken to refer to allegations that the deceased owed Bound a drug debt. In a recorded "walk-through re-enactment interview" conducted on 8 January 2008 (page 45 line 23) Belford stated that Bound "deals with drugs and stuff like that".

[45] Belford's reference to Bound dealing in drugs is not admissible in the prosecution case against Bound. Arguably, it is relevant to Belford's defence. It was submitted by counsel for Belford that the statements relating to drugs were important, first of all, in characterising Belford's knowledge of "the type of person" Bound is, and also is relevant to the jury's consideration of whether Belford would knowingly aid Bound in the offence. It was also submitted to be relevant to Bound's motivation in participating in the assault on the deceased and that it was important in Belford's defence to show that Bound had a motive and interest in the deceased.[27]

[46] Statements made by Belford to the police that implicate Bound in drug dealing are not the only evidence concerning Bound's alleged dealing in drugs. In that regard, the evidence is not as prejudicial as might have been the case if there was no evidence admissible against Bound in relation to drugs. However, a source of prejudice is that it tends to add weight to the assertions of the deceased and Bound is at the disadvantage that the statements of the deceased, admitted pursuant to s 93B of the *Evidence Act*, cannot be the subject of cross-examination of the maker of the statements. Their admission is subject to warnings to the jury. However, Belford's statements about Bound's drug dealing would tend to confirm them.

[47] Whilst the evidence in Belford's statements about Bound's alleged drug dealing are prejudicial, I am not persuaded that they are so highly prejudicial that their prejudicial effect cannot be addressed in directions to the jury. I am not persuaded that the prosecution case against the applicant, which consists in part of evidence

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26 *Winning v R* (supra) at [42] cited in *R v Roughan & Jones* (supra) at 400 [56].

27 Transcript 23 October 2009 pp 1-23–1-24.

that Bound dealt in drugs and supplied drugs to the deceased, will be made significantly stronger by reason of Belford's statements concerning Bound's dealing in drugs.

[48] Belford's statements about Bound and drugs portray Bound as a disreputable character. However, these statements are not apparently advanced as propensity evidence, namely that Bound's alleged involvement in drug dealing is evidence of a propensity to commit serious violence of the kind that he is alleged to have committed in assaulting the deceased. Counsel for Belford did not indicate an intention to rely upon Belford's statements about Bound dealing with drugs as evidence of a propensity to commit the kind of violent crime which Bound is alleged to have committed against the deceased. It is open to Belford to rely upon statements made in the police interviews concerning Bound's drug dealing in the manner indicated by his counsel, as evidence going to Belford's knowledge of the type of person Bound is, and, accordingly, the likelihood that Belford would knowingly assist him to kill the deceased. The statements may also be relied upon by Belford, in conjunction with other evidence about drug dealing, as indicating that the debt owed by the deceased was for drugs, and therefore as being relevant to Bound's motivation to assault the deceased. The statements made by Belford that Bound dealt in drugs are clearly prejudicial. However, I do not consider that their prejudicial impact is likely to be so high that they cannot be addressed by appropriate directions.

Other matters

[49] Belford told police that Bound had been stalking the deceased at work and that the deceased "had a bit of trouble with him there" and had a DVO on Bound.[28] There is evidence which is admissible against Bound, including evidence from police, concerning threats that he made against the deceased. The deceased's grandmother, who is a potential witness, refers to the deceased's intent to apply for a Court order against Bound.

[50] Belford told police that after the deceased died Bound went through his wallet.[29] This statement and a statement that Bound asked the deceased for his PIN number during the assault is evidence upon which Belford may rely as indicating Bound's motivation to recover monies owed to him.

[51] Paragraph 72 of Belford's statement consists of a statement attributed to Bound after the deceased's death in which Bound is alleged to have said that he had "no pity for Wayne". The statement is indicative of a callous nature.

Discussion

[52] Discussion of the admissibility and use of the contentious evidence starts with the general proposition that all evidence, including that adduced by an accused in order to raise a doubt as to guilt, must be relevant in the sense that it could rationally affect, directly or indirectly, the assessment of the probability of a fact in issue in the proceedings.[30] Evidence which tends rationally to show that the character and personality of one co-accused is such that he or she, rather than the other co-accused, is the guilty person will be admissible.[31] Evidence as to the character of a

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28 Police record of interview of "walk-through" on 8 January 2008, p 45 lines 40–48.
29 Ibid at p 31.
30 *Jones v R* (supra) at 632 [22].
31 *R v Beckett* [2009] QCA 196 at [33].

co-accused is not at large.[32] It will be admissible, at the instance of another accused, if it can be shown to be relevant to an issue in the case.[33]

[53] Certain evidence of bad character, such as previous convictions for serious criminal offences, may have probative value where the credit of the accused is an important issue.[34] Such evidence of bad character may mean that the person's exculpatory assertions might be treated as having less weight than otherwise would have been the case.[35] Where the evidence is relied upon as evidence of a propensity to commit a crime of violence of the kind with which the accused in charged, in this case murder, the evidence must have "the capacity to rationally bear on the determination of the likelihood that it was he who carried out the murderous assault".[36] As *R v Roughan & Jones* illustrates, convictions for certain criminal offences, including the use of illegal drugs and common assault, may be incapable of proving a propensity to commit a violent murder.[37] A distinction exists between a general disposition to commit crime and a disposition to commit the particular crime charged.[38]

[54] If evidence is admissible at the instance of an accused in a case such as this in relation to the character of a co-accused, for instance because it is relevant to the nature of their relationship, or is probative of the co-accused's credit or otherwise rationally affects the probable existence of a fact in issue, the discretion to exclude it due to its prejudicial effect on the co-accused is constrained by the need to accord the accused a fair trial.[39] In *R v Roughan v Jones*[40] it was accepted that certain prejudicial evidence might have been excised without compromising proof of the relationship between the two accused. However, where admissible evidence cannot be excluded without compromising the fair trial of a co-accused who wishes to rely upon it in his or her defence, it may be necessary to order separate trials.

[55] As the authorities earlier discussed show, whether a separate trial will be ordered depends upon an assessment of the prejudicial effect of the evidence upon the trial of the accused against whom it is not admissible, and whether that risk may be obviated by directions to the jury. Evidence in police interviews in which an accused implicates a co-accused is commonly received in joint trials, subject to directions to the effect that when considering the case of the co-accused they should exclude the statement from their minds.[41] As a commentator observed: "Our laws of evidence require juries to perform remarkable mental feats of this nature".[42] Appellate authorities in favouring joint trials in cases in which one accused seeks to cast the blame on another proceed on the assumption that, at least where the evidence can be isolated, such directions will be understood and followed.

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32 *Winning v R* (supra) at [40] citing Devlin J in *R v Miller* (1952) 36 Cr App R 169.
33 *Winning v R* (supra) at [40].
34 Ibid at [32].
35 *R v Roughan & Jones* (supra) at [82], 104].
36 *Jones v R* (supra) at 632 [21].
37 *R v Roughan & Jones* (supra) at 410 – 411 [105].
38 Butterworths, *Cross on Evidence Australian Edition*, Chapter 11 at [21050].
39 Some authorities are to the effect that there is no such discretion: *Cross on Evidence* (ibid) [21215] n 5. Dicta in *R v Roughan & Jones* (supra) at 400 [57] and 407 [92] accepted that evidence can be excluded.
40 Supra at 400 [57] and 407 [92].
41 *R v Gibb and Mackenzie* [1983] 2 VR 155 at 163–164.
42 Ibid.

[56] Additional problems, however, are recognized in cases in which the evidence relied upon by the accused is propensity evidence. In addition to the difficulties identified by Hayne J in *Jones v R*,[43] in some cases no directions may be adequate to ensure that the jury could be expected to perform the remarkable mental feats required of them.

[57] In summary, the mere reception of evidence of other criminal activities by an accused, or evidence of his or her bad character, is not a sufficient ground to order separate trials.[44] Evidence of the bad character of an accused, including evidence of criminal acts, that is admissible at the instance of a co-accused will not necessarily result in a separate trial. Whether separate trials will be ordered depends upon, amongst other things, how prejudicial the evidence is, whether that prejudice can be remedied by directions that the jury will understand and follow and whether highly prejudicial material will make a weaker prosecution case immeasurably stronger. Against that background I turn to assess the issue of prejudice.

[58] I have separately addressed various items of prejudicial evidence contained in statements made by Belford to the police. Some matters, such as steps taken by Bound to have the deceased dismissed from his employment, arguably fail the test of relevance. However, they are relied upon by counsel for Belford as relevant to Belford's knowledge of Bound's character and have some relevance to Belford's case concerning the probability or otherwise that he would aid someone with such a character to violently assault the deceased. Certain statements by Belford which have a marginal relevance to the case for and against Belford might be excluded without prejudicing the fairness of Belford's trial, and so much was acknowledged by counsel for Belford in relation to his statement that Bound lied about having cancer. The exclusion of such evidence would be justified if it had marginal relevance but was highly prejudicial. At this stage I do not propose to exclude such evidence because counsel for Belford says that it has a relevance to the relationship between his client and Bound, and his client's belief that Bound was a liar. I do not consider that statements made by Belford to the effect that Bound lied and was manipulative have such a high prejudicial impact that their impact cannot be the subject of suitable directions.

[59] The most prejudicial evidence in Belford's statements concerning Bound relate to acts of violence allegedly perpetrated by Bound on the night in question. These are inadmissible in the case against Bound, but admissible in the trial of Belford in his favour as suggesting that it was Bound who killed the deceased. This evidence concerning Bound's alleged acts of violence, whilst prejudicial, is readily identifiable. It is not "difficult to disentangle" or isolate and, as in other cases in which one co-accused seeks to cast the blame on another, can be the subject of suitable directions about its admissibility and use. There is not a proper basis to depart from the assumption that the jury will understand and follow such directions.[45]

[60] Counsel for Bound emphasised that the application for a separate trial did not rest on a difficulty of disentangling evidence that is admissible only against Belford. It was effectively accepted that Belford's allegations that Bound was the perpetrator could be easily identified and isolated. The application for a separate trial was

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43 Supra at 635 [37].

44 *R v Gibb and Mackenzie* (supra) at 166.

45 *R v Davidson* (supra) at [13].

based upon the fact that the evidence went further and alleged Bound's involvement in other unlawful or otherwise disreputable behaviour. I have given separate consideration to this evidence, but it is necessary to have regard to its cumulative prejudicial impact. It was effectively summarised by Belford's statement during the "walk-through re-enactment interview" when he referred to Bound as a "constant liar" who "deals with drugs and stuff like that". Whilst these statements are prejudicial in that they allege that Bound was involved in drugs and was otherwise disreputable, the statements are not apparently relied upon as evidence of a propensity to commit violent crime. They are, nevertheless, prejudicial. However, I do not consider that they are so prejudicial that they cannot be negated by appropriate directions.

[61] The matter involves a substantial body of evidence that is admissible against both Belford and Bound. The prosecution case against each has differences, particularly concerning their respective motivations. Although the evidence against Bound differs in some respects to that which is admissible against his co-accused, the prosecution case against Bound is not a weak one. No such submission was made, nor could it be made. This matter does not involve a significantly weaker case that will be made "immeasurably stronger by reason of the prejudicial material".[46]

[62] The prejudicial material in Belford's statements to police about Bound's actions on the night of 6 January 2008 can be readily identified and the subject of appropriate directions. The other prejudicial material identified by counsel for Bound is to the general effect that Mr Bound is a disreputable character who lies and is involved in dealing in drugs. Most of this material cannot be excluded without an effect on Belford's case because it relates to Belford's knowledge of Bound's character which is a relevant issue, as well as Bound's alleged motivation to assault the deceased. The evidence is not relied upon by Belford as evidence of a propensity to commit the kind of violent attack that Bound is alleged to have committed against the deceased. As I have explained, references to Bound's previous involvement in fights do not refer to violent fights in which Bound is alleged to have been the aggressor and the inclusion of references to these fights was as part of Belford's narrative concerning the circumstances under which he left home and, more generally, his adverse view of Bound.

[63] The statements made by Belford to the effect that Bound lied, was involved in drugs and was generally a disreputable character who fought and argued with people all the time is relied upon by Belford as relevant to his relationship with Bound, his knowledge of the type of person that Bound was and Bound's motivation to recover a debt from the deceased. It is not relied on as evidence of Bound's propensity to commit a violent crime of the kind with which he has been charged, and it will be necessary to give directions to the jury to the effect that the evidence cannot be relied upon as evidence of a propensity to commit the kind of offence with which Bound is charged.

Conclusion

[64] The statements of Belford include material which is prejudicial to Bound. However, this is not a case in which the case against Bound is weak or one in which the case against him will be made immeasurably stronger by reason of the prejudicial material. A risk exists that the case against Bound will be influenced by

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46 *R v Piller* (supra).

the prejudicial material. However, I have not been persuaded that such prejudice cannot be appropriately addressed by directions concerning the use and admissibility of those statements, or that such directions will be ignored by the jury.

[65] My present assessment of matters is based upon my understanding that the material in Belford's statements is not capable of proving a propensity to commit the kind of violent offence with which he has been charged, and is not relied upon by Belford as proving that Bound had such a propensity. If, however, Belford sought to rely upon the evidence as proving Bound's propensity to violence, or propensity to violence of a particular kind, then it would be necessary to consider whether the evidence could be said to be relevant and capable of establishing such a propensity and, if so, the implications of relying upon the evidence for such a purpose for the conduct of the trial. This would include the extent to which the trial might be diverted "into the byways of collateral issues about the nature, extent and probative significance of these propensities",[47] and whether directions on propensity would require the jury to perform the kind of "remarkable mental feats" that they could not be expected to perform. As indicated, I do not understand that Belford proposes to rely upon the contentious evidence as proof that Bound had a propensity to violence or a propensity to violence of a particular kind. On that basis, I do not consider that the jury will be required to perform "remarkable mental feats" that would make it appropriate to direct a separate trial. Instead, the prejudicial evidence should be the subject of suitable directions.

[66] In the interests of ensuring a fair trial, those directions should be formulated in draft form in advance of the trial, and submissions will be received as to the directions that should be made at the commencement of the trial and during it to obviate the risk of prejudice. The matter will be listed for further review before me for such a purpose.

[67] The applicant has not established that a joint trial would be an unfair one which would result in positive injustice. I decline to direct a separate trial.

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47 *Jones v R* (supra) at 635 [37] per Hayne J.