CITATION:	*The King v Swan* [2024] NTSC 82
PARTIES:	THE KING
	v
	SWAN, Rebecca
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory Jurisdiction
FILE NO:	22037672
DELIVERED:	3 October 2024
HEARING DATE:	3 October 2024
JUDGMENT OF:	Grant CJ

REPRESENTATION:

Counsel:

Crown:	A Lonergan
Accused:	C Voumard with D Gorry

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The King v Swan [2024] NTSC 82
No. 22037672

BETWEEN:

THE KING

AND:

REBECCA SWAN

CORAM: GRANT CJ

EDITED REASONS FOR DECISION
(Delivered *ex tempore* on 3 October 2024)

[1] This matter was first listed for trial at the criminal call over on 29 March 2023. At no time in any of the subsequent pre-trial hearings or iterations of the Schedule 2 certifications has the defence identified any issue required to be dealt with by way of preliminary determination or advance ruling. Now, three working days out from trial, the defence has raised a number of issues which it says require determination in advance of trial. Although two of those issues relate to the admissibility of evidence which is the subject of continuing discussions between the Crown and defence and may fall away, the other two issues require determination in advance of the trial and prior to the empanelment of the jury.

The charges and Crown case

[2] The accused is charged by indictment dated 15 March 2023 with one count of property damage, one count of unlawfully causing serious harm to the female complainant and one count of aggravated assault of the male complainant. They are counts 1, 2 and 3 on the indictment respectively. The Crown case in relation to those charges may be summarised briefly as follows.

[3] The accused and the male complainant were married at the time of the alleged offending. The male and female complainants were old family friends. The accused suspected that the male complainant was engaged in a sexual liaison with the female complainant and was jealous as a result of that suspicion, and sexually jealous in a more general sense.

[4] On the evening of 7 November 2020, the male complainant was drinking with the female complainant and other friends at a local club. Later that evening, the female complainant drove the male complainant and his cousin to a different licensed venue. After a short time there, the female complainant drove the male complainant back to his cousin's house where he was apparently staying. The male complainant got out of the vehicle, walked to his cousin's house, knocked on the bedroom window and was let into the house by his cousin.

[5] As that was happening, the accused drove along the street in another vehicle and pulled up in front of the female complainant's car. It is alleged that the accused got out of the vehicle holding a wooden bat approximately one metre in length. The accused then smashed the windscreen and driver's side window of the female complainant's car with the bat. The accused then struck the female complainant in the face with the bat causing fractures to her eye socket and nose and causing glass to enter her eye. The female complainant reversed her car away from the accused and drove to a relative's place for assistance. Police and an ambulance were subsequently called and attended at approximately 11 PM that night.

[6] During the course of the attack the male complainant could hear the sound of glass smashing. He looked outside and saw that the female complainant had left the vicinity and that the accused was standing on the street yelling at him. He then went to sleep in the spare room of his cousin's house.

[7] The medical evidence is said to establish that had the female complainant not undergone medical treatment it is more than likely that she would have suffered an infection of her eye which could have resulted in impaired vision and an infection of her sinus which could have caused chronic illness and nasal deformity.

[8] It is then alleged that on the following morning, which was the day of 8 November 2020, the male complainant was woken up by the accused banging on the front door of his cousin's house and yelling for him to open it. By the time he got up and dressed himself, the accused was sitting inside her vehicle outside the house. The accused got out of the car holding a cricket bat, walked up to the male complainant and struck him with the bat to the left and right forearms, left hand, back and face. As a consequence, the male complainant suffered a dislocated and fractured finger and lacerations to his lip and face requiring sutures.

Severance and separate trials

[9] The first application made by the defence is for a ruling pursuant to s 341 of the *Criminal Code 1983* (NT) that count 3 in relation to the male complainant be severed from the indictment and tried separately from counts 1 and 2 in relation to the female complainant. The grounds for that application are said to be:

(a) counts 1, 2 and 3 do not form a series of offences permitting their joinder in the one indictment under s 309 of the *Criminal Code*;

(b) the evidence in relation to counts 1 and 2 on the one hand, and count 3 on the other hand, is not mutually admissible; and

(c) the accused is prejudiced in her defence by being charged with two separate incidents of alleged violent offending in the one indictment.

[10] Section 309 of the *Criminal Code* is an adoption by the legislature of the common law principle under which charges could be joined in the same indictment if they formed part of "a series of offences of the same or a similar character". The first statutory enactment of that principle was made in England in 1915. The Northern Territory section relevantly provides:

> **Circumstances in which more than one charge may be joined against the one person**
>
> (1) Charges for more than one offence may be joined in the same indictment against the same person, whether he is being proceeded against separately or with another or others, 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.
>
> (1A) To avoid doubt, charges for more than one offence may be joined in the same indictment even if the offences are alleged to have been committed against different persons.
>
> (2) ...

[11] Accordingly, the necessary precondition to joinder is either that the charges are founded on the same facts and/or that they form part of a series of offences of the same or similar character and/or that they form a series of offences committed in the prosecution of a single purpose. As the provision makes express, the fact that the offences are alleged to have been committed against different persons does not preclude joinder.

[12] It is obviously not asserted by the Crown that the charges are founded on the same facts or that the offences were committed in the

prosecution of a single purpose in terms of the individual assaults alleged to have been perpetrated against each complainant. The relevant question is whether the charges form part of a series of offences of the same or similar character. The meaning of the word "series" in this context has been said to be somewhat vague, but connotes some connection between the crimes: see *Packett v The King* (1937) 58 CLR 190 at 207; *Sutton v The Queen* (1984) 152 CLR 528 at 540-541. The analysis of connection is directed more to the legal character or components of the offences than to the facts alleged by the prosecution in each particular instance: see *De Jesus v The Queen* (1986) 61 ALJR 1 at 9. What is required is some nexus or similarity between the offences which in all the circumstances of the case enables them to be described as a "series": see *R v PJMS* [2011] NTSC 48 at [10].

[13] The counts in this matter have a patent nexus or similarity given that each offence is connected by the accused's alleged motive of sexual jealousy, the relationship between the accused and complainants *inter se*, and the similarity between the offences in terms of character, componentry, the type of weapon allegedly deployed, *locus* and temporal proximity. So far as the type of weapon involved is concerned, I approach with some circumspection the defence suggestion that the evidence is unequivocally to the effect that the first weapon was a nulla nulla and the second weapon was a wooden cricket

bat. In both cases, the damage is alleged to have been inflicted by a wooden implement approximately one metre in length, the precise characterisation of which on each occasion will not be known until trial. So far as motive is concerned, I also treat with circumspection the defence submission that the Crown case in that respect is predicated solely on the female complainant's account of what the accused said to her on the night in question, and the male complainant's account of what the accused said to him the following morning. The Crown case in relation to motive is not framed in that limited or restricted fashion. Having regard to those features, the offences clearly form part of what might generally be described as a single or continuing course of conduct.

[14] The fact that all the evidence in relation to the charges may not be mutually admissible does not preclude their joinder in the one indictment. For the reasons described further below in the context of prejudice, however, much of the evidence in this case is mutually admissible.

[15] It follows from the relationship between the two incidents that the joinder of the three counts in the one indictment was permissible under the terms of s 309 of the *Criminal Code*. That leaves the question whether the joint trial of those counts would give rise to prejudice in the relevant sense. Section 341 of the *Criminal Code* provides:

Separate trials where 2 or more charges against the same person

(1) Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in his defence by reason of his being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any offence or offences charged in an indictment the court may order a separate trial of any count or counts in the indictment.

(1A) Subsection (1) applies subject to section 341A.

[16] Although a lack of mutual admissibility will not warrant an order for separate trials in and of itself, separate trials will be ordered where there is a real risk of prejudice that cannot be allayed by directions from the trial judge. In the exercise of that discretion, the dominant consideration remains ensuring that an accused is not deprived by prejudice of a fair trial. The notion of prejudice in this general context "means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate": see *HML v The Queen* (2008) 235 CLR 334 at [12]. Similarly, the loss by an accused of the strategic advantage of conducting his or her defence to a particular count in isolation does not of itself constitute prejudice in the material sense. Something more is required, such as the misuse of evidence on one charge to support a conviction on another charge for which it would be inadmissible.

[17] That consideration focuses attention on the relationship between the evidence to be received in relation to counts 1 and 2, and the facts

alleged in count 3. If the evidence in relation to counts 1 and 2 is irrelevant to the proof of the allegation contained in count 3, there is a greater risk of misuse. That proposition has obverse application to the relevance of the evidence to be received in relation to count 3 to the facts alleged in counts 1 and 2.

[18] There is no application by the Crown in this case that the evidence be mutually admitted for tendency purposes. However, that does not preclude mutual admissibility for a non-tendency purpose. The admissibility of evidence for non-tendency purposes is governed by the general test of relevance in s 55 of the *Evidence (National Uniform Legislation) Act 2011* (NT). The possible non-tendency purpose in this particular case is evidence for the purpose of context. In *HML v The Queen* (2008) 235 CLR 334, various members of the High Court observed that evidence of other conduct by an accused may be admissible:

(a) as essential background against which the evidence of the complainant and the accused necessarily falls to be evaluated, to show the continuing nature of the conduct, and to explain the offences charged;

(b) to overcome a false impression that the event in question happened "out of the blue", where the acts are closely and inextricably mixed up with the history of the offence;

(c) to assess the credibility of a complainant's evidence; and

(d) to ensure that the jury is not required to decide issues in a vacuum, and to negative issues concerning identity and lawfulness.

[19] In order for context (or relationship) evidence to be relevant it must be shown that the evidence would make the complainant's version of the particular incident subject to the charge more capable of belief when seen in the broader context or relationship. The evidence in proof of one charge may assume relevance in relation to another because it provides essential background to that other charge, and avoids the jury having to decide the matter in an artificial and individualised context for each episode of alleged offending.

[20] The evidence to be led by the Crown to prove the offences charged in counts 1 and 2, if accepted, is manifestly relevant in the assessment of the evidence concerning count 3. It has the clear potential to inform the assessment of the credibility and coherence of the male complainant's evidence. That is because it provides a history and context which has the potential to avoid any false impression or suggestion that the accused presented at the male complainant's residence on the morning in question and proceeded to assault him as an entirely isolated interaction without history, explanation or motive. The relevance, purpose and probative value of evidence received for that purpose is quite different and distinct from a tendency purpose.

[21] In addition to that ground of purpose and relevance, the evidence in relation to counts 1 and 2 is also relevant and admissible as evidence of the accused's disposition late on the night of 7 November 2020 because it may inform an assessment of the accused's disposition early on the morning of 8 November 2020: see, by way of analogy, *R v Sullivan* [2002] NSWCCA 505 at [13]. This is because the conduct of the accused in relation to the male complainant is closely related in time and circumstance to the conduct alleged in counts 1 and 2. In those circumstances, the evidence will have substantial probative value both as to whether the conduct alleged occurred and the accused's state of mind and attitude at the time: see, for example, *O'Leary v The King* (1926) 73 CLR 566 at 577-578; *R v Adam* (1999) 106 A Crim R 510 at 515-516; *Semaan v The Queen* [2013] VSCA 134 at [32]. Again, that purpose is quite distinct from a tendency purpose. On the face of the matter, the two incidents are sufficiently proximate in the temporal sense to sustain a finding of admissibility on that ground. Whether they are sufficiently proximate in time and similar in circumstance to inform the fact-finding process will ultimately be a matter for the jury.

[22] In a similar way, evidence of the accused's disposition at the time of the incident constituting count 3 is relevant and admissible in relation to counts 1 and 2. Apart from the question of disposition, the Crown evidence in relation to Count 3 to the effect that the accused assaulted

the male complainant in a jealous rage informs the question of motive for the conduct said to constitute counts 1 and 2.

[23] To the extent that the defence submits that the male complainant's evidence concerning the first incident is irrelevant and inadmissible in relation to the second incident, that submission must be rejected. The male complainant's evidence in that respect is that he saw the accused's car come down the street outside his cousin's residence on the night of 7 November 2020 prior to the assault on the female complainant, and that he heard the accused's voice during the course of that incident. For reasons already described, the presence of the accused in that location with that disposition and for that apparent purpose on the previous night is relevant and admissible in relation to the offence charged concerning conduct early on the following morning.

[24] For those reasons, the evidence in relation to each count is relevant and probative in the proceeding as context, relationship and disposition evidence concerning each other count because, if accepted, it could rationally affect various facts in issue. I turn then back to the question under s 341 of the *Criminal Code* of whether the separate trials should be ordered by reason of prejudice to the accused, and the related question under ss 135 and 137 of the *Evidence (National Uniform Legislation) Act* of whether the probative value of the evidence otherwise mutually admissible as context, relationship and disposition

evidence is outweighed by the danger of unfair prejudice to the accused.

[25] The exercise of the discretion under s 341 of the *Criminal Code* is guided by a number of considerations: see generally *R v KRA* [1999] 2 VR 708 at 715; *R v Christou* [1997] AC 117 at 129. For the reasons already described, there is a high degree of interrelationship between the facts giving rise to each of the counts, and the evidence is cross-admissible between counts for a legitimate purpose. For those same reasons, the evidence has substantial probative value. On the other hand, I accept the defence submission that there is unlikely to be any particular adverse impact on either complainant of ordering separate trials. That leaves the consideration of whether any potential prejudice in the form of propensity or bad character reasoning may be allayed by proper directions to the jury.

[26] There is nothing unusual about this case which might provoke some emotional or partial response from a juror in terms of the transgressive nature of the accused's conduct or the level of violence involved. The orthodox assumption in those circumstances is that any risk that the jury may use the evidence improperly can be accommodated by suitable directions: see, for example, *Gilbert v The Queen* (2000) 201 CLR 414 at 425; *Reza v Summerhill Orchards Ltd* (2013) 37 VR 204 at [50]; *R v Mokbel* (2009) 26 VR 618 at [90]; *Dupas v The Queen* (2010)

241 CLR 237 at [22], [26], [29], [38]. As Gleeson CJ and Gummow J observed in *Gilbert v The Queen* (2000) 201 CLR 414 at 420:

> The system of criminal justice, as administered by appellate courts, requires the assumption that, as a general rule, juries understand, and follow, the directions they are given by trial judges. It does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.

[27] The relevant directions in the present case would include that evidence in relation to one count cannot be used to engage in propensity or character reasoning in the proof of any other count; and that the task is to be approached in a logical and rational manner unaffected by sympathy or emotion.

[28] The application for severance is dismissed.

Basha inquiry

[29] The second application by the defence is for a *Basha* inquiry to be conducted of the male complainant, and potentially of the investigating police officers. That application is made on the basis that the male complainant provided a statement to police on 8 November 2020 which refers to the existence of a statement made earlier that day. The possible existence of an earlier statement was also apparently recorded in notes of a proofing session conducted by a prosecutor who previously had carriage of the matter. That previous statement is subject to a subpoena which has been served on police requiring production at noon on 4 October 2024. The defence expectation is that

the advice from police will be that the statement has been mislaid, although the most recent information suggests that the existence and form of any additional statement is uncertain. The unarticulated premises underlying both the issue of the subpoena for that particular purpose and the defence expectation is that there was a prior formal written statement, and that statement, in whatever form it took, contained an additional or further or different account of one or both incidents by the male complainant.

[30] It should be noted at the outset that there is nothing unusual about police taking a preliminary statement from a witness, whether oral or in notebook form, and then going back at a later time to take a formal statement. The assumptions and premises underlying the defence application for a *Basha* inquiry are speculative in nature. The most that can be said at this stage is that if there is an earlier statement made by the male complainant and recorded in some form, the defence may be able to identify what it says are inconsistencies between the two statements for the purposes of the cross-examination of the male complainant. On the information and evidence presently to hand, the exploration of those matters is not properly the subject of a *Basha* inquiry. That may or may not change depending upon what is produced in response to the subpoena which has been issued.

[31] At common law, a *Basha* inquiry is used to ensure a fair trial where the accused has not been adequately informed of what evidence the witness

will give: see *R v Basha* (1989) 39 A Crim R 337; *DPP v Denysenko* [1998] 1 VR 312. This situation most often arises where the accused, for whatever reason, has not been able to cross-examine the witness at the committal hearing: see *R v Pham* [2008] VSCA 41; *Harvey & McManus v County Court of Victoria* [2006] VSC 293. However, it may also arise where it appears likely that the witness might change his or her evidence between the committal hearing and the trial, as this risk could negate any benefits obtained by cross-examining the witness at the committal hearing: see *R v Ibrahim* [2007] NSWSC 1140. Neither of those reasons present here.

[32] In deciding whether there is a serious risk that the trial would be unfair, the court must consider the purpose of a committal proceeding and the limitations on cross-examination of a witness at a committal hearing. The *Basha* process is not designed to let the defence test out a line of cross-examination, and to see if risky questions produce favourable answers in the absence of the jury; or so the defence is more confident in cross-examining the witness. Such matters are not part of the purpose of committal hearings, and an inability on the part of the defence to pursue those purposes does not produce a risk of an unfair trial: see *R v Montaine* (unreported, VSCA, 11 December 1997); *R v Sandford* (1994) 33 NSWLR 172; *Barron v Attorney-General for NSW* (1987) 10 NSWLR 215; *Moss v Brown* [1979] 1 NSWLR 114.

[33] The test is whether there is a "serious risk that the trial would be unfair". It follows from that test that preliminary cross-examination is not necessary in all cases where the prosecution gives the defence a notice of potential additional evidence: see *R v Sandford* (1994) 33 NSWLR 172; *DPP v Denysenko* [1998] 1 VR 312; *Williams & Ors v DPP* [2004] VSC 516. This is such a case. There is nothing precluding the defence from cross-examining the male complainant or investigating police in the ordinary course in relation to the provision of an earlier statement to police, if there is foundation for doing so, and nothing precluding the defence from achieving its forensic purposes in the conduct of such cross-examination.

[34] The application for a *Basha* inquiry is dismissed.

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