Watt v The Queen [1999] NTSC 10

PARTIES:	WATT, Gary William v THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9712853
DELIVERED:	10 February 1999
HEARING DATES:	5 February 1999
JUDGMENT OF:	MARTIN CJ.

REPRESENTATION:

Counsel:

Applicant:	Ms D Elliott
Respondent:	Mr R Noble

Solicitors:

Applicant:	Diana Elliott
Respondent:	DPP

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mar99003
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Watt v The Queen [1999] NTSC 10
No. 9712853

BETWEEN:

GARY WILLIAM WATT
Applicant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 10 February 1999)

Application for separate trial.

[1] The accused Gary William Watt stands charged for that on 31 May 1997 at Howard Springs he did (a) have sexual intercourse, namely digital penetration, of the vagina with AH without her consent; (b) have sexual intercourse, namely fellatio, with her without her consent; (c) counsel or procure Scott Anthony Eaton to have sexual intercourse, namely fellatio, with her without her consent, and (d) unlawfully enter a building at Palmerston with intent to commit an offence namely depriving Ms H of her liberty, the building being a dwelling house which was occupied at the time of entry and the entry occurring at night.

[2] Scott Anthony Eaton stands charged that on the same date and at the same place (a) he had sexual intercourse, namely fellatio, with Ms H without her consent, and (b) he had sexual intercourse, namely penile penetration, of the vagina with her without her consent.

[3] James Scott Parnell Knight stands accused that on the same date and at the same place he had sexual intercourse namely penile penetration of the vagina with Ms H without her consent, and with having entered the premises at Palmerston with Watt with intent to commit an offence with the same circumstances of aggravation.

[4] None of the accused are charged jointly with any of the others in respect of any of the offences, nor in any capacity other than as principals in the commission of each individual offence. I understand the Crown case to be that Watt and Knight went to premises in Palmerston and there committed unlawful entry with intent to deprive Ms H of her liberty in the circumstances described. She was then conveyed to premises at Howard Springs where each of the accused committed the individual offences giving rise to the nominated charges. In respect of those later happenings there is only one charge in which two of the accused are related in some way and that is in regard to the allegation that Watt procured Eaton to have sexual intercourse with Ms H and that he did so.

[5] Watt applies for a separate trial. He does so on the sole ground that it is understood that the accused Eaton and the accused Knight will each be calling evidence of their good character, and he does not intend to do so.

[6] The submission made on his behalf is that in those circumstances he will stand out from the other two as a person who is unable to call evidence of good character, and thus there will be substantial prejudice to him arising from a joint trial, that prejudice being not really amenable to nullification by judicial direction. He argues that there is a strong claim for a separate trial upon that ground. It is acknowledged that such an application will not succeed as a matter of course (see *Jones v Waghorn* (1991) 55 A Crim R 159 at 164).

[7] The first issue is as to the potential for substantial prejudice. Assuming that evidence of good character is elicited on the part of Eaton and/or Knight, then they would expect a direction from me that, if that evidence is accepted as a matter of fact by the jury, the jury should bear it in mind as a factor affecting the likelihood of the particular accused committing the crime charged. In addition, in the event that either Eaton or Knight gives evidence himself in the case then the jury should also consider his previous good character in assessing his credibility in relation to evidence given by him.

[8] Senior counsel for Mr Watt suggests that in those circumstances there is no way in which I could so direct the jury that the supposed potential for real prejudice would be overcome, In fact, he argues, by attempting to do so, I

would simply be highlighting Mr Watt's position in that regard. He bluntly puts it that that prejudice will arise and cannot be overcome.

[9] I have not been directed to any Australian authority directly on point, but it has been considered in the English Court of Appeal in *Gibson* (1991) 93 CR App R at p9 and *Shaw* (1993) 97 Crim App R at 218. The suggestion in *Gibson* at p12 that may be in these circumstances it would be advisable for the Judge to say very little, if anything, about the character of the defendant who has called evidence of good character, is not a course open here. It is pointed out that in dealing with the good character of an accused, the Judge may be doing two things. First of all highlighting the bad character of the other and seemingly, by reason of highlighting the bad character of the other, reflecting that bad character on the accused said to be of good character. With respect, the suggestion of highlighting bad character does not seem to me to arise. There would be no evidence as to character in the case of Watt. At p221 of *Shaw* it was said that where an accused insists on wanting a full direction in relation to good character, then it might lead to a necessity of separate trials.

[10] I bear the following in mind:

1. The charges against each of the accused are serious and carry a maximum penalty of imprisonment for life.

2. Apart from the one matter which I have mentioned, the charges are against each accused individually.

3. There is to be a separate trial of another person, Hogan, on a charge of indecent assault, said to have arisen in the course of the events leading to these charges being brought. The order for that separate trial was made by consent.

4. Although there may be evidence of good character, which may or may not be accepted by the jury in the case of Eaton and Knight, (the nature of that evidence, how it is to be adduced and its potential effect is presently speculative), it is not suggested that in the case of Watt there would be any evidence of bad character, prior convictions or otherwise. It is not suggested on his part that he may follow a course of action which may give the Crown leave to adduce such evidence if any is available.

5. There is a risk which can not be presently evaluated that if the trials proceed together, then circumstances may develop in the course of the trial, including surrounding this question, which in hindsight may have necessitated separate trials (*R v Demirok* (1976) VR 245 and *R v Gibb and McKenzie* (1983) 2 VR 155).

6. I must explain to the jury that the case against each accused must be considered separately on the evidence available in each case.

7. Although evidence of good character of either or both of Eaton and Knight may be of assistance to them, as individuals, the absence of such evidence can not be used as affecting consideration of the guilt of Watt.

There are many cases in which the accused does not call evidence of good character, for whatever reason, and it is not open to a Judge to instruct a jury that in the absence of evidence of good character they may form a view adverse to the accused.

8. In *Demirok*, the Full Court at p2454 listed matters of public interest which must be considered in cases such as these:

   (a) Administrative matters, and Court time spent and public expense incurred if more than one trial is to be conducted. The present position is that more than one trial is to be conducted and if a separate trial of Watt is to be held, that will make three. I am told that the time initially set aside for the conduct of the joint trial is now seen as being somewhat an over estimate and that even if a separate trial of Watt was to be conducted, the trials of those three accused would not use the whole of that time. On current estimates it is likely that two separate trials would take longer than would a joint trial. There would be a lot of duplication of evidence, addresses, summing up and so on. To that should be added the separate trial of Hogan

   (b) It is said to be against the interests of justice that there should be inconsistent verdicts and those interests require that where the accounts of accused persons differ or conflict their differences should be resolved by the same jury at the same trial. I have not

been told of any accounts of the various accused where they would differ or conflict. As to inconsistent verdicts, it is true to say that none of the accused stand jointly charged. As I understand the case, the evidence against them will revolve greatly around that of Ms H, there are no independent witnesses to the events. It does not seem to me that there would be any greater potential for some accused to be convicted and others acquitted of one or more of the charges individually brought against them whether tried together or separately. Whether joint or separate trials, it would be open to a jury to accept evidence of the Crown as to the involvement of one or more and have reasonable doubt about the involvement of the other or others of them.

(c) Finality should be achieved as expeditiously as possible and "no system could function if it permitted the repeated retrial of the same issues except in situations where the concept of justice so required". Commencement of the trial has already been significantly delayed. The offences were said to have been committed in May 1997 and the trial of all four accused originally set down for April last year, but those dates were abandoned. The conduct of separate trials should take place one immediately after the other. All the issues would be resolved, broadly within the time it was expected that would occur should a joint trial take place.

(d) As to the convenience of witnesses, it must be accepted that "the lot of a witness in a criminal trial is not a happy one" (especially one would think in a case like this). The view of the Full Court is that "unless for good reason witnesses should not be required to give evidence of the same offence at the succession of trials".

9. I also take into account the submission made on behalf of the Crown as one of the grounds for opposing this application that an issue will be that of consent and that evidence of the whole of the events of the night in question will be relevant on that account. This is not, on the Crown case, a singular incident of sexual assault, but a succession of singular incidents of sexual assault perpetrated by different accused in succession at the same place over a relatively short span of time.

[11] I have weighed these various factors as best I can. I bear in mind the potential for impermissible prejudice to Mr Watt if the others follow the course envisaged. However, I am not persuaded that it is not possible to give a direction which would nullify it.

[12] The application is refused.
