R v Daniel William Drummond [2016] NTSC 19

PARTIES:	THE QUEEN
	v
	DRUMMOND, Daniel William
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21541395
DELIVERED:	8 April 2016
HEARING DATE:	11 January 2016
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

CRIMINAL LAW — Practice and procedure — indictment — severance — offences founded on similar facts and circumstances — evidence cross-admissible — application refused

EVIDENCE — *Res gestae* doctrine did not survive the enactment of the *Uniform Evidence Act*

Criminal Code (NT) s 303, s 309, s 341
Uniform Evidence Act s 55

R v CHS (2006) 159 A Crim R 560; *R v Vanko* [2014] NTSC 3; *Sutton v The Queen* (1984) 152 CLR 528; *KRM v The Queen* (2001) 206 CLR 221, *R v Christou* [1997] 117; *O'Leary v The King* (1946) 73 CLR 566; *R v Fairbairn* (2011) A Crim R 32, referred to.

REPRESENTATION:

Counsel:

Crown:	D Dalrymple
Defence:	C McConnel

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	BLO 1604
Number of pages:	19

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Daniel William Drummond [2016] NTSC 19
No. 21541395

BETWEEN:

THE QUEEN
Crown

AND:

DANIEL WILLIAM DRUMMOND
Defence

CORAM: BLOKLAND J

RULING ON SEVERANCE APPLICATION

(Delivered 8 April 2016)

Introduction

[1] Application was made on 11 January 2016 on behalf of the accused to sever certain counts on the indictment and order separate trials as between a number of counts. On 22 January 2016, counsel for both parties were advised of the decision refusing the application. These are the reasons for that decision.

Counts on the Indictment

[2] On an indictment signed on 23 November 2015, counts 1 and 2 charge that Daniel Drummond (the accused) assaulted Neil Waight and stole $50 cash

from him. The charge of assault alleges one circumstance of aggravation, namely that the victim suffered harm.

[3] Count 3 charges an aggravated robbery of Paul Bower, the circumstance of aggravation being that immediately before or at the time of the robbery, the accused caused harm to Mr Bower. The property stolen was a wallet, a set of keys and a mobile phone.

[4] In the alternative to count 3, the indictment charges on count 4, that the accused assaulted Mr Bower, the circumstance of aggravation being that Mr Bower suffered harm and further on Count 5 a charge of stealing from Mr Bower.

Application

[5] On behalf of the accused, an application was made pursuant to s 341 of the *Criminal Code* (NT) to sever counts 1 and 2 from counts 3, 4 and 5 on the indictment dated 23 November 2015, broadly on the basis that it would be prejudicial to hear all matters together.

Relevant Legislation

[6] The general rule is governed by s 303 of the *Criminal Code*. Unless "otherwise expressly provided" an indictment must charge one offence against one person.

[7] Section 309 of the *Criminal Code* provides for circumstances in which more than one charge may be joined against the one person in the same indictment.

[8] Section 309 (1) provides:

> 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 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.

[9] Relevantly, s 309 (1A) of the *Criminal Code* further provides:

> 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.

[10] Section 341 of the *Criminal Code* provides the circumstances in which it may be appropriate for the Court to separate trials when 2 or more charges are against the same person:

> 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.

[11] The onus rests upon the party making the application to sever the indictment. It must be shown to be both desirable and practical to make the order to ensure a fair trial in the face of prejudice or embarrassment.[1]

[1] See R v *CHS* (2006) 159 A Crim R 560, 575 [73]; *R v Vanko* [2014] NTSC 3, [5]

Outline of the Arguments on Behalf of the Accused

[12] On behalf of the accused it was submitted he would be prejudiced in his defence to counts 3, 4 and 5 if a jury were to make a finding of guilt on counts 1 and 2. The principal arguments made on his behalf were as follows:

(a) The allegations against the accused involve "two discrete sets of offending";[2]

(b) The evidence against him on counts 3, 4 and 5 constitutes a weak circumstantial case and the Crown seeks to rely upon the evidence of counts 1 and 2 to bolster these counts.

(c) It would create 'insurmountable prejudice' for a jury to hear both matters together and a jury direction would be inadequate to remedy this prejudice;[3]

(d) The inconvenience of running two trials would be minor as the overlap of witnesses would be limited to investigating police, employees at the Hidden Valley Tavern and one forensic scientist. Potential inconvenience could be remedied by way of facts agreed between the parties.[4] Counsel for the accused estimated that if the trials were to be separated both matters could be heard within 8 days.[5] Further, it was

[2] See Defendant's outline of submissions at [11]
[3] Voir Dire Transcript (11 January 2016) at 9
[4] Voir Dire Transcript (11 January 2016) at 18; Defendant's outline of submissions at [26]
[5] Defendant's outline of submissions at [28]

submitted that neither victim would be able to give evidence that is relevant to the offending against the other victim.[6]

[13] A number of authorities were relied on by counsel for the accused in support of the application. Reference was made to *Sutton v R,*[7] where Brennan J held a real risk of prejudice may arise where evidence implicating the accused to one of the offences charged in the indictment is not admissible towards proof of his guilt of the other offence.[8] In these circumstances a direction to the jury may be insufficient to guard against a risk of impermissible prejudice, and in such a case an application for separate trials should generally be granted.

[14] In *KRM v R,*[9] McHugh J held that ordinarily where there are different victims the court should order separate trials where the evidence in respect of one victim is not relevant to the charge in respect of the other victims, or where the joinder of the charges creates a risk of prejudice. In some cases however, an application for separate trials may be refused on the ground that the convenience of trying the charges together far outweighs any risk of prejudice.

[15] In *R v Christou,*[10] the important competing factors to be weighed in severance applications were said to include:

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[6] Voir Dire Transcript (11 January 2016) at 17
[7] (1984) 152 CLR 528
[8] Ibid 541 – 42
[9] (2001) 206 CLR 221, 234 – 235
[10] [1997] AC 117, 129

a. How discrete or interrelated are the acts giving rise to the counts;

b. The impact of ordering two or more trials on the defendant and his family, and the victims and their families and;

c. Whether directions the judge can give to the jury will suffice to give a fair trial if the counts are tried together.[11]

[16] In terms of the evidence said to be admissible by the Crown with respect to all counts, counsel for the accused highlighted weaknesses in parts of the circumstantial evidence that may be led by the Crown. This included reliance on DNA evidence of Mr Waight's blood on a red shirt found in a backpack, that the Crown will contend belonged to the accused. Further weaknesses were pointed out with respect to the inferences that may be drawn from the presence of the accused and Mr Waight's DNA on the black 'Croc' shoes located in a 'carport area' at the Vigilante Bush Camp, four days after the alleged offending, and the production of the backpack to police with arguably limited links to the accused. These issues are dealt with further below.

Outline of Crown Argument

[17] On behalf of the Crown it was indicated that the evidence to be adduced in respect of each of the alleged incidents "would be the same" in terms of

[11] [1997] AC 117 at 129

both the witnesses and also the victims.[12] Counsel for the Crown submitted the combination of all of the evidence, relating as it does to a sequence of closely connected matters across a relatively short time frame, justifies the jury being presented with all available evidence in relation to both assaults in a similar manner as the evidence was presented in the common law case of *O'Leary v The King.*[13]

[18] Although decided well before the *Uniform Evidence Act* was enacted, *O'Leary v The King,*[14] represents an approach to relevance that is not inconsistent with the approach to relevance pursuant to s 55 of the *Uniform Evidence Act,*[15] save for the question of the doctrine of *res gestae.*

[19] Section 55 of the *Uniform Evidence Act* provides evidence is relevant if it "could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue." My view, informed by Refshauge J's discussion in *R v Fairbairn,*[16] is that the *res gestae* doctrine did not survive the enactment of the *Uniform Evidence Act*. While evidence that might have been included in the *res gestae* may assist to elucidate questions of relevance, it cannot operate to make admissible, evidence that is excluded by operation of the exclusionary provisions of the *Uniform Evidence Act*. It cannot, for example, operate to make tendency evidence

[12] Voir Dire Transcript (11 January 2016) at 18
[13] (1946) 73 CLR 566; Outline of Crown Submissions at [9]
[14] Ibid
[15] Outline of Crown Submissions at [9]
[16] (2011) 212 A Crim R 32 [98] – [100]

admissible when the evidence does not meet the requirements of s 97 of the *Uniform Evidence Act*.

[20] The issue of relevance in *O'Leary v The King*,[17] arose in circumstances involving men working in a timber camp at a remote location, consuming alcohol at different locations over many hours before the acts giving rise to the murder charges were committed. The issue was the relevance of the events leading up to the murder.

[21] Latham CJ held that evidence of "facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued" should be put to the jury.[18] This puts the facts in a setting which "makes it possible for the jury to obtain a real appreciation of the events of the day and night".[19] Rich J highlighted that such evidence is admissible as "it forms part of the circumstances of the crime, including the drunken condition of the prisoner, how he reached that condition, how long it continued and how, while in the condition, he was behaving. His violence, the fact that he exhibited this violence on slight or no provocation, and all the circumstances form inseparable features of a transaction consisting on connected events."[20]

[22] The Crown contended that in order for the jury to make proper sense of the content and sequence of events on the evening, evidence should be adduced

[17] (1946) 73 CLR 566
[18] Ibid 575
[19] See also *O'Leary v The King* (1946) 73 CLR 566, 575
[20] *O'Leary v The King* (1946) 73 CLR 566, 576

from both assaults in each case. This is because the evidence concerning the appearance of the accused at the relevant locations, within the relevant timeframe surrounding the assault on Mr Bower, was also relevant to identifying the accused as a participant in the attack on Mr Waight.

[23] With particular reference to DNA evidence, the Crown contended that this in itself demanded the cross-admissibility of all evidence.[21] The Crown relied on the results of the DNA tests conducted on a pair of black 'Croc' shoes, which returned a mixed DNA profile consistent with the accused, Mr Waight and Mr Bower all being contributors. In response, counsel for the accused submitted this evidence did not conclusively tie the accused to the incident against Mr Bower, as there was also the DNA of other unknown individuals on the 'Croc' shoes. Further, counsel for the accused highlighted a number of issues in respect of the 'Croc' shoes including; the fact the accused was not wearing the shoes at the time of his arrest, and that the shoes were located 4 days after his arrest, in a relatively public area, namely the carport of Mr Freeman's caravan (an area known as "Vigilant Bush Camp") where itinerants regularly drink.[22] Counsel for the accused submitted it was conceivable that somebody else had worn the shoes and committed the assault on Mr Bower.[23]

[24] The Crown also submitted that the evidence in relation to the attack on both victims is cross-admissible on a coincidence evidence basis; although it was

[21] See outline of Crown submissions at [8]
[22] Voir dire transcript (11 January 2016) at 26
[23] Voir dire transcript (11 January 2016) at 26

acknowledged that a Notice of coincidence evidence had not yet been served. The following similarities or connecting criteria between the attacks were highlighted by the Crown:[24]

(a) Counts 1 and 2, and counts 3, 4 and 5 took place within a short distance from each other;

(b) Counts 1 and 2, and counts 3, 4 and 5 were committed around a similar time frame;

(c) The appearance of the accused including that he was in the company of an Aboriginal woman and the presence of a backpack shortly after the time of the assault on Mr Waight is consistent with the description provided by Barry Fowler of the person he observed prior to calling 000, shortly after the attack against Mr Bower;[25]

(d) Similarity in terms of the attack on each victim being accompanied, or followed by the taking of personal property; and

(e) Similarity in terms of the victim in each instance, being in each case a middle-aged man rendered vulnerable by intoxication.

Further Consideration on the Issues

[25] It seems to me that the two incidents forming the basis of all of the charges, counts 1 and 2 comprising the first incident and counts 3, 4 and 5 (counts 4 and 5 in the alternative) comprising the second incident, are so closely

[24] See email of David Dalrymple to Chrissy McConnel dated 22 Dec 2015, now before the Court
[25] See statement of Scott Pearson at [10]; statement of Barry Fowler at [5] - [6]

connected in time and place that there is a strong case for cross admissibility between all counts on a number of different grounds.

[26] There is evidence, if accepted, that at some point around or shortly before 8:24 pm on 24 May 2015, the accused and another (Mr Cooper) assaulted Mr Waight, the victim, with respect to counts 1 and 2, by kicking and punching him. At around that time, the accused was near the Harvey Norman store wearing a red t-shirt he had been seen wearing earlier at the Hidden Valley Tavern bottle shop. He was also seen wearing black 'Croc' shoes and carrying a backpack.[26] The statement of Rosine Nilco states he was wearing 'black steel cap boots,' and following the first assault he placed these in his bag along with his red shirt. There is CCTV showing the accused wearing 'Croc' shoes.

[27] It is anticipated that DNA and blood consistent with being from the alleged victim Mr Waight in counts 1 and 2, was found on the red t-shirt, the black 'Croc' shoes and the accused's hands. Testing of the accused's left hand revealed the presence of DNA consistent with being from the victim Mr Waight. One witness (Rosine Nilco) attests to the accused stealing cash from a pocket of Mr Waight's clothing.[27]

[28] After being attacked, Mr Waight entered the Hidden Valley Tavern and asked the duty manager to call police. Shortly afterwards, Kelly Cooper and Anthony Johns, who had earlier been at the Hidden Valley bottle shop, were

[26] Statement of Rosine Nilco and Harvey Norman CCTV footage
[27] Statement of Rosine Nilco at [18]

again in the area of the bottle shop. Anthony Johns is shown on CCTV footage looking through the windows into the main bar. After police arrived at the Hidden Valley Tavern and spoke to Mr Waight, they found the accused, Kelly Cooper, Anthony Johns and an Aboriginal woman sitting on the grass by Vigilant Lane. The Aboriginal woman gave her name as "Maria Melpi" but the Crown will say she is really Philomena Nilco. At the time police attended the group, the accused was wearing a different coloured shirt and the Crown will be submitting that his red shirt was placed in a black backpack. Police made no statement in relation to the shoes the accused was wearing. The presence of DNA from Mr Bower, the alleged victim with respect to counts 3, 4 and 5 on the 'Croc' shoes however, is consistent with the accused having worn them at a later time. There may be other explanations and other possibilities that the Crown will need to negate if it is to implicate the accused in both incidents however the presence of the DNA from both victims on the 'Crocs' that the accused was wearing at some stage close to the events and in the subject area is strong connecting evidence.

[29] In terms of the involvement of Kelly Cooper and Anthony Johns, Mr Cooper is charged with respect to count 1 but not the other counts. In respect of the other counts, the Crown's case is that the behaviour of the group, in particular in relation to an alleged attempted flight after the assault on Mr Bower, may indicate some involvement, however it is only with respect to the accused that it is submitted the evidence is capable of proving the

counts with respect to the second incident beyond reasonable doubt. Clearly the Crown places significant weight on the DNA of Mr Bower on the 'Croc' shoes. It is the case, as submitted on behalf of the accused, that there may be other explanations for Mr Bower's DNA on the 'Croc' shoes, and that it may also be consistent with other persons wearing those shoes, however, that is a matter that would ordinarily be part of the reasoning process with respect to circumstantial evidence, and in my view does not create significant prejudice in the circumstances.

[30] Other evidence that implicates the accused, if accepted, consists of sightings of him at around the time of the assault on Mr Bower; that is a male, with an Aboriginal female, and with a backpack. It is the Crown case that the Aboriginal female is the accused's girlfriend, Philomena Nilco. The accused agrees in his record of interview that he was drinking in the subject area until the time police attended.

[31] It is anticipated that Rosine Nilco would give evidence that the accused's shoes were placed into his bag. I note that in her statement Ms Nilco asserts that the accused was wearing 'steel capped boots' and they were placed in his bag. This is relied upon by the Crown as a strong link to the accused. A black backpack was produced by Mr Freeman the day after the assaults. He stated that one of the men had left it at his place. The CCTV footage depicts the accused with a backpack. The backpack was also seen by one witness, Barry Fowler, who says that he saw a man with an Aboriginal woman in the vicinity where Mr Bower was found. Mr Fowler heard yelling and

screaming and went outside. He saw an Aboriginal woman and man arguing. He describes the man having a backpack over his shoulders. Officer Pearson's statement refers to an account of a Mr Hermans to the effect that he saw an Aboriginal woman with a black backpack. While not available at the time of hearing this application, it is anticipated there will be evidence from Officer Bailey to the effect that Anthony Johns had a black backpack when he was apprehended at the Sunrise Rehabilitation Centre.

[32] The black backpack was provided to police by Jimmy Freeman the next day. He explained that one of the persons he had been drinking with at his camp had left it there. The backpack was then taken by police to the watch house and placed into the accused's property. It was then searched and the red shirt was found along with other identifying documents apparently belonging to the accused. At the time of hearing this application I was told it was not clear whether the name tag on the black backpack was an existing name tag or whether it was placed on it by police to identify the person whose property it was associated with. Although there may be legitimate arguments about whether the backpack belongs to the accused, there is some evidence that it was the accused's red shirt with Mr Waight's blood on it that was in the backpack.

[33] The backpack was transported with the accused to the Magistrates Court where it was accessed by police. The Crown acknowledges it was not seized immediately as an exhibit by police, but rather was placed with the accused's property.

[34] Of significance is that after being called to attend the alleged offending against Mr Waight, Police Officers Pearson and Gossow spoke to the accused, Mr Cooper, Mr Johns and Ms "Melpi". Police attended to duties with them under liquor laws as they were consuming alcohol in a public place. They were directed to "move on" and the accused who was initially uncooperative, walked along Vigilant Lane towards Harvey Norman. Shortly after they left, police were alerted to a disturbance in Vigilant Lane. Responding to the call, police saw three males, including Mr Johns and Mr Cooper. Mr Johns attempted to run away however was stopped and spoken to. He then walked off.

[35] The same officers were then advised of an aggravated assault at 5 Hidden Valley Road, the industrial shed fronting Vigilant Lane.[28] Two males were present, one being John Hermans who contacted police. He reported that his neighbour was on the ground with blood on his face. He told police that after hearing a disturbance he observed a male running towards Harvey Norman car park wearing white shorts, a black shirt and wearing a black bag. The male threw something into a bin in the Harvey Norman car park and met up with an Aboriginal female. The two left in the direction towards the grass between Vigilant Lane and Boulter Road.

[36] Officer Pearson states Mr Bower was confused when he attended to him. When asked to check his pockets, he discovered he did not have his wallet. Later, police found Mr Cooper at an old caravan in the grassland off

[28] Statement of Scott Pearson [19].

Vigilant Lane. Mr Cooper denied any knowledge of the assault on Mr Bowers. Mr Cooper appeared to have blood on him and was arrested.

[37] After that time, at 2209 hours another police officer, Officer Hovland advised he had two other persons, the accused and Ms "Melpi" in Beaton Road. Officer Hovland noticed blood on the accused's feet. When Officers Pearson and Gossow approached Officer Hovland, he advised he had lost the accused near the long grass. A search of a cordoned off area was conducted. Later, at 2300 hours, the accused was located by a police dog and handler. The accused was arrested. Officer Hovland's observation was that the accused appeared to have rubbed the blood from his feet.

[38] The red shirt that there is some evidence of the accused wearing on the evening tested positive to the presumptive test for blood and components of DNA attributed to both Mr Waight and the accused. DNA attributed to Mr Waight was on the accused's hands. The black 'Croc' shoes tested positive to the presumptive test for blood. A mixed DNA profile from at last two individuals was obtained. The major components were attributed to Neil Waight. A swab of the inner heel resulted in a partial mixed DNA profile from at least three individuals. Some of the components matched components attributed to the accused and Neil Waight.

[39] In my view, while there are certainly arguments that are well open in respect of the inferences that may be properly drawn, clearly there are strong grounds for the admission of the forensic evidence in respect of the two

incidents. This is especially so when taken with the accused's proximity to the alleged events and the sightings of him in the area where both assaults were said to take place. I am drawn to the reasoning determining relevance as discussed in *O'Leary v The King*.[29] The evidence concerning the accused and his whereabouts, his demeanour, his associates and his presence in both areas is relevant to both counts and should not be considered as evidence relevant only to one charge but not the other.

[40] As has been mentioned there is plenty of room for argument, especially given the location, finding and timing of seeing the shoes and the mixed DNA profile, however, that is a matter of circumstantial evidence and whether reasonable inferences can be drawn against the accused. There are similar issues with respect to the bag. Added to the body of evidence overall, it must also be remembered that Mr Fowler, who found Mr Bower, states he saw a man with a backpack with an Aboriginal woman just before he found Mr Bower lying on the ground. The accused makes reference in his record of interview to the effect he was "sitting down, getting harassed with my new missus by the fucking police, trying to have a fucking drink in private."[30] He then talked about walking away from the area and still getting harassed on Beaton Road. He said "You know, my missus left my fucking bag sitting on the fucking shit behind Harvey Norman. My other bag's over the road at me other mate's joint. Now the police are trying to say that this was from the assaults." He also talks about being "Up and

[29] (1946) 73 CLR 566
[30] Record of Interview Transcript at [8]

down that street behind Harvey Norman. And there was heaps of other people up and down there all night."[31]

[41] Asked if he could describe his missus. He answered "Black….."[32]

[42] As Ms McConnell argued, the evidence in respect of the first incident is stronger against the accused and the second incident is primarily a matter of circumstantial evidence. I agree with Ms McConnell's observation however that the circumstances that may be relevant to proof of the second incident are wider circumstances than those that immediately surround that particular assault. In my opinion this is not a case where the jury would be tempted to reason improperly or in a prejudicial manner. There is a body of evidence, some of which strongly implicates the accused directly and some which may be the subject of inference. In my opinion it is not a case of prejudice that could not be overcome by direction. The accused is not at risk of an unfair trial if both matters proceed together.

[43] I agree that neither trial would necessarily be lengthy and perhaps not all witnesses would need to be called twice if there were to be two trials. Inconvenience and length of trial is not as significant here as in other cases, however, it seems with respect to the second incident there would be a need to call many of the witnesses a second time including civilians.

[31] Record of Interview at [9]
[32] Record of Interview Transcript at [11]

[44] In my view the indictment should not be severed. Much of the evidence that I have access to at this stage is relevant to both counts, either directly or circumstantially. I do not make this ruling on the basis that the jury may simply infer from the conduct of the accused with respect to the first incident, that he is guilty of the second. That would be to invite impermissible tendency reasoning. However, for the reasons outlined, the facts and circumstances revealed by the evidence are so closely connected that there is significant cross admissibility.

[45] As indicated at the time of the severance argument, I decline to rule on the issue of coincidence evidence. That point was not fully argued. It is premature without the Notice, even if the substance of a proposed Notice is known. Further, as the trial is currently listed before another Judge that matter may be more appropriately dealt with at a later time.

[46] By arrangement with counsel these reasons will be forwarded by email. They will not be published on the Court website until the conclusion of the trial.
