PARTIES:	THE QUEEN
	v
	ANTON HOFSCHUSTER
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA20 of 1993
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JUDGMENT OF:	Kearney, Angel JJ and Gray AJ

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Criminal Code (NT), ss17 and 18

STATUTES - interpretation - "similar offence" - "conduct therein impugned"

Criminal Code (NT), ss17 and 18

REPRESENTATION:

Counsel:

Appellant: R. Wild Q.C.
Respondent: C. R. McDonald

Solicitors:

Appellant: Office of Director of Public Prosecutions
Respondent: Northern Territory Legal Aid Commission

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kea94024J

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. CA20 of 1993

BETWEEN:

THE QUEEN
Appellant

AND:

ANTON HOFSCHUSTER
Respondent

CORAM: KEARNEY, ANGEL JJ AND GRAY AJ

REASONS FOR JUDGMENT

(Delivered 29 July 1994)

KEARNEY J

I have had the benefit of reading the opinion of Gray AJ and concur in his Honour's reasons and conclusion, and the orders he proposes.

ANGEL J

I agree with Gray AJ.

GRAY AJ

On 1 October 1993, Anton Hofschuster, whom I will refer to as "the accused", appeared before the Court. An indictment containing three counts was presented by the Crown. The first count alleged that the accused had attempted to murder Stojan Versic at Humpty Doo on 24 December 1991.

Count 2 alleged an act intended to do grievous harm. Count 3 alleged a dangerous act. Counts 2 and 3 were alternatives to Count 1 and were based upon alternative views of the facts upon which Count 1 was founded.

Before the accused was arraigned, an application was made on behalf of the accused to have the indictment quashed pursuant to s339 of the Code on the ground that it was calculated to prejudice or embarrass the accused in his defence. It was further submitted that the proceedings should be stayed because they were vexatious or harassing.

This application was fully argued, but before the Court made its ruling, it was agreed that the accused should be arraigned to enable a further point to be argued.

The accused was then arraigned. To each of Counts 1 and 2, he pleaded that he had been acquitted of a similar offence. To Count 3, he pleaded that he had been acquitted of the same or a similar offence.

The Court then heard argument that the accused had been previously acquitted within the meaning of s18 of the Code, to the terms of which I shall return in a moment.

On 1 November 1993, the learned primary judge rejected the application based upon s339 but upheld the application based upon s18. Section 347 of the Code authorises the Court, rather than a jury, to determine an application based upon s18. In the result, it was ordered that the accused be discharged.

The Crown now appeals against the ruling upon the s18 application. It is authorised to appeal as of right by s414(1)(b) of the Code.

In order to understand the issue raised by this appeal, it is necessary to set out the course of events leading to the applications before the learned primary judge.

The events giving rise to the charges took place on 24 December 1991 at Humpty Doo. The Crown case is that the accused and the victim were two of a group of five men who came together and began drinking in the lounge of the caravan in which the accused lived. Following an argument, the accused went to the bedroom of the caravan, picked up and loaded a .303 rifle, pointed it at the victim and pulled the trigger. The rifle jammed and failed to fire. The victim made a hurried exit from the caravan and left the scene.

About half an hour later, the victim returned. The accused was waiting behind a tree with his rifle. He shot the victim at a range of four to six metres. The victim ran off into the darkness but soon after collapsed and died.

After a further interval of about thirty minutes three policemen arrived. One of them had a torch as they were endeavouring to find the caravan. The accused fired at the light, claiming later that he believed that the victim had returned to the scene.

On 4 November 1992, an indictment was presented to Mildren J which contained four counts. Counts 1 and 2, which alleged attempted murder and grievous harm respectively were

based on the incident in the caravan. Count 3 alleged murder and was based upon the fatal shooting. Count 4 alleged attempted murder and was based upon the shooting when the police arrived.

An application was made on behalf of the accused that there should be a separate trial of Count 3. After hearing argument, Mildren J acceded to the application. His Honour based his ruling on the complications which would be involved in discussing with the jury all the issues and all the alternatives which would be open if all the counts were before the jury. It does not appear to have been argued that, in the absence of severance, it was not open to the jury to find the accused guilty on Count 1 or 2 and on Count 3 because they were the same or similar offences.

However, counsel for the Crown did argue that, if severance was ordered, the Crown may thereafter face a contention that Counts 1 and 2 and Count 4 charged "similar offences" within the meaning of s18. Mildren J said that such a contention had, in his view, no foundation. His Honour also expressed the opinion that there was no risk that, if the accused was acquitted of murder, he could not be convicted on the other counts.

On 1 December 1992 an indictment was presented to Mildren J which alleged one count of murder based upon the fatal shooting when the victim returned to the vicinity of the caravan. The accused pleaded not guilty and the trial proceeded. The Crown led evidence concerning the incident in

the caravan as evidence tending to show that the accused had the requisite intent to kill or do grievous harm at the time of the fatal shooting.

In relation to the fatal shooting, the issue of self defence was raised on behalf of the accused. When interviewed by the Police, the accused had described the victim's return to the caravan. The accused stated that the victim had a knife in his right hand and approached the accused with the knife raised despite the accused's calls upon him to stop. In those circumstances, the fatal shot was fired. Such was the accused's version of the facts.

The jury returned a verdict of not guilty of murder and each of its alternatives, manslaughter and dangerous act. The verdicts seem most readily explainable upon the footing that the jury was not prepared to reject self defence. Following the verdicts, the accused was discharged on 9 December 1992. Then followed the proceedings to which I referred at the outset which are the subject of this appeal.

The statutory provisions which are critical to the question before this Court are s18 of the Code and the definition of "similar offence" to be found in s17. It is necessary to set them out in full.

> "DEFENCE OF PREVIOUS CONVICTION OR ACQUITTAL
>
> Subject to sections 19 and 20, it is a defence to a charge of any offence to show that the accused person has already been convicted or acquitted of -
>
> (a) the same offence;
>
> (b) a similar offence;

(c) an offence of which he might be convicted upon the trial of the offence charged; or

(d) an offence upon the trial of which he could have been convicted of the offence charged."

"Similar offence" means an offence in which the conduct therein impugned is substantially the same as or includes the conduct impugned in the offence to which it is said to be similar."

The counts in the present indictment are based upon the events in the caravan which can be described as the first episode in an evening's events which contain three quite distinct episodes. Each episode is characterised by a set of facts which are said to constitute criminal liability, although this appeal is concerned only with a consideration of the first two episodes. Each episode is, in my view, quite distinct from each of the others in both a factual and temporal sense. There is no overlapping or intermingling of the facts which constitute each episode. There is a substantial interval of time between each episode. The evening's events fall naturally into three clearly distinguishable phases.

This prosaic factual consideration is, in my view, of central importance to the present problem. The Court was told, and it can be readily accepted, that the evidence that the Crown proposes to lead at the trial will not deal with events subsequent to the victim's departure from the caravan after the first attempted shooting. Accordingly, there will be no Crown evidence touching the transaction of which the accused has been acquitted of criminal liability. Thus, there will be no

question of the accused not getting the full benefit of his acquittal.

Nor do I feel any difficulty about the construction of s18 or the definition of "similar offence".

It is important to bear in mind that the "similar offence" referred to in the definition is the charge of murder and its alternatives of which the accused has been acquitted. The "conduct therein impugned" can only mean the conduct which gives rise to the criminal liability. In this case, that means the acts of the accused and the accompanying states of mind which constitute the elements of the offence.

In the present context, it cannot be suggested that the offence, if any, committed in the caravan is the same offence as that of which the accused has been acquitted. The submission of Mr McDonald of counsel, who appeared for the accused, was that the offence in the caravan was a "similar offence" to the offence of which the accused was acquitted. But this is clearly not so. The conduct of the accused in the caravan to which the Crown seeks to attach criminal liability is conduct which is separate in time and dissimilar in kind.

It can be accepted that the evidence of the accused's conduct in the caravan was led by the Crown in support of its case on the count of murder and its alternatives. The evidence was clearly relevant to show that the accused had the requisite intention at the time of the fatal shooting. But that is a very different thing from saying that the offence alleged to have been committed in the caravan is a similar offence, as

defined, to the offence alleged to have been committed at the time of the fatal shooting. It is commonplace for evidence in support of one count in an indictment to be used in support of a different count. But that circumstance does not produce the result that the two offences are "similar" for the purposes of the autrefois acquit doctrine.

In my view, the construction of s18 and the s17 definition do not give rise to any ambiguity and I feel no impulse to turn to dictionary meanings of the words used. Section 18 and the definition of "similar offence" appear to me to substantially reproduce the common law doctrine as laid down in the judgment of Lord Morris of Borth-y-Gest in *Connelly v DPP* [1964] AC 1254 at pp1305-6. The fundamental principle is that a person is not to be prosecuted twice for the same criminal conduct. It is quite apparent, in my view, that if the accused is hereafter convicted of any of the offences charged in the present indictment, he will not have been prosecuted in breach of the stated principle.

Mr McDonald contended that the Crown at the trial relied upon the events in the caravan as showing "a continuing intention to kill". This meant, so it was said, that the accused's conduct in the caravan formed part of the conduct impugned in relation to the offences of which the accused has been acquitted. This argument, in my view, gives a construction to the definition of "similar offence" which is of almost limitless width. It amounts to a contention that any

conduct of the accused which provides evidence that he has committed an offence is conduct "therein impugned".

As I have already said, I am of opinion that "conduct therein impugned" means the facts alleged to constitute the legal ingredients of the offence and does not include facts which merely provide evidence tending to prove the presence of the essential ingredients.

In the trial before Mildren J, the accused's conduct in the caravan was not impugned in the relevant sense. It was merely used by the Crown for the purpose of impugning the accused's conduct in relation to the later fatal shooting.

It follows that I prefer the opinion expressed by Mildren J in dealing with the severance application in November 1992 to that expressed in the judgment from which this appeal is brought.

Mr McDonald invited the Court, in the event that his primary submission failed, to consider whether the appeal should be dismissed pursuant to s411(2) of the Code because no substantial miscarriage of justice has occurred. Alternatively, he submitted that the Court should decline to make the orders for a continuance of the proceedings which the Crown seeks under s414(1) of the Code.

It seems clear that s411(2) has no application to an appeal by the Crown. In relation to s414(1), there is, in my opinion, no adequate reason for the Court to deny the Crown the relief it seeks. If there is any basis for an argument that it is oppressive to require the accused to stand trial again, a

representation to that effect can doubtless be made to the Crown.

For the reasons I have endeavoured to express, I would allow the appeal and I propose the following orders:-

(i) that the accused's plea of "already acquitted of the same or similar offence" is no defence to any of the counts on indictment dated 1 October 1993;

(ii) that the order discharging the accused in respect of the said indictment be quashed;

(iii) that the proceedings on the said indictment continue and that the accused be tried thereon;

(iv) that the accused be arrested and brought before the Court on the arraignment day fixed for 2 August 1994.
