R v PJMS [2011] NTSC 48

PARTIES:	THE QUEEN
	v
	PJMS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21013634
DELIVERED:	24 JUNE 2011
HEARING DATES:	9 JUNE 2011
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – joinder of charges – assault charge joined with two counts of indecent dealing – whether properly joined – whether all counts should be severed – *Criminal Code* (NT) s 309(1), s 341

Criminal Code, s 309(1), s 341

R v Cogley [1999] 3 VR 366; *R v Cranston* (1988) 1 Qd R 159; followed

Carr v The Queen (2001) 206 CLR 221; *De Jesus v The Queen* (1986) 61 ALJR 1; *R v Mulkatana* [2009] NTSC 52; *Sutton v The Queen* (1984) 132 CLR 528; referred to

REPRESENTATION:

Counsel:

Crown:	T McNamee
Defendant:	P Maley

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Defendant:	Maleys

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v PJMS [2011] NTSC 48
No 21013634

BETWEEN:

THE QUEEN
Crown

AND:

PJMS
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 24 June 2011)

[1] The accused in this case was charged with three counts on the same indictment.

[2] Counts 1 and 2 both alleged an indecent dealing with CAS, a child under the age of 16 years. Count 3 alleged a charge of aggravated unlawful assault upon CAS.

[3] After hearing submissions, I ruled that count 3 was improperly joined with counts 1 and 2. It was submitted that counts 1 and 2 were also improperly joined. I rejected that submission. Counsel for the accused asked me to sever counts 1 and 2 in exercise of my powers under s 341 of the *Code*.

I declined to sever count 2 from count 1. I provided brief reasons at the time and said that I reserved the right to publish more complete reasons at a later time.

[4] These are those reasons.

Joinder of Charges

[5] The general rule is that except as otherwise expressly provided by the *Criminal Code* an indictment must charge one offence against one person.[1]

[6] Section 309 of the *Criminal Code* provides that:

> (1) Charges for more than one offence may be joined in the same indictment against the same person, whether he has been proceeded against separately or with another or others, if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.

[7] The facts which the Crown were relying upon in relation to count 1 were essentially that in about November 2008 the child was visiting the accused pursuant to an arrangement under which the accused had access to the child over a weekend. The accused lived with his parents in a separate flat on the same land. The house in which the accused's parents lived had three bedrooms, one of which was a bedroom to be used by the child. In the bedroom was a double bed at the end of which was a television set which could be used only for the purpose of watching DVDs. It was the accused's practice to lie on the bed with the child and watch DVDs. It was alleged

[1] *Criminal Code*, s 303.

that on the occasion in question the accused and the child, whilst watching a DVD, placed his leg over the child's leg and began rubbing it up and down. It is alleged that as he was doing this his penis came into contact with the child's leg or thigh.

[8] Count 2 relates to an incident which occurred in November 2009 in very similar circumstances. The accused and the child were watching a DVD in the child's bedroom. They were on the bed together. On this occasion, it is alleged that the accused put his hand under a t-shirt, which the child was wearing, and onto her panties in the area of her vagina and that he squeezed it.

[9] As to count 3, this is alleged to have occurred between 1 January 2010 and 1 March 2010. On this occasion, it is alleged that the child found a receipt for the purchase of petrol in a car and ripped it up. The accused then punched her once on the arm saying, "You're a dickhead". The punch resulted in a "big bruise". It is unclear precisely what the circumstances were, but it appears that at the time this occurred they were travelling in a car being driven by the accused. Certainly, there was no suggestion that the assault occurred in the bedroom.

[10] In order for a number of offences to be a series of offences of a similar character, there must be some nexus between the offences, that is, elements

of similarity which in all the circumstances of the case enable the offences to be described as a series.[2]

[11] As was said in *R v Cranston*:[3]

> "Similar" is obviously a word of wider scope than "same" so the problem for his Honour and the problem presented for our consideration is whether all seven charges here constitute a "series of offences of … similar character". These words have been subjected to scrutiny in a number of cases but it has to be accepted that attempts at analysis so far have not been able to produce by way of explanation a test which is completely clear and definite. An exercise of some judgment will be called for in each case."

[12] So far as count 3 is concerned, apart from the fact that the offence was committed allegedly on the same victim it is hard to see how they are part of a series of offences of the same or a similar character as the other offences. Counts 1 and 2 are both sexual offences. Count 3 is not a sexual offence at all. It is separated in time by over a year from count 2 and two years from count 1. It occurred in a different place and under entirely different circumstances.

[13] Ms McNamee argued that there was commonality by reference to the fact that an assault involves touching and there was also a history of threats and emotional control which the accused allegedly exercised over the child which were realised on this particular occasion. I do not consider that those factors are sufficient to fall within the provision. In my opinion, count 3 was not properly joined.

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[2] *See R v Cogley* [1999] 3 VR 366 at 373-374 [24].
[3] (1988) 1 Qd R 159 at 162.

[14] On the other hand, it seems to me that counts 1 and 2, apart from charging the same offence, are similar on a number of grounds. The only point of difference is that count 2 relates to a touching of the pants around the vagina, and according to the complainant a squeezing of the vagina, which is not alleged in relation to count 1. Although the two offences are a year apart the surrounding circumstances of the offences are identical.

[15] It is well established that to constitute a "series" within the meaning of the rule, only two offences are needed to constitute a series.[4]

[16] In my opinion, counts 1 and 2 were properly joined.

[17] As to the exercise of discretion, there are a number of cases which suggest that as a general rule sexual offences ought not to be joined particularly in circumstances where the evidence in relation to one account is not admissible in relation to the other.[5] However, these observations have not been formulated into a set of rules.

[18] Indeed, even the fact that evidence in relation to one count is not admissible in relation to the other does not prevent counts from being joined properly.[6]

[19] Counsel for the accused, Mr Maley, referred me to *R v Mulkatana*, where Reeves J considered the relevant principles.[7] His Honour referred to the

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4 See *R v Cogley* [1999] 3 VR 366 at 373 [24] and *R v Cranston* (1988) 1 Qd R 159 at 164.
5 *Sutton v The Queen* (1984) 132 CLR 528 at 531 per Gibbs CJ, at 542 per Brennan J; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3 per Gibbs CJ, at 7 per Brennan J.
6 See *R v Cogley* [1999] 3 VR 366 at 374 [25].
7 [2009] NTSC 52 at [10]-[16].

judgment of McHugh J in *Carr v The Queen*,[8] where his Honour said:

> Ordinarily, however, the Court should order separate trials where the joinder of charges creates a risk of prejudice (*Sutton v The Queen* (1984) 152 CLR 528 at 531, 541 to 542; *De Jesus v The Queen* (1986) 61 ALJR 1 at 378; 68 ALR 1 at 4 to 5, 12, 13). But in some cases, an application for the trial of separate counts maybe refused on the ground that the convenience of trying the charges together far outweighs any risk of prejudice or, more usually, because a separate trial is not sought. If that occurs, as propensity warning will almost certainly be required.

[20] In the present case, there are a number of considerations. The victim is the same in each case. The victim is a child, now 11 years of age, and the possibility of having to give evidence on two separate occasions against a family member is a matter of some concern. My preliminary view is that the evidence in relation to one count is considerably weaker than the evidence on the other. Overall, the opinion I formed is that any prejudice to the accused could be overcome in this case by appropriate directions to the jury and that there were cost savings to the parties and in particular to the Crown in having the two charges heard together. Accordingly, on balance, I declined to exercise the powers contained in the *Criminal Code* to sever counts 1 and 2.

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[8] (2001) 206 CLR 221 at [235].