PARTIES:	RUDOLF PETER HOESSINGER
	v
	R
TITLE OF COURT:	COURT OF CRIMINAL APPEAL (NT)
JURISDICTION:	APPEAL FROM SUPREME COURT
FILE NO:	CA 14/91
DELIVERED:	24 APRIL 1992
HEARING DATES:	6 MARCH 1992
JUDGMENT OF:	GALLOP, ANGEL and MILDREN JJ

CATCHWORDS:

Criminal Law and Procedure - Indictment - Whether charge duplicitous or latently ambiguous - Whether substantial miscarriage of justice -

Criminal Code Act (NT) s154(1), s187, s188, s303, s305, s411(2).

Cotteril v Lempriere (1890) 24 QBD 634, referred to.

Iannella v French (1968) 41 ALJR 389, referred to.

Burton v Samuels (1973) 5 SASR 201, referred to.

Rex v Molloy [1921] 2 KB 364, referred to.

Johnson v Miller (1937) 59 CLR 467; 497, considered.

Ex Parte Graham; Re Dowling & Anor (1968) 88 WN (Pt 1) NSW 270, considered.

R v Thompson [1914] 2 KB 99, referred to.

R v Nilson [1968] VR 238, considered.

Joe Gee v Williams (1980) 27 NZLR 932, referred to.

Attorney-General of New South Wales v MacPherson (1870) 3 LRPC 268, considered.

Criminal law and Procedure - Particular offences - Offences against the person - Homicide - Necessity to particularise the act causing death - Coincidence between act and intent - Criminal Code Act (NT) s154(1)

Royall v The Queen (1991) 65 ALJR 451, considered.

Ryan v The Queen (1967) 121 CLR 205; 217-218, considered.

White v Ridley (1978) 140 CLR 342; 359, considered.

REPRESENTATION:

Counsel:

Applicant: T RILEY QC

Respondent: R WALLACE

Solicitors:

Applicant: NT LEGAL AID COMMISSION

Respondent: DIRECTOR OF PUBLIC PROSECUTIONS

Judgment category classification: CAT B

Court Computer Code:

Judgment ID Number: ANG92007

Number of pages: 32

ang92007

IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. CA 14 of 1991

ON APPEAL FROM the Honourable Mr Justice Kearney in proceedings SCC No. 62 of 1991

BETWEEN:

RUDOLF PETER HOESSINGER
Applicant

AND:

THE QUEEN
Respondent

CORAM: GALLOP, ANGEL and MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 24 April 1992)

GALLOP J: This is an application for leave to appeal against a conviction recorded on 18 October 1991 against the applicant of an offence against s.154(1) of the Criminal Code Act. On 1 October 1991 the applicant was arraigned on an indictment charging him with that offence in the following terms:

"Count 1

On the 6th day of October 1990 at Darwin in the Northern Territory of Australia, did an act, namely assault John Rankin who was standing near the edge of a rooftop, which act caused serious actual danger to the life, health or safety of the said John Rankin who was a member of the public, in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done that act.

AND THAT the said act involved the following circumstances of aggravation, namely:

(a) The said Rudolf Peter Hoessinger thereby caused the death of John Rankin.

(b) The said Rudolf Peter Hoessinger was under the influence of an intoxicating substance, namely alcohol.

Section 154(1), (3) and (4) of the Criminal Code."

The jury returned its verdict of guilty on 4 October 1991.

On the hearing of the appeal, leave was granted to the applicant to amend the Notice of Appeal so as to add a ground of appeal that the indictment was bad for duplicity, and likewise the conviction on the above count was bad for duplicity. Section 154 is in the following terms:

"154. DANGEROUS ACTS OR OMISSIONS

(1) Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years.

(2) If he thereby causes grievous harm to any person he is liable to imprisonment for 7 years.

(3) If he thereby causes death to any person he is liable to imprisonment for 10 years.

(4) If at the time of doing or making such act or omission he is under the influence of an intoxicating substance he is liable to further imprisonment for 4 years.

(5) Voluntary intoxication may not be regarded for the purposes of determining whether a person is not guilty of the crime defined by this section."

The Crown case as opened to the jury was that on Saturday, 6 October 1990 the applicant and the victim lived in separate flats in a row of one storey flats at 27 Eden Street, Stuart Park. The victim was doing some repair work on the roof of the building. He was dismantling, cleaning and fixing some solar panels for a hot water system situated on the roof. The roof was 3.85 metres high.

The applicant had been drinking at premises in the City area of Darwin and watching a game of football. After the game he returned to his flat in Eden Street and continued drinking. Some dialogue ensued between the applicant and the victim. It was not suggested that the exchange was particularly odious, unusual or extraordinary, but it resulted in the victim throwing some water on to the roof of the car in which the applicant and an associate were about

to depart. This caused the applicant to get out of the car and, by means of a ladder, gain access to the roof.

Angry words were said and, as stated in the Crown opening, "the accused assaults Mr Rankin who is standing with his back to the edge, a matter of feet away. He assaults him with his right hand. This knocks Mr Rankin down backwards and over. He lands half on the roof, the top half off, momentum taking him over and he falls straight down on to the concrete fronting head first. He's immediately critically injured, a large amount of blood is seen flowing from his ear and he's unconscious." A little later the Crown opened to the jury that the essence of the case was what happened up on the roof and what the applicant did to the victim while on the roof.

Towards the end of the Crown opening the Crown Prosecutor outlined to the jury the evidence of the conversations with the accused before he was charged. The Crown referred to the exculpatory version given by the accused to investigating police and said:

> "By the accused's less culpable version, namely some sort of friendly shenanigans on the roof, 'a buck's stand off' is one of the terms he uses at some stage, and he's grabbing at Mr Rankin, who's standing a few feet from the roof's edge. Let me make it quite plain now, at the very beginning of this trial, if that is the case, the Crown says that that act itself is a dangerous act. We say that that act is one that you

> wouldn't do, because you would clearly foresee the danger it causes to the health, the safety, to the life of Mr Rankin who was standing where he was."

The trial was conducted by the Crown on the basis that the act of the applicant was an unlawful assault upon the victim. The precise act was not identified by the Crown. Ultimately the act amounting to an assault was put to the jury in alternative ways. The Crown case was either that the applicant struck the victim a blow or, alternatively, swung his right fist in the direction of the victim without actually connecting with the victim, or behaved in such a way as to threaten the victim causing him to apprehend that he was about to be struck.

It is apparent from the Crown opening and exchanges between the trial judge and the respective counsel for the Crown and the applicant that the trial was conducted on the basis that the jury could convict the applicant if they were satisfied beyond reasonable doubt that he had unlawfully assaulted the victim in any of the ways relied upon by the Crown.

In summing up to the jury the trial judge identified for the jury the first element of the offence charged as being that the applicant assaulted the victim. He explained assault to mean that the applicant applied force to the

victim without the victim's consent or that he attempted or threatened to apply force to him while he had an actual or apparent present ability to apply that force, and evidenced his purpose by some bodily movement or threatening words. He went on to define the nature of an assault as a slap or touch to the body or a threatening or attempting to apply force. His Honour supplemented those directions by furnishing each member of the jury with what he called an Aide Memoire, a copy of which is Annexure A to these reasons.

The meaning of an assault as set out in the Aide Memoire appears to have been taken from the definition of assault in s.187 of the Code. His Honour, as appears from the Aide Memoire, even directed the jury about provocation. Pursuant to s.34 of the Code, provocation excuses a person from criminal responsibility for certain acts, including assault, in certain circumstances as set out in s.34(1).

It was submitted on behalf of the applicant that as the case against the applicant charged an offence against s.154(1) of the Code, and also particularised the act done by the accused as an unlawful assault upon the victim according to alternative findings, the applicant had in effect to meet more than one case on the one count in the indictment.

The Elements of an Offence against s.154 -

The elements of an offence against s.154 are:-

1. the doing or making of an act or omission;
2. that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public); and
3. the act or omission must be done in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission.

The gravamen of the offence is doing or making an act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person. However, the act must be done in circumstances where an ordinary person similarly circumstanced, would have clearly foreseen such danger and not have done or made that act. It is not an element of the offence that the offender must have clearly foreseen such danger. So far as the mental element is concerned, it is sufficient to make out the offence if an ordinary person similarly circumstanced would have clearly foreseen such danger. It may be logically true that if an ordinary person similarly circumstanced would have clearly foreseen such danger, then the accused would have clearly foreseen such danger. But the standard of foreseeability is

an objective one, that is, the state of mind to accompany the act is that of an ordinary person similarly circumstanced, not that of the offender. The nature of the act is related to whether an ordinary person similarly circumstanced would have clearly foreseen the danger caused by the act. It is thus essential that the nature of the act be identified. Indeed the actus reus is the doing of such an act. Of course the doing of the act must be "voluntary" in the sense stated by Barwick CJ in Ryan v. The Queen (1967) 121 CLR 204 at 214-217.

Duplicity -

Where an offence is charged in the alternative there is duplicity (Cotteril v. Lemprière (1890) 24 QBD 634). It is a fundamental rule that the conviction itself shall be free of duplicity (Iannella v. French (1968) 41 ALJR 389; Burton v. Samuels (1973) 5 SASR 201). The authorities even go so far as to assert that such a conviction must be set aside by an appellate court even though the point was not taken by the appellant at the trial (see, for example, Rex v. Molloy (1921) 2KB 364).

There are provisions in the Criminal Code prescribing the form and content of indictments.

"303. GENERAL RULE AS TO INDICTMENTS

Except as otherwise expressly provided an indictment must charge one offence against one person."

"305. FORM OF INDICTMENT

(1) An indictment shall contain a statement of the offence charged together with such particulars as may be necessary to give reasonable information as to the nature of the charge.

(2) If more than one offence is charged each offence shall be set out in a separate paragraph called a count and numbered consecutively.

(3) The statement of the offence shall describe the offence shortly in ordinary language in which the use of technical terms is unnecessary and it need not state all the elements of the offence, but it shall contain a reference to the section and the enactment defining the offence.

(4) If any circumstance of aggravation is intended to be relied upon it shall be charged in the indictment."

Contravention of such provisions is not a mere matter of pleading, it is positively illegal. But, apart from the statutory prohibition provided by ss.303 and 305, it is well settled law that but one offence can be proved under one charge. Except to prove intent or system or to exclude accident or mistake, evidence that an accused person committed other like offences is seldom relevant to the issue of guilt. That is the reason that a prosecutor can be compelled to specify which act is the subject of the charge.

In Johnson v. Miller (1937) 59 CLR 467 Evatt J said at p.497:

> "It is of the very essence of the administration of criminal justice that a defendant should, at the very outset of the trial, know what is the specific offence which is being alleged against him."

In Ex parte Graham; Re Dowling and Another (1968) 88 WN(Pt 1) NSW 270, Asprey JA, after citing that passage, said:

> "There is abundant authority for the proposition that an accused person must have precise notice of what he is accused. He must have full opportunity of being heard and such an opportunity is denied to him if he is left in doubt in regard to that of which he is accused."

At p.282-3 Asprey JA went on to say:

> "If ex facie it is apparent that an information is in respect of two or more offences the magistrate should not proceed to hear the information, but should request the prosecutor to elect on which charge he will proceed and upon his election should strike out the other charge. If the prosecutor declines to elect, that information is bad for duplicity and should be dismissed (Edwards v. Jones [1947] KB 659; Brangwynne v. Evans [1962] 1 WLR 267; Hargreaves v. Alderson [1964] 2 QB 159; and see especially Byrne v. Baker [1964] VR at pp.457-458). ... A failure to comply with the statutory requirement of s.57 [of the Justices Act 1902] is not a mere irregularity, and the omission of a defendant to object thereto does not amount to a waiver of the protection afforded by the statute (Hargreaves v. Alderson, at p.165; Mallon v. Allon [1964] 1 QB 385, at pp.392-393; Munday v. Gill (1930) 44 CLR 38, per Isaacs CJ at p.63 and per Dixon J at pp.89-90)."

Nor is it permissible for the Crown to charge one offence only and rely on particulars which are duplicitous and hence allege more than one offence. In Ex parte Graham,

Re Dowling and Another (supra), a driver had been charged with one offence of negligent driving upon a public street to wit the Hume Highway. On the application of the defendant in the case the prosecution was ordered to furnish particulars and they stated that the alleged offence was observed to have occurred on the Hume Highway from the top of the hill south of Paddys River to the northern side of the Paddys River bridge, a distance of half to three-quarters of a mile. The evidence against the driver was that he was proceeding over a hill south of the bridge on the Hume Highway. He attempted to overtake an articulated vehicle travelling in the same direction and in doing so he drove for a distance of about 40 yards with his near-side wheels about five feet on the off-side of double separate unbroken lines. He then caused his vehicle to slow down and come back in behind the articulated vehicle which was on its correct side of the road.

The police constable who was travelling in the opposite direction stated that he was forced to brake his police vehicle hard and to diverge to the left into the near-side lane to avoid a collision with the defendant's vehicle. The articulated vehicle with the defendant behind it then proceeded down the hill to the bridge, which had a carriageway of bitumen some 22 feet in width. 600 feet south of the bridge was a sign reading "Narrow Bridge" and

300 feet south of the bridge was another sign reading "No Overtaking on Bridge". The constable alleged that on the bridge the defendant overtook the articulated vehicle and crossed back to his correct side of the roadway at the northern end of the bridge.

Asprey JA observed (at 283) that on its face the information was sufficient in law in that it described one offence in the appropriate words of s.4(1) of the Motor Traffic Act 1909 and thus the information could not be said to be infected with duplicity. But difficulties arise, his Honour said, where the nature of the charge, in the absence of particulars, is such that, to support it, evidence is led to prove conduct which comprises a continuity of action or a series of connected acts. He said that in cases of this type where the evidence adduced passes beyond proof of conduct of the kind so described, and calls upon a defendant to answer two or more separate offences upon a single information, a conviction upon the offence charged in the information is bad.

On the facts of the case, Asprey JA regarded the alleged conduct of crossing the separate unbroken lines on the hill on the south side of the bridge and the continuation of his driving in that position to a point where he caused the police vehicle to turn sharply to avoid

a collision as a single continuous incident of negligent driving. But, in his view, another situation arose in relation to the alleged overtaking of the articulated vehicle on the bridge some half to three-quarters of a mile further along the highway. This was because for a considerable distance before that position had been reached, the driver had driven his motor vehicle back to the correct side of the road and had followed the articulated vehicle for the distance in question on to the bridge in a manner of driving to which no exception was taken, before he commenced the act of overtaking it. In other words, one alleged act of negligent driving had been completed and followed by a distinct course of exemplary conduct before the alleged occurrence of conduct of quite a different character.

For those reasons, Asprey JA was of the opinion that the acts alleged against the defendant on the evidence of the constable disclosed two separate offences. He held that because the course taken by the evidence before the magistrate resulted in a situation which was not a mere procedural irregularity, the fact that the driver took no part in the hearing and failed to object to its admissibility, could not debar him from raising the point on appeal. Whether what took place amounted to duplicity strictly so called, or whether the alleged facts disclosed a latent ambiguity or uncertainty in the information did not

matter. Accordingly, the order nisi for statutory prohibition was made absolute.

The phrase "latent ambiguity" is taken from the judgment of Dixon J (as he then was) in Johnson v. Miller (1937) 59 CLR 467 at 486. The licensee of specified premises had been charged in the language of s.209(1) of the Licensing Act 1932-35 (SA). In the course of correspondence between the parties furnishing particulars, the prosecution said that it alleged and proposed to prove that about 30 men were seen coming in and out of the premises between stated times, and that the prosecution was in a position to give the exact time when each man was seen but could prove the identity of only four of the men. The letter giving particulars as to 30 men was later withdrawn and a statement that an unknown person was seen coming out of the premises during the specified hours was substituted.

At the hearing the complaint was amended to refer to "a certain person" instead of "certain persons". The defendant then contended that the prosecution should supply further particulars to show which of the 30 men was the man whose emergence from the hotel was the subject of the complaint. The prosecution refused to do so and the complaint was dismissed on the ground that it was defective in substance. The High Court held that it was rightly dismissed.

Dixon J noted that the complaint as amended appropriately charged an offence. He went on to say (at 486-487):

> "But, if the complainant were to prove that many persons unknown issued from the hotel during the period given in the particulars on the day, at the place and in the circumstances mentioned in the complaint, it is evident that it would become quite uncertain which of them was the person unknown to whom the complaint referred. In other words, the facts or the alleged facts disclosed a latent ambiguity in the complaint. The latent ambiguity might have been removed by making an amendment or by giving particulars selecting one instance or person to the exclusion of the others. Doubtless it would not be easy to avoid all ambiguity, but, either by reference to the exact time when the person selected was seen to emerge or to the numerical place he occupied in the succession of people said to have been seen between the times given, it would have been possible to tie the complaint down to one instance and make it incapable of equal application to each of the thirty instances. The existence in the complaint of such a latent ambiguity is the foundation for the contention, which the magistrate upheld, that there was a defect in the complaint by which the defendant, the now appellant, had been prejudiced."

Dixon J further observed (at p.488) that a conviction should have as much certainty as an information, for a defendant is entitled to be appraised not only of the legal nature of the offence with which he is charged, but also of the particular act, matter or thing alleged as the foundation of the charge.

The later observations of Dixon J (at p.489) are directly in point in relation to the present appeal. He said that where an information or complaint is so drawn as to disclose more than one offence and one set of facts

amounts to each of the various offences covered by the charge, the proper course is to put the complainant to election. The prosecutor clearly should be required to identify the transaction on which he relies, and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence, the legal nature of which is described in the complaint.

At the trial of the present applicant, the Crown relied upon alternative occurrences as constituting the act which is an offence against s.154 of the Code. Whether the conviction which followed may be described as duplicitous or having a latent ambiguity, it is bad and must be set aside.

In my opinion this course was not permissible and was expressly prohibited by ss.303 and 305 of the Code. The Crown could, of course, have charged alternative offences.

Arguments on behalf of the Crown -

The Crown was taken by surprise by the amendment to the Grounds of Appeal so as to add the ground based upon duplicity of the charge and the conviction. It referred to the alternative states of mind which are sufficient to

establish the crime of murder and the recent High Court case of Royall v. The Queen (1991) 65 ALJR 451. In that matter, the applicant for special leave to appeal had been convicted of the murder of a woman who was killed when she jumped or fell from a window after a dispute with him in which he exhibited considerable violence. How the deceased came to fall and just what part the applicant played in the events which precipitated the deceased's fall were central to the issues which the jury were called upon to determine at the trial.

The Crown case was that the applicant murdered the deceased in one of three ways:-

1. that the applicant pushed or forced the deceased out of the window;
2. that the applicant physically attacked the deceased in the bathroom and that, in retreating from or avoiding that attack, she fell from the window; or
3. that, immediately before her fall from the window, the deceased had a well-founded and reasonable apprehension that, if she remained in the bathroom, she would be subjected to life-threatening violence from the applicant and, in order to escape from the violence, she jumped out the window.

The case was left to the jury on the footing that it was for them to determine whether the applicant had caused the deceased's death in any of the three ways suggested by the Crown. The trial judge instructed them that, if they were satisfied that the applicant caused the deceased's death, they should consider whether he had the requisite intent. His Honour stated that the requisite intent would be satisfied by an intent to kill, an intent to inflict grievous bodily harm or reckless indifference to human life. All the Judges of the High Court examined the concept of causation in the crime of murder as provided by s.18 of the Crimes Act 1900 (NSW). Section 18 reads:-

> "(1)(a) Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of a crime punishable by penal servitude for life or for 25 years.
>
> (b) Every other punishable homicide shall be taken to be manslaughter.
>
> (2)(a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.
>
> (b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only, or in his own defence."
>
> "Section 18 must be read in conjunction with s.5 which defines "Maliciously" in these terms:

> "Every act done of malice, whether against an individual or any corporate body or number of individuals, or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.""

The respective judgments note that it was crucial to a conviction under s.18(1), whether it be of murder or manslaughter, that there be an act of the accused, or thing omitted to be done, "causing the death charged". At the applicant's trial, on his appeal to the Court of Criminal Appeal and on this application for special leave to appeal, much was made of the meaning of "causing" and its application to the facts of the case.

In his observations about the concept of causation, Mason CJ (at 454) observed that ordinarily there is no occasion for a trial judge to spend much time on the identification of the act causing death but there is a "logical and practical necessity to isolate that act, for it is of it, and it alone, that one or more of the several specified conditions or concomitants must be predicated if the terms of s.18 are to be satisfied".

Quoting Barwick CJ in Ryan v. The Queen (1967) 121 CLR 205 at 217-218, Mason CJ said that in Ryan the trial judge's directions were deficient in that they failed to isolate the particular act or acts which the jury might identify as the cause of death. In that case there was room for argument about what was the act which caused death. Different considerations arose for determination in ascertaining whether Ryan's state of mind satisfied the requirements of s.18, depending upon which act was identified as the cause of death. The Crown case was that Ryan went to rob a service station. While he had his finger on the trigger of a loaded, cocked gun pointed at the deceased's back, with his other hand he tried to find a cord in his pocket. The deceased made a sudden movement, Ryan stepped back and the gun discharged, killing the deceased. If pressing the trigger was identified as the act causing death, the question was whether Ryan willed that act and intended to kill or inflict grievous bodily harm or whether it was an unwilled reflex movement. If, however, presentation of the gun was identified as the act causing death, the question was whether Ryan knew that in the circumstances the involuntary discharge of the gun was probable: see per Barwick CJ at 219.

Thus the case was one in which identification of the act causing death required "specific and close consideration".

In Ryan, the Chief Justice pointed out (at 218) that:-

> "the choice of the act causing death is not for the presiding judge or for the Court of Criminal Appeal: it is essentially a matter for the jury under proper direction".

In Royall, Mason CJ emphasised (at 454) that there was a need for the trial judge to give specific and close attention to the identification of the various acts which, on the Crown case, might have been the cause of death. In ascertaining whether there was the requisite intent, different matters may need to be taken into account depending on which act is identified as the act which caused death. He cited Stephen J in White v. Ridley (1978) 140 CLR 342 at 359:

> "It is always necessary, if there is said to be any lack of temporal coincidence between act and intent, accurately to identify the relevant act. It was to this need that Barwick CJ drew attention in Ryan v. The Queen [at 219]."

In Royall the Crown alleged that the applicant caused the death of the deceased in one of three alternative ways. In the respective judgments, the High Court stressed the

necessity for coincidence between act and intent and that coincidence depended upon the way in which the deceased met her death. Deane and Dawson JJ (at 466) observed that whichever of the acts of the applicant were regarded by the jury as having caused the death of the deceased, the intent which was required to accompany them was the same. The facts were sufficiently identified for the purpose of identifying the mental element required if the jury were to convict the applicant of murder.

What I deduce from Royall's case is that when dealing with a murder case the Crown must prove:-

(a) death as a result of the voluntary act of the accused; and

(b) malice of the accused (Woolmington v. The Director of Public Prosecutions [1935] AC 462 at 481.

The Crown may prove that death was caused by a series of acts, even alternative acts, according to how the jury view the evidence. But the Crown must specify which act or series of acts it alleges caused death. Whichever act or series of acts caused death, the accused cannot be convicted unless the act or series of acts was accompanied by the necessary mental element. Royall's case goes no further than that for present purposes. There is no reference in

the judgments to any objection to the count of murder based upon duplicity or latent ambiguity.

What Royall does not establish is that it is permissible to particularise the act or series of acts causing death as a legal concept or as another criminal offence, such as assault, because that does not tell the accused what it is alleged that he has done.

In this appeal, the Crown has particularised the act causing death in alternative ways, but has described the three alternatives as an assault. Those three alternatives relied upon by the Crown may each have constituted an assault under the Code. But that is not the point. It was not necessary for the Crown to prove an assault, only a physical act which caused serious danger in circumstances attracting objective foreseeability. In the count in the indictment, and in the Crown opening, the Crown never specified the act or series of acts which it is alleged the accused committed and which caused serious danger to the life of the victim.

Royall does not avail the Crown in refuting that it failed to identify the act alleged and introduced an irrelevant concept of assault.

In my opinion, the application for leave to appeal should be granted, the appeal allowed and the conviction and sentence set aside.

NB: PAGES 22-26 AIDE MEMOIRE FOR JURY - ANNEXURE A

R v RUDOLF PETER HOESSINGER

ANGEL J: The circumstances of this matter are fully set out in the reasons for judgment of Gallop J which I have had the advantage of reading in draft and I will not repeat them.

In my view, the applicant was embarrassed and prejudiced in the conduct of his defence by the defects in the indictment. The indictment alleged a legal conclusion (assault) as an ingredient of the charge under s.154 of the Criminal Code (NT). The indictment did not specify the conduct said to constitute the dangerous act or omission founding the charge under s.154 of the Code. To aver and seek to prove an unlawful assault was to introduce and persist in an irrelevancy and calculated to cause confusion, embarrassment and prejudice. The allegation of assault introduced a latent ambiguity in the Crown case (what assault?), and was calculated to prejudice a fair trial. The whole tenor of the trial, evidenced, for example, by the learned trial Judge's directions to the jury on unlawful assault and provocation, misdirectly focussed upon the offence of unlawful assault rather than the ingredients of an offence under s.154 of the Code, and in particular, the act of the applicant which was alleged to be dangerous to the life, health or safety of the deceased. The applicant's case at trial was, in great measure, directed to meeting a

partly particularised case of unlawful assault, and, with the potential for confusion caused by the form of the indictment, the possibility of a substantial miscarriage of justice simply cannot be excluded. In these circumstances, counsel for the Crown's resort to s.411(2) of the Criminal Code is of no avail. I agree with the orders proposed by Gallop J.

Mildren J: The facts are set out in the judgment of Gallop J and I will not repeat them.

It is apparent from the course which was adopted in this case that the learned trial judge gave directions to the jury in relation to the dangerous act, particularised in the indictment as an "assault," which are explicable only on the basis that the "assault" was an unlawful one. His Honour directed the jury on the elements of an assault in accordance with the definition of "assault" contained in s187 of the *Criminal Code*. His Honour also left provocation to the jury, which is a defence to the offence of an unlawful assault, but not to the offence of committing a dangerous act. Although the indictment did not use the expression "unlawful assault" it is apparent that the parties, and the trial judge, approached the case on the basis that the "assault" particularised in the indictment was an unlawful one, and the jury were instructed on that basis. The jury were also instructed that unless the assault was proved, the offence of committing a dangerous act was not made out.

The consequence of this is that the jury must have convicted the applicant of the offence of unlawful assault, contrary to s188 of the *Criminal Code,* in order to have convicted him

of the offence of dangerous act, contrary to s154 of the *Criminal Code*.

The applicant was either never charged with the offence of an unlawful assault; or, if he was, the offence of assault appeared in the same count in the indictment as the offence of dangerous act.

If the indictment had pleaded one count containing two offences, the indictment would be bad for duplicity, and as the judgment of Gallop J points out, contrary to the express provisions of the *Criminal Code*. It is unnecessary to decide whether the indictment did contain one count of two offences. What is clear is that the indictment at the very least contained a latent ambiguity which was revealed when the Crown opened its case to the jury, and particularised the assault relied on as an assault upon the deceased by the applicant with his right hand which knocked the deceased down. Be that as it may, it is elementary that a conviction must also be free of duplicity, and that even if the indictment was not bad on its face, a conviction which is duplicitous is also bad: see for example *Johnson v Miller* [1937] 59 CLR 467 and *Ex parte Graham, Re Dowling and Anor* (1968) 88 WN (Pt1) NSW 270. A further reason why this conviction cannot stand is that, notwithstanding the jury's verdict, it is uncertain whether the applicant in this case

would be able to plead *autrefois convict* if he were to be charged now with assault contrary to s188 of the *Criminal Code*: cf *Joe Gee v Williams* (1908) 27 NZLR 932 at 936.

Mr Wallace , for the Crown, submitted that as the Crown had undertaken to prove an element which was not an element of the charge of a dangerous act, the additional element of an unlawful assault could be disregarded as surplusage. Lord Cairns, who delivered the opinion of the Privy Council in *Attorney-General of New South Wales v MacPherson* (1870) 3 LRPC 268, said (at 281):

> "Their Lordships read the information in this case as an information which states, in fit and apt terms, that an assault was committed by the Defendant upon the person named in the information, viz. *Benjamin Lee*. They read it as alleging, that "the Defendant in and upon the said *Benjamin Lee*, did make an assault, and him, the said *Benjamin Lee*, did then beat, wound, and ill-treat," words which, in all respects, are apt words for the purpose of describing a common assault. They find, then, that added to those words there are some further words, viz. "in contempt of the said Assembly, in violation of its dignity, and to the great obstruction of its business." Their Lordships cannot read these words as an allegation of a further or of a separate offence, but simply as the statement of a consequence resulting from that common assault which is described in the earlier words. Whether that consequence did or did not result from the common assault, whether that consequence ought or ought not be considered as an aggravation of the common assault, is to the mind of their Lordships immaterial. The words do not alter the character, or the allegations with regard to the character, of the offence which is charged. They may be surplusage; but if surplusage, they do not in any way injure or take away from the effect of the earlier averments."

In this case it could not be said that the finding of guilty in respect of the dangerous act did not alter the character of the alleged unlawful assault.

Mr Wallace also submitted that this Court should apply the provisions of s411(2) of the *Criminal Code*. Such a course was adopted in *R v Thompson* [1914] 2 KB 99 and by the Full Court in *R v Nilson* [1968] VR 238. In *Nilson* the Crown proved an additional element to the offence with which the applicant had been charged, viz. the offence of stealing. The court observed (at 240):

> "Where, as here, the jury has found the additional element proved, and where the applicant has given no evidence and made no statement in denial of his complicity, we are of opinion that the inclusion of the additional element in the charge as framed cannot have led to the occurrence of any substantial miscarriage of justice, and, accordingly, that the proviso to s568(1) of the *Crimes Act* 1958 should be applied. For these reasons, as this is the only ground upon which the applicant has relied, his application must be dismissed."

In this case, the applicant did give evidence, and he denied any intention to assault the deceased or that any assault had occurred. It is my view that the applicant's defence, as the case unfolded, was largely directed towards meeting the allegation that an assault (which was vaguely opened upon by the Crown and ultimately put to the jury by the prosecutor in his summing up in alternative ways) had occurred. I consider that the applicant was both embarrassed and prejudiced by this course. The attention given to the issue of assault had a serious potential to distract the jury from considering what should have been the real issues, viz. what was the 'act' which was alleged to be dangerous, did that act cause serious danger to the life, health or safety of

the deceased, and was that act of such a quality that an ordinary person in the position of the accused would not have done that act. Finally, the trial judge did not direct the jury as to the mental element of the alleged unlawful assault which the Crown had undertaken to prove. In these circumstances, I am unable to say that no substantial miscarriage of justice has occurred.

I therefore agree with the orders proposed by Gallop J.